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2d Session

HOUSE OF REPRESENTATIVES

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IMPEACHMENT OF PRESIDENT DONALD JOHN TRUMP

THE EVIDENTIARY RECORD PURSUANT TO H. RES. 798

VOLUME XI, PART 6

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93d Congress, 1st Session - - - - - - House Document No. 93–7

IMPEACHMENT

SELECTED MATERIALS

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HOUSE OF REPRESENTATIVES
NINETY-THIRD CONGRESS
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Foreword

By Hon. Peter W. Rodino, Jr., Chairman, Committee on the Judiciary

The resolution of fundamental issues of public debate is always enhanced when wide segments of the American public become concerned and informed.

In recent months, the Committee on the Judiciary has daily received numerous requests for information regarding the constitutional and procedural bases for the impeachment of civil officers of the United States. For that reason, and to promote familiarity with a critical area of American law, I am pleased to transmit this document as a committee print.

It is my hope that these materials, some of them previously scattered in select libraries and in some cases out of print for more than a century, will now be more readily accessible to Members of Congress and to a larger segment of the American community.

October 9, 1973.

[H. Con. Res. 369, Passed Dec. 20, 1973]

NINETY-THIRD CONGRESS OF THE UNITED STATES OF AMERICA

At the First Session

Begun and held at the City of Washington on Wednesday, the third day of January, one thousand nine hundred and seventy-three

CONCURRENT RESOLUTION

Resolved by the House of Representatives (the Senate concurring), That there is authorized to be printed as a House document the House committee print on Impeachment. Selected Materials, and that six thousand four hundred twenty copies be printed, of which one thousand shall be for the use of the House Committee on the Judiciary, one thousand for the House Document Room, and the balance prorated to the Members of the House of Representatives.

SEC. 2. There shall be printed two thousand thirty additional copies of the document authorized by section 1 of this concurrent resolution, of which one thousand copies shall be for the use of the Senate Document Room and one thousand thirty copies shall be for the use of the Senate.

Attest:

W. PAT JENNINGS,
Clerk of the House of Representatives.

Attest:

FRANCIS R. VALEO,
Secretary of the Senate.

Contents

Provisions of the United States Constitution Regarding the Matter of Impeachment

The following provisions of the United States Constitution apply specifically to impeachment:

Article I; Section 2, clause 5

"The House of Representatives . . . shall have the sole Power of Impeachment."

Article I; Section 3, clauses 6 and 7

"The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be in Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no person shall be convicted without the concurrence of two thirds of the Members present.

"Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law."

Article II; Section 2, clause 1

"The President . . . shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in cases of Impeachment."

Article II; Section 4

"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."

Debate on the Question: "Shall the Executive Be Removable on Impeachments?" (From the Journal of James Madison, Records of the Federal Convention, Friday, July 20, 1787)*

"*to be removable on impeachment and conviction (for) malpractice or neglect of duty*". See Resol: 9:

Mr. Pinkney & Mr. Govr. Morris moved to strike out this part of the Resolution. Mr. P. observed. he (ought not to) be impeachable whilst in office

Mr. Davie. If he be not impeachable whilst in office, he will spare no efforts or means whatever to get himself re-elected. He considered this as an essential security for the good behaviour of the Executive.[1]

Mr. Wilson concurred in the necessity of making the Executive impeachable whilst in office.

Mr. Govr. Morris. He can do no criminal act without Coadjutors who may be punished. In case he should be re-elected, that will be sufficient proof of his innocence. Besides who is to impeach? Is the impeachment to suspend his functions. If it is not the mischief will go on. If it is the impeachment will be nearly equivalent to a displacement, and will render the Executive dependent on those who are to impeach.

Col. Mason. 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? When great crimes were committed he was for punishing the principal as well as the Coadjutors. There had been much debate & difficulty as to the mode of chusing the Executive. He approved of that which had been adopted at first, namely of referring the appointment to the Natl. Legislature. One objection agst. Electors was the danger of their being corrupted by the Candidates: & this furnished a peculiar reason in favor of impeachments whilst in office. Shall the man who has practised corruption & by that means procured his appointment in the first instance, be suffered to escape punishment, by repeating his guilt?

Docr. Franklin was for retaining the clause as favorable to the executive. History furnishes one example only of a first Magistrate being formally brought to public Justice. Every body cried out agst this as unconstitutional. What was the practice before this in cases where the chief Magistrate rendered himself obnoxious? Why recourse

*From the records of the Federal Convention, Friday, July 20, 1787; reprinted with permission of Yale University Press, Vol. 2, Farrand, *The Records of the Federal Convention of 1787*.

[1] Crossed out: "To punish him when".

was had to assassination in wch. he was not only deprived of his life but of the opportunity of vindicating his character. It wd. be the best way therefore to provide in the Constitution for the regular punishment of the Executive when his misconduct should deserve it, and for his honorable acquittal when he should be unjustly accused.

Mr. Govr Morris admits corruption & some few other offences to be such as ought to be impeachable; but thought the cases ought to be enumerated & defined;

Mr. (Madison)—thought it indispensable that some provision should be made for defending the Community agst the incapacity, negligence or perfidy of the chief Magistrate. The limitation of the period of his service, was not a sufficient security. He might lose his capacity after his appointment. He might pervert his administration into a scheme of peculation or oppression. He might betray his trust to foreign powers. The case of the Executive Magistracy was very distinguishable, from that of the Legislative or of any other public body, holding offices of limited duration. It could not be presumed that all or even a majority of the members of an Assembly would either lose their capacity for discharging, or be bribed to betray, their trust. Besides the restraints of their personal integrity & honor, the difficulty of acting in concert for purposes of corruption was a security to the public. And if one or a few members only should be seduced, the soundness of the remaining members, would maintain the integrity and fidelity of the body. In the case of the Executive Magistracy which was to be administered by a single man, loss of capacity or corruption was more within the compass of probable events, and either of them might be fatal to the Republic.

Mr. Pinkney did not see the necessity of impeachments. He was sure they ought not to issue from the Legislature who would in that case hold them as a rod over the Executive and by that means effectually destroy his independence. His revisionary power in particular would be rendered altogether insignificant.

Mr. Gerry urged the necessity of impeachments. A good magistrate will not fear them. A bad one ought to be kept in fear of them. He hoped the maximum would never be adopted here that the chief Magistrate could do (no) wrong.

Mr. King expressed his apprehensions that an extreme caution in favor of liberty might enervate the Government we were forming. He wished the House to recur to the primitive axiom that the three great departments of Govts. should be separate & independent: that the Executive & Judiciary should be so as well as the Legislative: that the Executive should be so equally with the Judiciary. Would this be the case if the Executive should be impeachable? It had been said that the Judiciary would be impeachable. But it should have been remembered at the same time that the Judiciary hold their places [2] not for a limited time, but during good behaviour. It is necessary therefore that a forum should be established for trying misbehaviour. Was the Executive to hold his place during good behaviour? [3]—The Executive was to hold his place for a limited term like the members of the Legislature; Like them particularly the Senate whose members would continue in appointmt the same term of 6 years. he would periodically

[2] Crossed out: "for life".
[3] Crossed out: "He wished this were the case. But it was not."

be tried for his behaviour by his electors, who would continue or discontinue him in trust according to the manner in which he had discharged it. Like them therefore, he ought to be subject to no intermediate trial, by impeachment. He ought not to be impeachable unless he hold his office during good behavior, a tenure which would be most agreeable to him; provided an independent and effectual forum could be devised; But under no circumstances ought he to be impeachable by the Legislature. This would be destructive of his independence and of the principles of the Constitution. He relied on the vigor of the Executive as a great security for the public liberties.

Mr. Randolph. The propriety of impeachments was a favorite principle with him: Guilt wherever found ought to be punished. The Executive will have great opportunitys of abusing his power; particularly in time of war when the military force, and in some respects the public money will be in his hands. Should no regular punishment be provided, it will be irregularly inflicted by tumults & insurrections. He is aware of the necessity of proceeding with a cautious hand, and of excluding as much as possible the influence of the Legislature from the business. He suggested for consideration an idea which had fallen (from Col Hamilton) of composing a forum out of the Judges belonging to the States: and even of requiring some preliminary inquest whether just grounds of impeachment existed.

Doctr. Franklin mentioned the case of the Prince of Orange during the late war. An agreement was made between France & Holland; by which their two fleets were to unite at a certain time & place. The Du(t)ch fleet did not appear. Every body began to wonder at it. At length it was suspected that the Statholder was at the bottom of the matter. This suspicion prevailed more & more. Yet as he could not be impeached and no regular examination took place, he remained in his office, and strengtheing his own party, as the party opposed to him became formidable, he gave birth to the most violent animosities & contentions. Had he been impeachable, a regular & peaceable inquiry would have taken place and he would if guilty have been duly punished, if innocent restored to the confidence of the public.

Mr. King remarked that the case of the Statholder was not applicable. He held his place for life, and was not periodically elected. In the former case impeachments are proper to secure good behaviour. In the latter they are unnecessary; the periodical responsibility [4] to the electors [5] being an equivalent security.

Mr Wilson observed that if the idea were to be pursued, the Senators who are to hold their places during the same term with the Executive, ought to be subject to impeachment & removal.

Mr. Pinkney apprehended that some gentlemen reasoned on a supposition that the Executive was to have powers which would not be committed to him: (He presumed) that his powers would be so circumscribed as to render impeachments unnecessary.

Mr. Govr. Morris.'s opinion had been changed by the arguments used in the discussion. He was now sensible of the necessity of impeachments, if the Executive was to continue for any time in office. Our Executive was not like a Magistrate having a life interest, much less like one having an hereditary interest in his office. He may be bribed by

[4] Crossed out "trial".
[5] Crossed out "rendering them unnecessary".

a greater interest to betray his trust; and no one would say that we ought to expose ourselves to the danger of seeing the first Magistrate in foreign pay without being able to guard agst it by displacing him. One would think the King of England well secured agst bribery. He has as it were a fee simple in the whole Kingdom. Yet Charles II was bribed by Louis XIV. The Executive ought therefore to be impeachable for treachery; Corrupting his electors, and incapacity were other causes of impeachment. For the latter he should be punished not as a man, but as an officer, and punished only by degradation from his office. This Magistrate is not the King but the prime-Minister. The people are the King. When we make him amenable to Justice however we should take care to provide some mode that will not make him dependent on the Legislature.

(It was moved & 2ded. to postpone the question of impeachments which was negatived. Mas. & S. Carolina only being ay.)[a]

On ye. Question, Shall the Executive be removeable on impeachments?

Mas. no. Ct. ay. N.J. ay. Pa. ay. Del. ay. Md. ay. Va. ay. N.C. ay. S.C. no. Geo-ay- [Ayes—8; noes—2.]

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[a] Taken from *Journal*.

Debate in the First Congress, 1789, on the Establishment of Executive Departments and the Power of Removal From Office

EXECUTIVE DEPARTMENTS

On motion of Mr. BOUDINOT, the House resolved itself into a Committee of the Whole House on the state of the Union, Mr. TRUMBULL in the Chair.

Mr. BOUDINOT.—I rise, Mr. Chairman, with diffidence, to introduce a subject to the consideration of the committee, which I had hopes would have been brought forward by an abler hand; the pressing necessity of it must alone be my excuse. The great Executive departments which were in existence under the late Confederation, are now at an end, at least so far as not to be able to conduct the business of the United States. If we take up the present Constitution, we shall find it contemplates departments of an Executive nature in aid of the President: it then remains for us to carry this intention into effect, which I take it will be best done by settling principles for organizing them in this place, and afterwards appoint a select committee to bring in a bill for the same. I need say little to convince gentlemen of the necessity which presses us into a pursuit of this measure. They know that our national debt is considerable; the interest on our foreign loans, and the instalments due, amount to two millions of dollars. This arrearage, together with the domestic debt, is of great magnitude, and it will be attended with the most dreadful consequences to let these affairs run into confusion and ruin, for want of proper regulations to keep them in order.

I shall move the committee, therefore, to come to some such resolution as this: That an office be established for the management of the finances of the United States, at the head of which shall be an officer to be denominated the Secretary of Finance. I am not tenacious of the style, perhaps some other may be proper, but the object I have in view is to establish the department; after which we may go on to narrate the duties of the officer, and accommodate the name to the acts he is to perform. The departments under the late Constitution are not to be models for us to form ours upon, by reason of the essential change which has taken place in the Government, and the new distribution of Legislative, Executive, and Judicial powers.

If gentlemen then agree with me so far, I shall proceed to restrain the Secretary of Finance, and all persons under him, from being concerned in trade or commerce, and make it his duty to superintend the treasury and the finances of the United States, examine the public debts and engagements, inspect the collection and expenditure of the revenue, and to form and digest plans for its improvement. There may be other duties which gentlemen may add, as I do not pretent to have perfectly enumerated them all. After this point is settled, we may then

go to the consideration of the War Department and the Department of Foreign Affairs; but, for the present, I would wish to confine ourselves to the Department of Finance.

Mr. BENSON wished the committee to consider what he judged to be a previous question, namely, how many departments there should be established? He approved of the division mentioned by the gentlemen; but would, with his leave, move that there be established in aid of the Chief Magistrate, three Executive departments, to be severally denominated the Department of Foreign Affairs, Treasury, and War. After determining this question, if it was a proper division, the Committee might proceed to enumerate the duties which should be attached to each.

Mr. BOUDINOT was not tenacious of the form he had thrown his motion into, it was the substance he contended for; he had therefore no objection to the gentleman's motion. While he was up, he would correct a mistake into which he had fallen; it respected the arrearage of the interest and instalments of the foreign debt. He had learned from good authority, since he sat down, that there was nothing due on this account, but that it was completely paid up to the present year; but this did not do away the necessity of the present motion.

Mr. BLAND objected to the last motion as too indefinite, and feared the committee would precipitate the business, if they did not order the motions to lie on the table until to-morrow, or rather rise and refer it to be digested by a select committee.

Mr. WHITE wished gentlemen had been more particular in bringing this question forward, and had pointed out the nature and extent of the powers proposed to be given, so that his mind might be able to embrace the whole subject.

Mr. BOUDINOT said, he could apologize for not bringing the business on in another way. It seemed to be a settled point in the House that a Committee of the Whole was the proper place for determining principles before they were sent elsewhere; he had therefore adopted that mode on the present occasion, though his own judgment would incline him to pursue that last mentioned by the gentleman from Virginia, (Mr. BLAND.) He conceived the necessity of having such an office was indisputable; the Government could not be carried on without it; but there may be a question with respect to the mode in which the business of the office shall be conducted; there may also be a question respecting the constitution of it, but none with respect to the establishment of either of the three departments he had mentioned.

Mr. PARTRIDGE wished the committee to attend to one object at a time. If they had determined upon the propriety of the Department of Finance, they could go on to the next, and so on until they had decided upon all they conceived necessary; for his part, he could not see any reason for determining there should be three or five great departments; or what was the object of such a question, unless it was to decide the whole business at once.

Mr. BENSON said, his motion was founded upon the Constitutional division of these powers; the Constitution contemplated them, because it gave the President the right of requiring the opinion of the principal officer in each of the Executive departments, upon any subject relating to the duties of their respective offices. If gentlemen were inclined to waive the determination for the present, he had no

objection; it was certainly a subject of great importance, and required time for consideration.

Mr. VINING thought the gentleman should have added another department, viz: the Home Department. The territorial possessions of the United States, and the domestic affairs, would be objects of the greatest magnitude, and he suspected would render it essentially requisite to establish such a one.

Mr. BOUDINOT wished to confine the question to the Department of Finance.

A motion was made by Mr. BLAND for the committee's rising.

Mr. MADISON hoped they would not rise until the principles were settled. He thought it much better to determine the outlines of all business in a Committee of the Whole. He was satisfied it would be found, on experience, to shorten their deliberations. If the gentlemen who had offered motions to the committee would withdraw them, he would offer one, which he judged likely to embrace the intentions of both gentlemen.

Mr. BENSON withdrew his motion, and Mr. MADISON moved, that it is the opinion of this committee, that there shall be established an Executive Department, to be denominated the Department of Foreign Affairs, at the head of which there shall be an officer, to be called the Secretary to the Department of Foreign Affairs, who shall be appointed by the President, by and with the advice and consent of the Senate; and to be removable by the President.

That there shall be a Treasury Department, &c.

That there shall be a War Department, &c.

Mr. VINING seconded the motion, and offered to amend it, by adding the Domestic Department, *mutatis mutandis*. He said this department, in his opinion, was of absolute necessity, more requisite than either of the other three, except the Department of Finance; the present and increasing duties of such a department will oblige them to make the establishment.

Mr. LIVERMORE was not prepared to decide on the question even as now brought forward, nor did he see a reason why the Department of Foreign Affairs was placed at the head of the list. He thought the Treasury Department of more importance, and consequently deserved the precedence.

As to the Domestic Department just mentioned by the gentleman from Delaware, he thought its duties might be blended with the others, and thereby save the United States the expense of one grand department. If the gentleman, therefore, would wait to see what were the duties assigned to them severally, he would be able to judge respecting his motion with greater propriety.

Mr. VINING withdrew his motion for the present.

And the committee agreed to the establishment of the Department of Foreign Affairs, and placing at the head thereof an officer to be called the Secretary of Foreign Affairs; but when they came to the mode of appointing the officer—

Mr. SMITH (of South Carolina) moved to strike out the words "who shall be appointed by the President, by and with the advice and consent of the Senate." He conceived the words to be unnecessary; besides, it looked as if they were conferring power, which was not the case, for the Constitution had expressly given the power of appoint-

ment in the words there used. He also objected to the subsequent part of this paragraph, because it declared the President alone to have the power of removal.

Mr. PAGE saw no impropriety in passing an act to carry into execution the views of the Constitution, and therefore had no objection to repeat those words in the resolution. He thought if the committee stopped there, they would be under no difficulty respecting the propriety of their measure, but if they went further, they might meet with considerable embarrassment.

Mr. MADISON remarked, that as there was a discretionary power in the Legislature to give the privilege to the President alone of appointing inferior officers, there could be no injury in declaring in the resolution the Constitutional mode of appointing the heads of departments; however, if gentlemen were uneasy, he would not object to strike it out.

Mr. LEE thought this officer was an inferior officer; the President was the great and responsible officer of the Government; this was only to aid him in performing his Executive duties; hence he conceived the power of appointing to be in the gift of the Legislature, and therefore the words were proper.

Mr. SMITH (of South Carolina.)—This officer is at the head of a department, and one of those who are to advise the President; the inferior officers mentioned in the Constitution are clerks and other subordinate persons. The words are only a repetition of the words in the Constitution, and are consequently superfluous.

The question was taken on striking out those words and carried in the affirmative.

The committee proceeded to the discussion of the power of the President to remove this officer.

Mr. SMITH said he had doubts whether the officer could be removed by the President. He apprehended he could only be removed by an impeachment before the Senate, and that, being once in office, he must remain there until convicted upon impeachment. He wished gentlemen would consider this point well before they decided it.

Mr. MADISON did not concur with the gentleman in his interpertation of the Constitution. What, said he, would be the consequence of such construction? It would in effect establish every officer of the Government on the firm tenure of good behaviour; not the heads of Departments only, but all the inferior officers of those Departments, would hold their offices during good behaviour, and that to be judged of by one branch of the Legislature only on the impeachment of the other. If the Constitution means this by its declarations to be the case, we must submit; but I should lament it as a fatal error interwoven in the system, and one that would ultimately prove its destruction. I think the inference would not arise from a fair construction of the words of that instrument.

It is very possible that an officer who may not incur the displeasure of the President, may be guilty of actions that ought to forfeit his place. The power of this House may reach him by the means of an impeachment, and he may be removed even against the will of the President; so that the declaration in the Constitution was intended as a supplemental security for the good behaviour of the public officers. It is possible the case I have stated may happen. Indeed, it may, perhaps, on some occasion, be found necessary to impeach the President himself;

surely, therefore, it may happen to a subordinate officer, whose bad actions may be connived at or overlooked by the President. Hence the people have an additional security in this Constitutional provision.

I think it absolutely necessary that the President should have the power of removing from office; it will make him, in a peculiar manner, responsible for their conduct, and subject him to impeachment himself, if he suffers them to perpetrate with impunity high crimes or misdemeanors against the United States, or neglects to superintend their conduct, so as to check their excesses. On the Constituionality of the declaration I have no manner of doubt.

Mr. BENSON.—If we refer to the Constitution for light on this subject, it will appear evident that the objection is not well founded. The objection is this: that an officer ought not to be removed but by impeachment; then every officer is appointed during good behaviour. Now, the Constitution expressly declares, that the Judges, both of the Supreme and Inferior Courts, shall hold their offices during good behaviour. If it is declared, that they are told their offices by this particular tenure, it follows that the other officers of the Government should hold them only at pleasure. He thought this an important question, and one in which they were obliged to take the Constitution by construction. For although it detailed the mode of appointing to office, it was not explicit as to the supersedure: this clause, therefore, would be a mere declaration of the Legislative construction on this point. He thought the importance and necessity of making the declaration, that the Chief Magistrate might supersede any civil officer was evident, and he should therefore vote in favor of the clause as it stood.

Mr. VINING said there were no negative words in the Constitution to preclude the President from the exercise of this power; but there was a strong presumption that he was invested with it: because it was declared, that all Executive power should be vested in him, except in cases where it is otherwise qualified; as, for example, he could not fully exercise his Executive power in making treaties, unless with the advice and consent of the Senate—the same in appointing to office.

He viewed the power of removal, by impeachment, as a supplementary security to the people against the continuance of improper persons in office; but it did not consist with the nature of things, that this should be the only mode of removal; it was attended with circumstances that would render it insufficient to secure the public safety, which was a primary object in every Government. Witness a transatlantic instance of its incompetency—he meant the famous case of Mr. Hastings. With what difficulty was that prosecution carried on! What a length of time did it take to determine! What is to be done while the impeachment is depending? For, according to the ideas of the gentleman from South Carolina, (Mr. SMITH,) he cannot be removed but on conviction. If he cannot be removed, I should suppose he cannot be suspended; and what security have the people against the machinations of a bad man in office? He had no doubt but the Constitution gave this power to the President; but, if doubts were entertained, he thought it prudent to make a Legislative declaration of the sentiments of Congress on this point. He was therefore in favor of the clause.

Mr. BLAND thought the power given by the Constitution to the Senate, respecting the appointment to office, would be rendered almost

nugatory if the President had the power of removal. If the first nomination of the President should be disapproved by the Senate, and the second agreed to, he had nothing to do but wait the adjournment of Congress, and then fill the vacancy with his favorite; who, by thus getting into the possession of the office, would have a considerable chance of permanency in it. He thought it consistent with the nature of things, that the power which appointed should remove; and would not object to a declaration in the resolution, if the words were added, that the President shall remove from office, by and with the advice and consent of the Senate. He agreed that the removal by impeachment was a supplementary aid favorable to the people; but he was clearly of opinion, that the same power that appointed had, or ought to have, the power of removal.

Mr. JACKSON wished the motion had been referred to a sub-committee to digest: it seemed to him they were building the house before the plan was drawn. He wished to see the system reduced to writing, that he might leisurely judge of the necessity and propriety of each office and its particular duties.

With respect to the question before the House, he was of opinion that if the House had the power of removal by the Constitution, they could not give it out of their hands; because every power recognised by the Constitution must remain where it was placed by that instrument. But the words in the Constitution declare, in positive terms, that all civil officers shall be removed from office on impeachment for, and conviction of, high crimes and misdemeanors; and however long it may take to decide, in this way it must be done. He did not think the case of Mr. Hastings ought to be brought forward as a precedent for conducting such business in the United States. He believed whenever an impeachment was brought before the Senate, they would proceed with all imaginable speed to its termination. He should, in case of impeachment, be willing to go so far as to give the power of suspension to the President, and he thought this all the security which the public safety required; it would prevent the party from doing further mischief. He agreed with the gentleman in the general principle, that the body who appointed ought to have the power of removal, as the body which enacts laws can repeal them; but if the power is deposited in any particular department by the Constitution, it is out of the power of the House to alter it.

Mr. MADISON did not conceive it was a proper construction of the Constitution to say that there was no other mode of removing from office than that by impeachment; he believed this, as applied to the Judges, might be the case; but he could never imagine it extended in the manner which gentlemen contended for. He believed they would not assert, that any part of the Constitution declared that the only way to remove should be by impeachment; the contrary might be inferred, because Congress may establish offices by law; therefore, most certainly, it is in the discretion of the Legislature to say upon what terms the office shall be held, either during good behaviour or during pleasure. Under this construction, the principles of the Constitution would be reconcilable in every part; but under that of the gentleman from South Carolina, it would be incongruous and faulty. He wondered how the gentleman from Georgia (Mr. JACKSON) would

reconcile his principles so far as to permit the President to suspend the officer. He begged his colleague (Mr. Bland) to consider the inconvenience his doctrine would occasion, by keeping the Senate constantly sitting, in order to give their assent to the removal of an officer; they might see there would be a constant probability of the Senate being called upon to exercise this power, consequently they could not be a moment absent. Now, he did not believe the Constitution imposed any such duty upon them; why, then, said he, shall we enjoin it, especially at such an expense of the public treasure?

Mr. Boudinot would by no means infringe the Constitution by any act of his; for if he thought this motion would lead the committee beyond the powers assigned to the Legislature, he would give it a decided negative; but, on an impartial examination of that instrument, he could not see the least foundation for such an objection; however, he was glad the question had come forward, because he wished to give a Legislative construction to this part of the Constitution.

The gentlemen who denied the power of the President to remove from office, founded their opinion upon the fourth section of the second article of the Constitution, where it is declared, that all officers shall be removed from office on impeachment for, and conviction of, treason or bribery. If their construction is admissible, and no officer whatever is to be removed in any other way than by impeachment, we shall be in a deplorable situation indeed. Consider the extent of the United States, and the difficult of conducting a prosecution against an officer, who, with the witnesses, resides a thousand miles from the seat of Government. But suppose the officer should, by sickness, or some other accident, be rendered incapable of performing the functions of the office, must he be continued? And yet it is to be apprehended, that such a disability would not furnish any good ground for impeachment; it could not be laid as treason or bribery, nor perhaps as a high crime or misdemeanor. Would gentlemen narrow the operation of the Constitution in this manner, and render it impossible to be executed?

When the committee come to consider the clause respecting the removal by impeachment, they will find it is intended as a punishment for a crime, and not intended as the ordinary means of re-arranging the Departments. We find in the clause in the Constitution subsequent to the one just mentioned, that the Judges are declared to hold their offices during good behavior; but if this is the tenure by which all offices are to be held, where is the necessity of this explicit declaration in favor of the Judges? Now, if any thing is to be drawn by construction from this part of the Constitution, it is that the Judges alone are to hold their offices during good behaviour; but all other officers during pleasure, unless otherwise provided in the Constitution. He was certain, from the nature of things, that it was not the intention of the Constitution to prevent the President from removing an officer who was found to be wholly unfit or incapable of doing his duty.

Mr. White thought no office under the Government was to be held during pleasure, except those which are to be constituted by law; but all the heads of departments are to be appointed by the President, by and with the advice and consent of the Senate. He conceived that, in all cases, the party who appointed ought to judge of the removal, except in those cases which by the Constitution are expected, and in those cases impeachment and conviction are the only mode by which

they can be removed. Although this committee may consider of the expediency of the present measure, yet the Senate would check, or correct, an improper decision; and he would ask the supporters of this part of the resolution, whether they expected the Senate would part with a power which they might think the Constitution vested in them? He had doubts respecting the authority of the House to decide this question, and was very tenacious of doing any thing that would look like an encroachment on the privileges of the other branch of the Legislature.

Mr. THATCHER asked, why the Judges were particularly mentioned in the Constitution as holding their offices during good behaviour, if it was not supposed that, without this express declaration in their favor, they in common with all other officers not immediately chosen by the State Legislatures and the people, would hold them during pleasure? The clause respecting impeachments was particularly calculated for removing unworthy officers of the other description. Holding this construction of the Constitution to be right, he was in favor of the clause as it stood.

Mr. JACKSON acknowledged the Judges held their offices during good behavior, and he believed the Legislature had the power of determining the time an office should continue, but did not think they could give to the Prsident alone the power of removing those who were appointed with the concurrence of the Senate.

Mr. SMITH admitted that Congress had a right to say that an office should be held a limited time, or for one year; but if no precise period was fixed, he conceived the officer's appointment to be during good behavior, and that the person could not be removed by the President. The Constitution expresses the precise time for which the President of the United States shall be chosen; if no precise time had been fixed, he should conceive the tenure to be during good behaviour. Now, on the same principle, he apprehended, if the Legislature did not fix a precise time for the Secretary of Foreign Affairs to hold his office, he would keep it during good behaviour; all that could be done in case of misbehaviour would be, to suspend the officer until after trial and conviction, when he would be removed. A gentleman has asked, what must be done if an incumbent is found unfit for his office? He would answer, the person must remain there. What must be done if a member of this House is found unfit to perform the business of his constituents? Certainly he must and will continue on this floor. You cannot remove him unless guilty of some crime. He did not hold the opinion mentioned by some gentlemen, that the power who appoints can remove, because there were several cases where those who appoint have not the power of removal. In some of the State Governments, the chief Executive Magistrate appoints to office, but cannot remove. So, under this Constitution, neither the people nor the Legislature can remove the members of the Senate or House of Representatives; nor can the Electors remove the President or Vice President, both of whom they appoint to those offices. He apprehended the power which the Constitution gave to Congress of establishing certain offices by law, would enable them to limit the tenure of the office; but if Congress declined the exercise of this power, the officers appointed would continue in their station during good behaviour.

Mr. LAWRENCE apprehended the words of the resolution limited the tenure of the office in the manner which the honorable gentleman last up seemed to admit to be proper. To be sure, it did not denominate the period by years or days, but it nevertheless fixed a precise period for its existence, viz. during the pleasure of the President. The Constitution had certainly intended that Congress should define the tenure of office, or it would never have declared the Judges should continue during good behaviour. This Constitutional provision in their favor, was to render them independent of the Legislature, which it was not supposed would be the case if nothing on this head had been declared. It is the only thing which prevents us from making them dependent upon the will of the President for their continuance in office, or from ordaining that their commission shall expire at the end of a certain term of years.

He conceived, as the Constitution was silent with respect to the time the Secretary of Foreign Affairs should remain in office, that it therefore depended upon the will of the Legislature to say how the department should be constituted and established by law, and the conditions upon which he shall enjoy the office. We can say he shall hold it for three years from his appointment, or during good behaviour; and we may declare unfitness and incapacity causes of removal, and make the President alone judge of this case. We may authorize the President to remove him for any cause he thinks proper. It is in our power to make such declaration; but at the same time the Constitution provides, that the President shall not have it in his power to hold a person in office who has been guilty of crimes or misdemeanors against the Government; the power of removal in such cases is in the Legislature, by impeachment. The only question which remained, he considered to be, could the Legislature safely trust the President with this power? The question of right he conceived to be indisputable; it was merely a question of expediency. Gentlemen admit that we have a right to limit the duration of the office. What is authorizing the removal by the President but limiting it? and if we conceive this the best method of limiting it, why shall it be objected to as unconstitutional? If it increases the responsibility of the President, and certainly it does this, why should the Legislature hesitate in obtaining the highest security for the public interest and safety?

Mr. SYLVESTER thought the Constitution ought to have a liberal construction, and therefore was of opinion that the clause relative to the removal by impeachment was intended as a check upon the President, as already mentioned by some gentlemen, and to secure to the people, by means of their representatives, a Constitutional mode of obtaining justice against speculators and defaulters in office, who might be protected by the persons appointing them. He apprehended the doctrine held out by the gentleman from South Carolina would involve the Government in great difficulties, if not in ruin, and he did not see it was a necessary construction of the Constitution. Why, then, should the House search for a meaning, to make the Constitution inconsistent with itself, when a more rational one is at hand? He, however, inclined at present to the sentiments of the gentleman from Virginia, (Mr. BLAND,) who thought the Senate ought to be joined with the President in the removal, as they were joined by the Constitution in the appointment to office.

Mr. GOODHUE was decidely against combining the Senate in this business. He wished to make the President as responsible as possible for the conduct of the officers who were to execute the duties of his own branch of the Government. If the removal and appointment were placed in the hands of a numerous body, the responsibility would be lessened. He admitted there was a propriety in allowing the Senate to advise the President in the choice of officers; this the Constitution had ordained for wise purposes; but there could be no real advantage arising from the concurrence of the Senate to the removal, but great disadvantages. It might beget faction and party, which would prevent the Senate from paying proper attention to the public business. Upon the whole, he concluded the community would be served by the best men when the Senate concurred with the President in the appointment; but if any oversight was committed, it could best be corrected by the superintending agent. It was the peculiar duty of the President to watch over the executive officers; but of what avail would be his inspection, unless he had a power to correct the abuses he might discover.

Mr. MADISON.—I look upon every Constitutional question, whatever its nature may be, as of great importance. I look upon the present to be doubly so, because its nature is of the highest moment to the well-being of the Government. I have listened with attention to the objections which have been stated, and to the replies that have been made, and I think the investigation of the meaning of the Constitution has supported the doctrine I brought forward. If you consult the expediency, it will be greatly against the doctrine advanced by gentlemen on the other side of the question. See to what inconsistency gentlemen drive themselves by their construction of the Constitution. The gentleman from South Carolina, (Mr. SMITH,) in order to bring to conviction and punishment an offender in any of the principal offices, must have recourse to a breach of the common law, and yet he may there be found guilty, and maintain his office, because he is fixed by the Constitution. It has been said, we may guard against the inconveniency of that construction, by limiting the duration of the office to a term of years; but, during that term, there is no way of getting rid of a bad officer but by impeachment. During the time this is depending, the person may continue to commit those crimes for which he is impeached, because if his construction of the Constitution is right the President can have no more power to suspend than he has to remove.

What fell from one of my colleagues (Mr. Bland) appears to have more weight than any thing hitherto suggested. The Constitution, at the first view, may seem to favor his opinion; but that must be the case only at the first view; for, if we examine it, we shall find his construction incompatible with the spirit and principles contained in that instrument.

It is said, that it comports with the nature of things, that those who appoint should have the power of removal; but I cannot conceive that this sentiment is warranted by the Constitution; I believe it would be found very inconvenient in practice. It is one of the most prominent features of the Constitution, a principle that pervades the whole system, that there should be the highest possible degree of responsibility in all the Executive officers thereof; any thing, therefore, which tends to lessen this responsibility, is contrary to its spirit and intention, and

unless it is saddled upon us expressly by the letter of that work, I shall oppose the admission of it into any act of the Legislature. Now, if the heads of the Executive departments are subjected to removal by the President alone, we have in him security for the good behaviour of the officer. If he does not conform to the judgment of the President in doing the executive duties of his office, he can be displaced. This makes him responsible to the great Executive power, and makes the President responsible to the public for the conduct of the person he has nominated and appointed to aid him in the administration of his department. But if the President shall join in a collusion with this officer, and continue a bad man in office, the case of impeachment will reach the culprit, and drag him forth to punishment. But if you take the other construction, and say he shall not be displaced but by and with the advice and consent of the Senate, the President is no longer answerable for the conduct of the officer; all will depend upon the Senate. You here destroy a real responsibility without obtaining even the shadow; for no gentleman will pretend to say the responsibility of the Senate can be of such a nature as to afford substantial security. But why, it may be asked, was the Senate joined with the President in appointing to office, if they have no responsibility? I answer, merely for the sake of advising, being supposed, from their nature, better acquainted with the character of the candidates than an individual; yet even here the President is held to the responsibility—he nominates, and, with their consent, appoints. No person can be forced upon him as an assistant by any other branch of the Government.

There is another objection to this construction, which I consider of some weight, and shall therefore mention to the committee. Perhaps there was no argument urged with more success, or more plausibly grounded against the Constitution, under which we are now deliberating, than that founded on the mingling of the Executive and Legislative branches of the Government in one body. It has been objected, that the Senate have too much of the Executive power even, by having a control over the President in the appointment to office. Now, shall we extend this connexion between the Legislative and Executive departments, which will strengthen the objection, and diminish the responsibility we have in the head of the Executive? I cannot but believe, if gentlemen weigh well these considerations, they will think it safe and expedient to adopt the clause.

Mr. GERRY.—The Constitution provides for the appointment of the public officers in this manner: The President shall nominate, and, by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers, and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law. Now, if there be no other clause respecting the appointment, I shall be glad to see how the heads of departments are to be removed by the President alone. What clause is it that the President gives his power in express terms? I believe there is none such. If there is a power of removal, besides that by impeachment, it must vest somewhere. It must vest in the President, or in the President and Senate, or in the President, Senate, and House of Representatives. Now there is no clause which expressly vests in the President. I believe no gentleman

contends it is in this House, because that would be that mingling of the Executive and Legislative powers gentlemen deprecate. I presume, then, gentlemen will grant, that if there is such a power, it vests with the President, by and with the advice and consent of the Senate, who are the body that appoints. I think we ought to be cautious how we step in between the President and the Senate, to abridge the power of the one, or increase the other. If the power of removal vests where I suppose, we, by this declaration, undertake to transfer it to the President alone.

It has been mentioned, that it is proper to give this power to the President, in order to make him more fully responsible for this office. I am for supporting the President to the utmost of my power, and making him as responsible as possible. I would therefore vest every gift of office, in the power of the Legislature, in the President alone; but I cannot think we ought to attempt to give him authority to remove from office, in cases where the Constitution has placed it in other hands.

Mr. LIVERMORE considered this as a Constitutional question, and was of opinion, that the same power which appointed an officer, had the right of removal also, unless it was restrained by an express declaration to the contrary. As the President, by and with the advice and consent of the Senate, is empowered to appoint ambassadors, certainly they have a right to remove them and appoint others. In the case of the judges, they must be appointed for life, or during good behaviour. He had no idea, that it could ever enter into the heart of any man living, that all officers appointed under the Constitution were to have a perpetuity in office. The judges themselves would not have had this right, if had not been expressly given by the Constitution, but would be removable in like manner with ambassadors, other public ministers, and consuls. He took it, therefore, in the present case, that the President and the Senate would have the power of removing the Secretary of Foreign Affairs. The only question, therefore, which appears to be before the committee is, whether we shall give this power to the President alone? And with that he thought they had nothing to do. He supposed, if the clause was left out, the President and the Senate would proceed, as directed by the Constitution, to appoint the officer; and hereafter, if they judged it necessary, would remove him; but if they neglected to do so, when it was necessary, by reason of his misdemeanors, this House would impeach him, and so get rid of him on conviction.

Mr. BLAND.—It seems to be agreed on all hands, that there does exist a power of removal; the contrary doctrine would be a solecism in Government. If an officer embezzles the public money, or neglects or refuses to do the duties of his appointment, can it be supposed there is no way of getting rid of such a person? He was certain it was essentially necessary such a power should be lodged somewhere, or it would be impossible to carry the Government into execution. Their inquiries were therefore reduced to this point: Does it reside, agreeably to the Constitution, in the President, or in the President and the Senate? The Constitution declares, that the President and the Senate shall appoint, and it naturally follows, that the power which appoints shall remove also. What would be the consequence of the removal by the President alone, he had already mentioned, and need not repeat. A new President might, by turning out the great officers, bring about a change of the

ministry, and throw the affairs of the Union into disorder; would not this, in fact, make the President a monarch, and give him absolute power over all the great departments of Government? It signifies nothing that the Senate have a check over the appointment, because he can remove, and tire out the good disposition of the Senate.

His colleague had objected to the removal in this way, because the Senate would be kept constantly sitting. He did not think this objection of any weight, because the Constitution made some other things their duty, which would require them to be pretty constantly sitting. He alluded to the part they were called upon to perform in making treaties; this, therefore, would be a trifling objection.

Mr. BENSON thought it was not absolutely necessary to make any provision on this head, because the power was given to the President by the Constitution; but as the argument had been pretty well gone into, he would add no more at present, than just to remark an error the gentleman last up had fallen into. He had supposed the President to have the powers of a monarch, that he could introduce and keep a favorite in office in despite of every other branch of the Government: the Senate was an effectual check to a system of favoritism, and it lay in the power of the House to correct any abuse arising from such a system, if it unhappily was fallen into.

Mr. BLAND insisted that the check of the Senate was not sufficient, if the power of removal was taken from them. Indeed, he was satisfied, from the privilege the President had of nominating and filling up vacancies *pro tempore*, he would become absolute, if he alone had the power of removal. He was therefore against this part of the motion, both on principle and policy. He therefore moved to add to the words of the motion, "by and with advice and consent of the Senate," so that the power of removal might be declared to be in the same body as the Constitution placed the appointment.

Mr. CLYMER said, the power of removal was an Executive power, and as such belonged to the President alone, by the express words of the Constitution: "the Executive power shall be vested in a President of the United States of America." The Senate were not an Executive body; they were a Legislative one. It was true, in some instances, they held a qualified check over the Executive power, but that was in consequence of an express declaration in the Constitution; without such declaration, they would not have been called upon for advice and consent in the case of appointment. Why, then, shall we extend their power to control the removal which is naturally in the Executive, unless it is likewise expressly declared in the Constitution?

The question on adding the words "by and with the advice and consent of the Senate," as moved by Mr. BLAND, was put and lost.

Mr. WHITE. It has been said, that the Senate are not an Executive body. I grant that they are not an Executive body when they are sitting for Legislative purposes; but they are an Executive body when performing their Executive functions as required in the Constitution.

Every question respecting treaties or public officers must go through their hands. Why shall we make the President responsible for what goes through other hands? He is not solely responsible, agreeably to the Constitution, for the conduct of the officers he nominates, and the Senate appoints; why then talk of obtaining a greater degree of responsibility than is known to the Constitution?

We are told, that we ought to keep the Legislative and Executive departments distinct; if we were forming a constitution, the observation would be worthy of due consideration, and he would agree to the principles; but the Constitution is formed, and the powers blended; the wished-for separation is therefore impracticable.

Mr. VINING remarked, that the argument of the gentleman from Pennsylvania (Mr. CLYMER) was too well founded to be overturned by the critical distinction made by the gentleman last up, and was sufficient to convince gentlemen, if they would consider it well, that the Constitution vested the power of removal in the President alone. He begged the committee to consider the monstrous effect it would produce if the Legislature went on to mingle the Legislative and Executive powers. He would place it in one other point of view, and then have done with the subject. It is well known, that the Senate are to decide upon an impeachment made by this House. Now, can they be impartial judges when they have already given judgment in the case? Suppose the President communicates his suspicions to the Senate respecting the malfeasance of a public officer, and they, from factious or party views, or, indeed, for want of full information, refuse their consent to the removal; can they be the equal and unbiased judicature which the Constitution contemplates them to be? He thought they could not.

Mr. PAGE requested the committee to delay the decision of this question, because he did not wish gentlemen to commit themselves, without having fully reflected upon the subject. It had presented itself to his mind, as one of the most momentous questions that could arise, in which the rights of the People, the energy of Government, and the liberty of posterity were staked. He begged them not to cast the die, on which the fate of millions was hazarded, until they had maturely considered the subject. He felt a degree of security in the check the Senate had over the President, in appointing to office; but he should not think himself safe, if the power of removal was in the President alone.

The question was now taken, and carried by a considerable majority, in favor of declaring the power of removal to be in the President.

Procedure of the Congress in Matters Relating to Impeachment (From Jefferson's Manual of Parliamentary Practice and Rules of the House of Representatives)

SEC. LIII.—IMPEACHMENT.

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§ 601. Jurisdiction of Lords and Commons as to impeachments.

These are the provisions of the Constitution of the United States on the subject of impeachments. The following is a sketch of some of the principles and practices of England on the same subject:

Jurisdiction. The Lords can not impeach any to themselves, nor join in the accusation, because they are the judges. *Seld Judic. in Parl., 12, 63.* Nor can they proceed against a commoner but on complaint of the Commons. *Ib., 84.* The Lords may not, by the law, try a commoner for a capital offense, on the information of the King or a private person, because the accused is entitled to a trial by his peers generally; but on accusation by the House of Commons, they may proceed against the delinquent, of whatsoever degree, and whatsoever be the nature of the offense; for there they do not assume to themselves trial at common law. The Commons are then instead of a jury, and the judgment is given on their demand, which is instead of a verdict. So the Lords do only judge, but not try the delinquent. *Ib., 6, 7.* But Wooddeson denies that a commoner can now be charged capitally before the Lords, even by the Commons; and cites Fitzharris's case, 1681, impeached of high treason, where the Lords remitted the prosecution to the inferior court. *3 Grey's Deb., 325-7; 2 Wooddeson, 576, 601; 3 Seld., 1604, 1610, 1618, 1619, 1641; 4 Blackst., 25; 9 Seld., 1656; 73 Seld., 1604-18.*

§ 602. Parliamentary law as to accusation in impeachment.

Accusation. The Commons, as the grand inquest of the nation, becomes suitors for penal justice. *2 Wood., 697; 6 Grey, 356.* The general course is to pass a resolution containing a criminal charge against the supposed delinquent, and then to direct some member to impeach him by oral accusation, at the bar of the House of Lords, in the name of the Commons. The persons signifies that the articles will be exhibited, and desires that the delinquent may be sequestered from his seat, or be committed, or that the peers will take order for his appearance. *Sachev. Trial, 325; 2 Wood., 602, 605; Lords' Journ., 3 June, 1701; 1 Wms., 616; 6 Grey, 324.*

§ 603. Inception of impeachment proceedings in the House.

In the House of Representatives there are various methods of setting an impeachment in motion: by charges made on the floor on the responsibility of a Member or Delegate (II, 1303; III, 2342, 2400, 2469; VI 525, 526, 528, 535, 536); by charges preferred by a memorial, which is usually referred to a committee for examination (III, 2364, 2491, 2494, 2496, 2499, 2515; VI, 552);

or by a resolution dropped in the hopper by a Member and referred to a committee (April 15, 1970, p. 11941–2); by a message from the President (III, 2294, 2319; VI, 498); by charges transmitted from the legislature of a State (III, 2469) or Territory (III 2487) or from a grand jury (III, 2488); or from facts developed and reported by an investigating committee of the House (III, 2399, 2444).

§ 604. A proposition to impeach a question of privilege.

A direct proposition to impeach is a question of high privilege in the House and at once supersedes business otherwise in order under the rules governing the order of business (III, 2045–2048; VI, 468, 469). It may not even be superseded by an election case, which is also a matter of high privilege (III, 2581). It does not lose its privilege from the fact that a similar proposition has been made at a previous time during the same session of Congress (III, 2408), previous action of the House not affecting it (III, 2053). So, also, propositions relating to an impeachment already made are privileged (III, 2400, 2402, 2410), such as resolutions providing for selection of managers of an impeachment (VI 517), proposing abatement of impeachment proceedings (VI, 514); but a resolution simply proposing an investigation, even though impeachment may be a possible consequence, is not privileged (III, 2050, 2546; VI, 463). But where a resolution of investigation positively proposes impeachment or suggests that end, it has been admitted as of privilege (III, 2051, 2052, 2401, 2402).

§ 605. Investigation of impeachment charges.

The impeachment having been made on the floor by a Member (III, 2342, 2400; VI, 525, 526, 528, 535, 536), or charges suggesting impeachment having been made by memorial (III, 2495, 2516; 2520, VI, 552), or even appearing through common fame (III, 2385, 2506), the House has at times ordered an investigation at once. At other times it has refrained from ordering investgation until the charges had been examined by a committee (III, 2364, 2488, 2491, 2492, 2494, 2504, 2513).

§ 606. Procedure of committee in investigating.

The House has always examined the charges by its own committee before it has voted to impeach (III, 2294, 2487, 2501). This committee has sometimes been a select committee (III, 2342, 2487, 2494), sometimes a standing committee (III, 2400, 2409). In some instances the committee has made its inquiry ex parte (III, 2319, 2343, 2366, 2385, 2403, 2496, 2511); but in the later practice the sentiment of committees has been in favor of permitting the accused to explain, present witnesses, cross-examine (III, 2445, 2471, 2518), and be represented by counsel (III, 2470, 2501, 2511, 2516).

§ 607. Impeachment carried to the Senate.

Its committee on investigation having reported, the House may vote the impeachment (III, 2367, 2412), and, after having notified the Senate by message (III, 2413, 2446), may direct the impeachment to be presented at the bar of the Senate by a single Member (III, 2294), or by two (III, 2319, 2343, 2307), or even five Members (III, 2445). These Members in one notable case represented the majority party alone, but ordinarily include representation of the minority party (III, 2445, 2472, 2505). The chairman of the committee impeaches at the bar of the Senate by oral accusation (III, 2413, 2446, 2473), and requests that the Senate take order as to appearance; but in only one case has the parliamentary law as to sequestration and committal been followed (III, 2118, 2296), later inquiry resulting in the conclusion that the Senate had no power to take into custody the body of the accused (III, 2324, 2367). Having delivered the impeachment the committee return to the House and report verbally (III, 2413, 2446; VI, 501).

§ 608. The writ of summons for appearance of respondent.

Process. If the party do not appear, proclamations are to be issued, giving him a day to appear. On their return they are strictly examined. If any error be found in them, a new proclamation issues, giving a short day. If he appear not, his goods may be arrested, and they may proceed. *Seld. Jud., 98, 99.*

The managers for the House of Representatives attend in the Senate after the articles have been exhibited and demand that process issue for the attend-

ance of respondent (III, 2451, 2478), after which they return and report verbally to the House (III, 2423, 2451; VI, 501). The Senate thereupon issue a writ of summons, fixing the day of return (III, 2423, 2451); and in a case wherein the respondent did not appear by person or attorney the Senate published a proclamation for him to apear (III, 2393). But the respondent's goods were not attached.

§ 609. Exhibition and form of articles.

Articles. The accusation (articles) of the Commons is substituted in place of an indictment. Thus, by the usage of Parliament, in impeachment for writing or speaking, the particular words need not be specified. *Sach. Tr., 325; 2 Wood., 602, 605; Lords' Journ., 3 June, 1701; 1 Wms., 616.*

The House of Representatives exhibits its articles after the impeachment has been carried to the bar of the Senate. The managers, who are elected by the House (III, 2300, 2345, 2417, 2448) or appointed by the Speaker (III, 2388, 2475), carry the articles in obedience to a resolution of the House (III, 2417, 2419, 2448) to the bar of the Senate (III, 2420, 2449, 2476), the House having previously informed the Senate (III, 2419, 2448) and received a message informing them of the readiness of the latter body to receive the articles (III, 2078, 2325, 2345). Having exhibited the articles the managers return and report verbally to the House (III, 2449, 2476). The articles in the Belknap impeachment were held sufficient, although attacked for not describing the respondent as one subject to impeachment (III, 2123)). These articles are signed by the Speaker and attested by the Clerk (III, 2302, 2449), and in form approved by the practice of the House (III, 2420, 2449, 2476).

§ 610. Parliamentary law as to appearance of respondent.

Appearance. If he appear and the case be capital, he answers in custody; though not if the accusation be general. He is not to be committed but on special accusations. If it be for a misdemeanor only, he answers, a lord in his place, a commoner at the bar, and not in custody, unless, on the answer, the Lords find cause to commit him, till he finds sureties to attend, and lest he should fly. *Seld. Jud., 98, 99.* A copy of the articles is given him, and a day fixed for his answer. *T. Ray.; 1 Rushw., 268; Fost., 232; 1 Clar. Hist. of the Reb., 379.* On a misdemeanor, his appearance may be in person, or he may answer in writing, or by attorney. *Seld. Jud., 100.* The general rule on accusation for a misdemeanor is, that in such a state of liberty or restraint as the party is when the Commons complain of him, in such he is to answer. *Ib., 101.* If previously committed by the commons, he answers as a prisoner. But this may be called in some sort judicium parium suorum. *Ib.* In misdemeanors the party has a right to counsel by the common law, but not in capital cases. *Seld. Jud., 102, 105.*

§ 611. Requirements of the Senate as to appearance of respondent.

This paragraph of the parliamentary law is largely obsolete so far as the practice of the House of Representatives and the Senate are concerned. The accused may appear in person or by attorney (III, 2127, 2349, 2424), or he may not appear at all (III, 2307, 2333, 2393). In case he does not appear the House does not ask that he be compelled to appear (III, 2308), but the trial proceeds as on a plea of "not guilty." It has been decided that the Senate has no power to take into custody the body of the accused (III, 2324, 2367). The writ of summons to the accused recites the articles and notifies him to appear at a fixed time and place and file his answer (III, 2127). In all cases respondent may appear by counsel (III, 2129), and in one trial, when a petition set forth that respondent was insane, the counsel of his son was admitted to be heard and present evidence in support of the petition, but not to make argument (III, 2333).

§ 612. Answer of respondent.

Answer. The answer need not observe great strictness of form. He may plead guilty as to part, and defend as to the residue; or, saving all

exceptions, deny the whole or give a particular answer to each article separately. *1 Rush., 274; 2 Rush., 1374; 12 Parl. Hist., 442; 3 Lords' Journ., 13 Nov., 1643; 2 Wood., 607.* But he cannot plead a pardon in bar to the impeachment. *2 Wood., 615; 2 St. Tr., 735.*

In the proceedings following the impeachment of President Andrew Johnson, the answer of the President took up the articles one by one, denying some of the charges, admitting others but denying that they set forth impeachable offenses, and excepting to the sufficiency of others (III, 2428). The form of this answer was commented on during preparation of the replication in the House (III, 2431). Blount and Belknap demurred to the charges on the ground that they were not civil officers within the meaning of the Constitution (III, 2310, 2453), and Swayne also raised questions as to the jurisdiction of the Senate (III, 2481). The answer is part of the pleadings, and exhibits in the nature of evidence may not properly be attached thereto (III, 2124).

§ 613. Other pleadings.

Replication, rejoinder, &c. There may be a replication, rejoinder, &c. *Sel. Jud., 114; 8 Grey's Deb., 233; Sach. Tr., 15; Journ. H. of Commons, 6 March, 1640–1.*

A replication is always filed, and in one instance the pleadings proceeded to a rejoinder, surrejoinder, and similiter (III, 2455). A respondent has also filed a protest instead of pleading on the merits (III, 2461), but there was objection to this and the Senate barely permitted it. In another case respondent interposed a plea as to jurisdiction of offenses charged in certain articles, but declined to admit that it was a demurrer with the admissions pertinent thereto (III, 2125, 2431). In the Belknap trial the House was sustained in averring in pleadings as to jurisdiction matters not averred in the articles (III, 2123). The right of the House to allege in the replication matters not touched in the articles has been discussed (III, 2457).

§ 614. Examination of witnesses.

Witnesses. The practice is to swear the witnesses in open House, and then examine them there; or a committee may be named, who shall examine them in committee, either on interrogatories agreed on in the House, or such as the committee in their discretion shall demand. *Seld. Jud., 120, 123.*

In trials before the Senate witnesses have always been examined in open Senate, and never by a committee, although such procedure has been once suggested (III, 2217).

§ 615. Relation of jury trial to impeachment.

Jury. In the case of Alice Pierce, *1 R., 2*, a jury was impaneled for her trial before a committee. *Seld. Jud., 123.* But this was on a complaint, not on impeachment by the Commons. *Seld. Jud., 163.* It must also have been for a misdemeanor only, as the Lords spiritual sat in the case, which they do on misdemeanors, but not in capital cases. *Id., 148.* The judgment was a forfeiture of all her lands and goods. *Id., 188.* This, Selden says, is the only jury he finds recorded in Parliament for misdemeanors; but he makes no doubt, if the delinquent doth put himself on the trial of his country, a jury ought to be impaneled, and he adds that it is not so on impeachment by the Commons, for they are in loco proprio, and there no jury ought to be impaneled. *Id., 124.* The Ld. Berkeley, *6 E., 3*, was arraigned for the murder of L. 2, on an information on the part of the King, and not on impeachment of the Commons; for then they had been patria sua. He waived his peerage, and was tried by a jury of Gloucestershire and Warwickshire. *Id., 126.* In *1 H., 7*, the Commons protest that they are not to be considered as parties to any judgment given, or hereafter to be given in Parliament. *Id., 132.* They have been generally and more justly considered, as is

before stated, as the grand jury; for the conceit of Selden is certainly not accurate, that they are the patria sua of the accused, and that the Lords do only judge, but not try. It is undeniable that they do try; for they examine witnesses as to the facts, and acquit or condemn, according to their own belief of them. And Lord Hale says, "the peers are judges of law as well as of fact;" *2 Hale, P. C., 275;* consequently of fact as well as of law.

No jury trial is possible as part of an impeachment trial under the Constitution (III, 2313).

§ 616. Attendance of the Commons.

Presence of Commons. The Commons are to be present at the examination of witnesses. *Seld. Jud., 124.* Indeed, they are to attend throughout, either as a committee of the whole House, or otherwise, at discretion, appoint managers to conduct the proofs. *Rushw. of Straff., 37; Com. Journ., 4 Feb., 1709-10; 2 Wood., 614.* And judgment is not given till they demand it. *Seld. Jud., 124.* But they are not to be present on impeachment when the Lords consider of the answer or proofs and determine of their judgment. Their presence, however, is necessary at the answer and judgment in case capital *Id., 58, 158,* as well as not capital; *162.* * * *.

§ 617. Attendance of the House of Representatives.

The House of Representatives has consulted its own inclination and convenience about attending its managers at an impeachment. It did not attend at all in the trials of Blount, Swayne, and Archbald (III, 2318, 2483); and after attending at the answer of Belknap, decided that it would be represented for the remainder of the trial by its managers alone (III, 2453). At the trial of the President the House, in Committee of the Whole, attended throughout the trial (III, 2427), but this is exceptional. In the Peck trial the House discussed the subject (III, 2377) and reconsidered its decision to attend the trial daily (III, 2028). While the Senate is deliberating the House does not attend (III, 2435); but when the Senate votes on the charges, as at the other open proceedings of the trial, it may attend (III, 2338, 2383, 2440). While it has frequently attended in Committee of the Whole, it may attend as a House (III, 2338).

§ 618. Voting on the articles in an impeachment trial.

* * * The Lords debate the judgment among themselves. Then the vote is first taken on the question of guilty or not guilty; and if they convict, the question, or particular sentence, is out of that which seemeth to be most generally agreed on. *Seld. Jud., 167; 2 Wood., 612.*

The question in judgment in an impeachment trial has occasioned contention in the Senate (III, 2339, 2340), and in the trial of the President the form was left to the Chief Justice (III, 2438, 2439). In the Belknap trial there was much deliberation over this subject (III, 2466). In the Chase trial the Senate modified its former rule as to form of final question (III, 2363). The yeas and nays are taken on each article separately (III, 2098, 2339), but in the trial of the President the Senate, by order, voted on the articles in an order differing from the numerical order (III, 2440), adjourned after voting on one article (III, 2441), and adjourned without day after voting on three of the eleven articles (III, 2443). After a conviction the Senate votes on the punishment (III, 2339, 2397).

§ 619. Judgment in impeachments.

Judgement. Judgments in Parliament, for death, have been strictly guided per legem terræ, which they can not alter; and not at all according to their discretion. They can neither omit any part of the legal judgment nor add to it. Their sentence must be secundum non ultra legem. *Seld. Jud., 168, 171.* This trial, though it varies in external ceremony, yet differs not in essentials from criminal prosecutions before inferior courts. The same rules of evidence, the same legal notions of

crimes and punishments, prevailed; for impeachments are not framed to alter the law, but to carry it into more effectual execution against too powerful delinquents. The judgment, therefore, is to be such as is warranted by legal principles or precedents. *6 Sta. Tr., 14; 2 Wood., 611.* The Chancellor gives judgments in misdemeanors; the Lord High Steward formerly in cases of life and death. *Seld. Jud., 180.* But now the Steward is deemed not necessary. *Fost., 144; 2 Wood., 613.* In misdemeanors the greatest corporal punishment hath been imprisonment. *Seld. Jud., 184.* The King's assent is necessary to capital judgments (but *2 Wood., 614,* contra), but not in misdemeanors. *Seld. Jud., 136.*

The Constitution of the United States (Art. I, sec. 3, par. 7) limits the judgment to removal and disqualification.

§ 620. Impeachment not interrupted by adjournments.

Continuance. An impeachment is not discontinued by the dissolution of Parliament, but may be resumed by the new Parliament. *T. Ray 383; 4 Com. Journ., 23 Dec., 1790; Lord's Jour., May 15, 1791; 2 Wood., 618.*

In Congress impeachment proceedings are not discontinued by a recess (III, 2299, 2304, 2344, 2375, 2407, 2505); and the Pickering impeachment was presented in the Senate on the last day of the Seventh Congress (III, 2320); and at the beginning of the Eighth Congress the proceedings went on from that point (III, 2321. But an impeachment may proceed only when Congress is in session (III, 2006, 2462).

Impeachable Offenses: Extracts From Hinds' and Cannon's Precedents of the House of Representatives

(A) Hinds' Precedents of the House of Representatives, Extracts From Volume 3, Chapter LXIII

2008. Reference to discussions as to what are impeachable offenses.—In the course of the arguments during the impeachment trial of Andrew Johnson, President of the United States, the question, "What are impeachable offenses?" was discussed at length and learnedly. Mr. Manager Benjamin F. Butler, of Massachusetts, argued [1] learnedly in favor of this definition:

> We define therefore an impeachable high crime or misdemeanor to be one in its nature or consequences subversive of some fundamental or essential principle of government or highly prejudicial to the public interest, and this may consist of a violation of the Constitution, of law, of an official oath, or of duty, by an act committed or omitted, or, without violating a positive law, by the abuse of discretionary powers from improper motives or for any improper purpose.

Mr. Butler also appended to his argument [2] an exhaustive brief on the "law of impeachable crimes and misdemeanors," prepared by Mr. William Lawrence, of Ohio.[3] This view was also supported by Mr. Manager John A. Logan, of Illinois.[4] Of the Senators who filed written opinions, Mr. Charles Sumner, of Massachusetts, argued at length that political offenses were impeachable offenses.[5] So also argued Mr. Richard Yates, of Illinois.[6]

Mr. Benjamin R. Curtis, of Massachusetts, of counsel for the President, argued, on the other hand, that impeachable offenses could only be offenses against the laws of the United States.[7] Mr. Thomas A. R. Nelson, of Tennessee, also of President's counsel, argued in the same line,[8] and Mr. William M. Evarts, of New York, also of counsel for the President, argued at length against the definition given by Mr. Manager Butler.[9] Of the Senators who filed written opinions on the case, this view was sustained by Mr. Garrett Davis, of Kentucky.[10]

2009. Argument that the phrase "high crimes and misdemeanors" is a "term of art," of fixed meaning in English parliamentary law, and

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[1] Second session Fortieth Congress. Globe, Supplement, p. 29.
[2] Pages 41–50.
[3] Globe, p. 1559.
[4] Pages 252–254.
[5] Pages 464–466.
[6] Page 487.
[7] Page 134.
[8] Pages 293, 294.
[9] Pages 343, 344.
[10] Pages 439, 440.

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transplanted to the Constitution in unchangeable significance.—On February 22, 1905,[11] in the Senate sitting for the impeachment trial of Judge Charles Swayne, Messrs. Anthony Higgins and John M. Thurston, of counsel for the respondent, offered a brief in support of their plea of jurisdiction as to the first seven articles. This brief, which was signed by them as counsel, but which, as they said, had been prepared by another, covered many questions relating to impeachments, the following being among them:

1. WHAT ARE IMPEACHABLE "HIGH CRIMES AND MISDEMEANORS," AS DEFINED IN ARTICLE II, SECTION 4, OF THE CONSTITUTION OF THE UNITED STATES?

By a strange coincidence, the death of parliamentary impeachment, as a living and working organ of the English constitution, synchronizes with its birth in American constitutions, State and Federal. Leaving out of view the comparatively unimportant impeachment of Lord Melville (1805), really the last of that long series of accusations by the Commons and trials by the Lords, which began in the fiftieth year of the reign of Edward III (1376), was the case of Warren Hastings, who was impeached in the very year in which the Federal Convention of 1787 met at Philadelphia. Before that famous prosecution, with its failure and disappointment, drew to a close, the English people resolved that the ancient and cumbrous machinery of parliamentary impeachment was no longer adapted to the wants of a modern and progressive society. But before this ancient method of trial thus passed into desuetude in the land of its birth it was embodied, in a modified form, first in the several State constitutions and finally in the Constitution of the United States.

Article II, section 4, of the Federal Constitution, provides that "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." Article I, section 2, provides that "the House of Representatives shall choose their Speaker and other officers; and shall have the sole power of impeachment." Article I, section 3, provides that "the Senate shall have the sole power to try all impeachments. When sitting for that purpose, they shall be on oath or affirmation. When the President of the United States is tried, the Chief Justice shall preside; and no person shall be convicted without the concurrence of two-thirds of the Members present. Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust, or profit under the United States; but the party convicted, shall nevertheless be liable and subject to indictment, trial, judgment, and punishment, according to law." Article III, section 2, provides that "the trial of all crimes, except in cases of impeachment, shall be by jury."

[11] Third session Fifty-eighth Congress, Record, pp. 3026–3028.

II. PROVISIONS BORROWED FROM THE ENGLISH CONSTITUTION

Mr. Bayard said in his argument in Blount's trial (Wharton's St. Tr., 264): "On this subject, the Convention proceeded in the same manner it is manifest they did in many other cases. They considered the object of their legislation as a known thing, having a previous definite existence. Thus existing, their work was solely to mold it into a suitable shape. They have given it to us, not as a thing of their creation, but merely of their modification. And therefore I shall insist that it remains as at common law, with the variance only of the positive provisions of the Constitution. * * * That law was familiar to all those who framed the Constitution. Its institutions furnished the principles of jurisprudence in most of the States. It was the only common language intelligible to the members of the Convention."

A recent writer of note, speaking on the same subject, has said: "If we examine the clauses of the Constitution, we perceive at once that the phraseology is applied to a method of procedure already existing. 'Impeachment' is not defined, but is used precisely as 'felony,' 'larceny,' 'burglary,' 'grand jury,' 'real actions,' or any other legal term used so long as to have acquired an accepted meaning, might be. The Constitution takes impeachment as an established procedure, and lodges the jurisdiction in a particular court, declaring how and by whom the process shall be put in motion, and how far it shall be carried. They have given to us a thing not of their creation, but of their modification. To ascertain, then, what this established procedure was, what were, at the time of the Constitutional Convention, impeachable offenses, we must look to England, where the legal notion contained in the clauses quoted had their origin." (American Law Review, vol. 16, p. 800. Article by G. Willett Van Nest.) Madison, in No. 65 of the Federalist, said: "The model from which the idea of the institution has been borrowed pointed out the course to the Convention. In Great Britain it is the province of the House of Commons to prefer the impeachment and of the House of Lords to decide upon it. Several of the State constitutions have followed the example."

III. HIGH CRIMES AND MISDEMEANORS AS DEFINED IN ENGLISH PARLIAMENTARY LAW

The English Parliament as a whole has always been considered and styled "The high court of Parliament," which is governed by a single body of law peculiarly its own. As Sir Thomas Erskine May (Parl. Prac., pp. 71 and 72) has well expressed it: "Each house, as a constituent part of Parliament, exercises its own privileges independently of the other. They are enjoyed, however, not by a separate right peculiar to each, but solely by virtue of the law and custom of Parliament." In the words of Lord Coke (4 Inst., 15), "As every court of justice hath laws and customs for its direction—

some the civil and canon, some the common law, others their own peculiar laws and customs—so the high court of Parliament hath also its own peculiar law, called the lex et consuetudo parliamenti." Blackstone (Bk. I, 163) in commenting upon the statement of Coke, that the law of Parliament, unknown to many and known by a few, should be sought by all, observes that, "It is much better to be learned out of the rolls of Parliament and other records and by precedents and continual experience than can be expressed by any one man." Chitty, in commenting upon the statement of Blackstone, has said:

"The law of Parliament is part of the general law of the land, and must be discovered and construed like all other laws. The members of the respective houses of Parliament are in most instances the judges of that law; and, like the judges of the realm, when they are deciding upon past laws, they are under the most sacred obligation to inquire and decide what the law actually is, and not what, in their will and pleasure, or even in their reason and wisdom, it ought to be. When they are declaring what is the law of Parliament, their character is totally different from that with which, as legislators, they are invested when they are framing new laws; and they ought never to forget the admonition of that great and patriotic chief justice, Lord Holt, viz, 'that the authority of the Parliament is from the law, and as it is circumscribed by law, so it may be exceeded; and if they do exceed those legal bounds and authority their acts are wrongful, and can not be justified any more than the acts of private men.' (1 Salk, 505.)" Chitty's Blackstone, vol. 1, p. 119, note 21.) It has always been conceded that the phrase "other high crimes and misdemeanors," embodied in Article II, section 4, of the Constitution of the United States, must be construed in the light of the definitions fixing its meaning in the parliamentary law of England as that law existed in 1787. The construction then given to the phrase in question was incorporated into our Federal Constitution as a part of the phrase itself, which is unintelligible and meaningless without such construction. The following elementary principles (as stated by Hon. William Lawrence, in the brief prepared by him for use in the trial of Andrew Johnson, Vol. I, pp. 125, 136), seem upon that occasion, to have passed unchallenged:

"As these words are copied by our Constitution from the British constitutional and parliamentary law, they are, so far as applicable to our institutions and condition, to be interpreted not by English municipal law but by the lex parliamentaria. * * * Whatever 'crimes and misdemeanors' were the subject of impeachment in England prior to the adoption of our Constitution, and as understood by its framers, are therefore subjects of impeachment before the Senate of the United States, subject only to the limitations of the Constitution. * * * 'Treason, bribery, and other high crimes and misdemeanors' are, of course, impeachable. Treason and bribery are specifically named, but 'other high crimes and misde-

meanors' are just as fully comprehended as though each was specified. The Senate is made the sole judge of what they are. There is no revising court. The Senate determines in the light of parliamentary law. Congress can not define or limit by law that which the Constitution defines in two cases by enumeration and in others by classification, and of which the Senate is sole judge. * * * Now, when the Constitution says that all civil officers shall be removable on impeachment for high crimes and misdemeanors, and the Senate shall have the sole power of trial, the jurisdiction is conferred and its scope is defined by common parliamentary law."

While the Senate sitting as a court of impeachment is the sole and final judge of what impeachable "high crimes and misdemeanors" are, no arbitrary discretion so to determine is vested. The power of the court simply extends to the construction of the phrase in question as defined in English constitutional and parliamentary law as it existed in 1787. That is made plain by Story in his Commentary on the Constitution, section 797, when he says: "Resort then must be had either to parliamentary practice, and the common law, in order to ascertain what high crimes and misdemeanors; or the whole subject must be left to the arbitrary discretion of the Senate for the time being. The latter is so incompatible with the genius of our institutions that no lawyer or statesman would be inclined to countenance so absolute a despotism of opinion and practice, which might make that a crime at one time or in one person which would be deemed innocent at another time or in another person. The only safe guide in such cases must be the common law."

IV. A RULE OF CONSTITUTIONAL CONSTRUCTION AS DEFINED BY THE SUPREME COURT OF THE UNITED STATES.

The fundamental principles of English constitutional law were first reproduced in the constitutions of the several States. In the light of the construction put upon them there, they were embodied, so far as applicable and desirable, in the Constitution of the United States. Thus the Federal Supreme Court was called upon at an early day to interpret the immemorial formulas or "terms of art" through which the cardinal principles of English constitutional law were incorporated in our governmental systems, State and Federal. The uniform rule for construing such formulas or "terms of art" adopted at the outset has been continued in force until the present time. When, in the trial of Aaron Burr, Chief Justice Marshall was called upon to construe Article III, section 3, of the Constitution, which provides that "treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort," he said, "What is the natural import of the words 'levying war?' and who may be said to levy it? * * * The term is not for the first time applied to treason by the Constitution of the United States. It is a technical term. It is used

in a very old statute of that country whose language is our language and whose laws form the substratum of our laws. It is scarcely conceivable that the term was not employed by the framers of our Constitution in the sense which had been affixed to it by those from whom we borrowed it. So far as the meaning of any terms, particularly terms of art, is completely ascertained, those by whom they are employed must be considered as employing them in that ascertained meaning, unless the contrary be proved by the context. It is therefore reasonable to suppose, unless it be incompatible with other expressions of the Constitution, that the term 'levying war' is used in that instrument in the same sense in which it was understood in England and in this country to have been used in the statute of twenty-fifth of Edward III, from which it was borrowed." (Burr's Trial, vol. 2, pp. 401, 402.)

When in the case of Murray *v.* The Hoboken Land Co. (184 How., 272) it became necessary for the Supreme Court to construe the formula "due process of law," as embodied in the fifth amendment, Mr. Justice Curtis, speaking for the court, said: "The words 'due process of law' were undoubtedly intended to convey the same meaning as the words 'by the law of the land' in Magna Charta, Lord Coke, in his commentary on those words (2 Inst., 50), says they mean due process of law. The constitutions which had been adopted by the several States before the formation of the Federal Constitution, following the language of the Great Charter more closely, generally contained the words 'but by the judgment of his peers, or the law of the land.' The ordinance of Congress of July 13, 1787, for the government of the territory of the United States northwest of the river Ohio, used the words."

When in the case of Davidson *v.* New Orleans (96 U.S., 97) it became necessary to again construe the same formula—"due process of law," as embodied in the fourteenth amendment—Mr. Justice Miller, speaking for the court, said: "The prohibition against depriving the citizen or subject of his life, liberty, or property without due process of law is not new in the constitutional history of the English race. It is not new in the constitutional history of this country, and it was not new in the Constitution of the United States when it became a part of the fourteenth amendment, in the year 1866. The equivalent of the phrase 'due process of law,' according to Lord Coke, is found in the words 'law of the land,' in the Great Charter, in connection with the writ of habeas corpus, the trial by jury, and other guarantees of the rights of the subject against the oppression of the Crown." In Smith *v.* Alabama (124 U.S., 465) it was held that "the interpretation of the Constitution of the United States is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in the light of its history," a statement affirmed by the adoption in the United States *v.* Wong Kim Ark (169 U.S. 649).

V. IMMEMORIAL FORMULAS TRANSPLANTED FROM THE ENGLISH CONSTITUTION, UNCHANGEABLE BY SUBSEQUENT CONGRESSIONAL LEGISLATION

The foregoing authorities put the fact beyond all question that the immemorial formulas or "terms of art" transferred from the English constitution to our own were adopted, not as isolated or abstract phrases, but as epitomes or digests of the great principles which they embodied. That is to say, the term "levying war" carried with it the identical meaning given it as a part of the statute of Edward III; the term "due process of law," the identical meaning given to it as a part of Magna Charta; the term "high crimes and misdemeanors," the identical meaning given it as a part of the law of the High Court of Parliament. Or, in other words, when such formulas were embedded in the Constitution of 1787, their historical meaning and construction went along with them as completely as if such meaning and construction had been written out at length upon the face of the instrument itself. If that be true, the conclusion is self-evident that no subsequent Congressional legislation can change in any way, by addition or subtraction, the definitions embodied in such formulas at the time of their adoption. If the contrary were true, Congress could any day give to the term "levying war" or "due process of law" a definition, conveying ideas of which the fathers never dreamed. Or if the term "high crimes and misdemeanors" could be subjected to a new Congressional definition, acts which were such in 1887 could be relieved of all criminality, and new acts not then criminal could be added to the list of impeachable offenses. So obvious is that fact that Congress can not legislate at all on the subject that Mr. Lawrence, whose brief has been heretofore quoted, frankly admitted, while striving to give to the powers of Congress the widest possible construction, that "Congress can not define or limit by law that which the Constitution defines into two cases by enumeration, and in others by classification, and of which the Senate is sole judge."

The last phrase is specially suggestive of the fact that if Congress could, by subsequent legislation, "define or limit by law that which the Constitution defines," the Senate sitting as a court of impeachment could be entirely deprived by such legislation of the power to determine what were impeachable high crimes and misdemeanors as defined by the fathers in 1787. In other words, if Congress can add to or subtract from the constitutional definition in any particular, it can destroy it altogether. In the great case of Marbury *v.* Madison (1 Cranch, 137) the first in which an act of Congress was ever declared unconstitutional, the question of questions was this: Does the fact that the Constitution itself has defined the original jurisdiction of the Supreme Court prohibit Congress from enlarging such original jurisdiction by subsequent legislation? The solemn answer was that the attempt of Congress to do so was void. Why? Because the dividing line between

the original and appellate jurisdiction having been drawn by the Constitution itself, it is immovable by legislation. In the words of the great Chief Justice: "If Congress remains at liberty to give this court appellate jurisdiction where the Constitution has declared their jurisdiction shall be original, and original jurisdiction where the Constitution has declared it shall be appellate, the distribution of jurisdiction made in the Constitution is form without substance." Thus it follows that any act of Congress which attempts to change the constitutional definition of impeachable high crimes and misdemeanors, by adding to the list some offense unknown to the parliamentary law of England as it existed in 1787, is simply void and of no effect.

2010. Argument of Mr. John M. Thurston, counsel, that judges may be impeached only for judicial misconduct occurring in the actual administration of justice in connection with the court.

Argument that an impeachment trial is a criminal proceeding.

On February 25, 1905,[12] in the Senate, sitting for the impeachment of Judge Charles Swayne, Mr. John M. Thurston, of counsel for the respondent, in final argument, said:

In the printed brief originally filed in behalf of the respondent a demonstration, based upon the authorities, was made, to the effect that no clear light is to be derived as to the meaning of the phrase "other high crimes and misdemeanors," so far as that phrase relates to the impeachment of English and American judges, except from the English and American judicial impeachment cases in which it has been applied to that subject. Instead of attempting to meet that reasonable and obvious contention upon its merits, the managers have evaded it by propounding a series of generalities, based upon principles drawn, in the main, from political impeachments which throw no real light upon the subject. In the course of that evasion the following remarkable statement has been made:

Said the managers in their brief:

"For the first time in impeachment trials in this or any other country the claim is made that a judge can be impeached only for acts done in his official capacity."

The fact that that statement does not fully relate the history of impeachment cases will appear by consideration of those cases. After the impeachments for bribery, pure and simple, of English judges are put aside, but two judicial impeachments remain in the entire history of the English people—that is, the impeachment of judges.

Judges, like all others, can be impeached for treason not committed upon the bench or in judicial affairs. They can be impeached for bribery by the strict terms of the Constitution, bribery committed anywhere, without regard to whether they were sitting upon the bench at the time. But as to other causes of impeachment I challenge the honorable managers to show me any case in history, English or American, where

[12] Third session Fifty-eighth Congress, Record, pp. 3365, 3366.

a judge has been impeached for any other crime or high misdemeanor except one alleged to have been committed in connection with his exercise of judicial authority. In saying that, I do not refer to some impeachment cases that have happened in States and under State constitutions, for many of the constitutions of the several States have provisions largely at variance with those of the Constitution of the United States upon this subject.

But four judicial impeachments have taken place under the Constitution of the United States. It was admitted by the House of Commons in England and by the House of Representatives in the United States by the form of the articles they presented in these judicial impeachment cases that, excepting treason or bribery, neither an English nor a Federal judge could be impeached except for judicial misconduct occurring in the actual administration of justice in connection with his court, either between private individuals or between the Government and the citizen.

The statement of the honorable managers in their brief—

"For the first time in impeachment trials in this or any other country the claim is made that a judge can be impeached only for acts done in his official capacity"—is contradicted by the judicial history of every case of impeachment of a judge in Great Britain and the United States.

Mr. Manager Olmsted was greatly mistaken when he said in his argument:

"One year later, the Senate having convicted John Pickering, Federal judge in a New Hampshire district, upon a charge of drunkenness"—

The article exhibited against John Pickering charged him with drunkenness upon the bench, and was limited to that charge, for the framers of that impeachment well knew that the drunkenness of the judge was no ground for impeachment under the Constitution of the United States unless he carried that drunkenness upon the bench.

The articles against Pickering read:

"Being then judge of the district court in and for the district of New Hampshire, did appear on the bench of the said court for the purpose of administering justice in a state of total intoxication, produced by the free and intemperate use of inebriating liquors, and did then and there frequently in a most profane and indecent manner"—

That is, on the bench, while administering justice—

"invoke the name of the Supreme Being, etc."

It was perfectly understood by every constitutional lawyer then, as it should be understood now, that the personal misconduct of an English judge off the bench has never furnished the ground for impeachment, and for the well-understood reason that under the English constitution, as it has been called, they provided for two methods of removing judges from the bench—one by impeachment for high crimes and misdemeanors and the other upon address to the sovereign by both houses of Parliament.

When we came to frame our Constitution we adopted from the English constitution the term "treason, bribery, and other high crimes and misdemeanors." The question was mooted in that convention as to whether or not we should also embody in our Constitution the English provision for the removal of Federal judges by address of the two Houses of Congress to the President. Understanding perfectly well, as the debates will show, that impeachment would only lie for a crime or offense committed in connection with the judicial office and the administration of justice, they rejected the proposed clause providing for removal by address. The framers of our Constitution did this because they were tenacious of the stability of the tenure of office of our Federal judges, and were fearful that if they enlarged the impeachment provision some of the States, by reason of local prejudice, might proceed criminally against them, and upon conviction of crime base articles of impeachment thereon.

Mr. President, I state here and now that the contention made by one of the honorable managers that a judge can be impeached under the Constitution of the United States for a crime committed as an individual against a State law has no foundation in any case that has ever been known of on the earth, was not thought of as possible by the framers of our Constitution, and is not the law to-day. It would leave a Federal judge at the mercy of a local condition, inimical as it might be to the Federal Constitution.

The case of Humphreys has been cited as a case where a Federal judge was impeached for other than judicial misconduct. Yes, Humphreys was impeached for treason. Any judge can be impeached for treason or for bribery, no matter where or how committed; but the only charge in his impeachment other than treason was the charge of judicial misconduct as the judge of the court, in the court, and acting in the administration of justice.

Mr. President, that the framers of our Constitution well knew the limitations they were imposing upon the right of impeachment is further attested by the fact that in the original draft of that great document the language was "for treason, bribery, or maladministration," and the word "maladministration" has crept into some of the constitutions of our several States. Upon the consideration of that question on the floor of the convention it was moved to strike out "maladministration" and insert "other high crimes and misdemeanors," and for the very reason that the term "maladministration" was a loose term that might mean, under the decisions of the Senate in the future, much or little; that it might cover impeachments at one period of time by one party in power that it would not cover at another period of time with another party in power. They struck it out because it was too large a term, too loose a term, and they inserted in its place those definite words, "high crimes and misdemeanors," taken from the English constitution with parliamentary construction already attached.

We took that provision from the English constitution and with it we took the interpretation that was placed upon it by the lex parliamenti, the law of Parliament, established by the adjudications in the great tribunal. That provision meant then what it meant in England at the time. Mr. President, that provision meant then what it has meant ever since. It meant then what it always must mean. From the debates in that convention it does appear that those words were adopted with that construction upon them because it was claimed that it would be unwise to permit even the Congress of the United States, by ever making something a crime that was not then a crime, to enlarge the operation of that impeachment provision of the Constitution, or to repeal some of those things which then constituted crimes and thereby prevent the impeachment of those who committed them.

Sir, that provision of the Constitution was embodied in that great instrument with a meaning that can never be changed by the Congress of the United States. It was embodied there with a meaning which will remain the same to the end of time. It furnishes the limitation with which the power of Congress can be exercised in impeachment cases.

I insist that for the first time in this case is it even suggested by constitutional lawyers that that term permits the impeachment of a judge simply because he has been tried and convicted in a court of a State for a crime against the statutes of a State, or because in his private life he has been impure or improvident, or because of any other shortcomings or failures exhibited in his career except those which relate to the administration of justice in the court over which he presides.

Mr. President, before proceeding to discuss the articles and the evidence, I call your attention to the fact that this is a criminal proceeding, and the respondent is charged with a crime. That question was settled by the Senate some days since upon the vote taken on the question of the admissibility of evidence. It is certain that this proposition is true, because the last portion of section 2 of article 3 of the Constitution of United States provides that "trial of all crimes except in cases of impeachment shall be by jury," and thereby the framers of that great instrument declared that an offense to be impeachable must be a crime, or, what is equivalent to it, a high misdemeanor.

Mr. President, this respondent, being on trial charged with crime, is entitled to every reasonable doubt that may arise upon the evidence in the case. I do not come here to claim that he needs the application of this rule, for I insist that the evidence in this case shows that he is guiltless beyond a reasonable doubt; but I invoke the attention of the Senate to that beneficent rule of law now because it is the outgrowth of the spirit of liberty and justice so strong in the Anglo-Saxon race. It is the common safeguard and heritage of every American citizen. It is the shield of the accused and is a bulwark

for the protection of the liberty and life of every man, woman, and child in the land.

2011. Argument of Mr. Manager Perkins that a judge may be impeached for personal misconduct.—On February 24, 1905,[12] in the Senate, sitting for the impeachment trial of Judge Charles Swayne, Mr. Manager James B. Perkins, of New York, in concluding argument, said in relation to the articles charging nonresidents in the district:

The argument made in behalf of the respondent is this: That a judge, under the precedent of the English courts, can not be impeached for any act except one done in the course of his duty as a judge, but an omission of duty as an individual.

Mr. President, this can best be answered by an illustration of what is the logical and necessary result of the argument on the other side, that a judge of the United States court can not be impeached by the Senate of the United States unless for some strictly judicial act. Let us suppose that a judge commits a crime; that he forges a note; that he embezzles money. He is indicted and tried and convicted in the State courts of these crimes and sentenced to bear the punishment. Then it is sought to remove him from office by impeachment. The judge having committed these crimes is impeached. He employs my learned friends on the other side, and they claim before the Senate then, as they claim now, that the Senate has no power to impeach a judge except for acts done as a judge. They say, and say justly, that when this judge forged a note, or embezzled money, he was not acting as a judge, but as an individual. And if the argument be just, we have this extraordinary conclusion: A judge can not be removed except by impeachment. The judge, for the crime committed in his private capacity, is serving his term in State's prison. As he marches to perform hard labor, he will once a month receive the consolation of opening the envelope containing the check which will be monthly sent to him to pay him his salary as a judge of the United States court. Such a result shows the absurdity of the position.

The English cases are cited, but in England, apart from the remedy by impeachment, a judge can be removed for any cause deemed sufficient by a bill of attainder. That is unknown in this country. Bills of attainder were not put in our Constitution, and the remedy by impeachment by the Senate is the sole remedy by which a judge can be removed.

But a word more. What offense is Judge Swayne charged with? It is that he did not reside within his district. The law could not say that Judge Swayne as an individual should reside in the northern district of Florida or anywhere else, but the law says that when he is a judge he, because he is a judge, shall reside within his district; and when he failed so to do he omitted a judicial requirement made of him just as much as if he had sold justice or made unrighteous decisions.

I shall say no more on that point, but come at once to what is the important, the great question in this case—not whether

[12] Third session Fifty-eighth Congress, Record, p. 3246.

the offense is impeachable, but whether the offense was committed. It has already been suggested that a judge of the United States court is the one officer in the land who holds his office by a life tenure. He can not be removed by the people. He can not be removed by the President. Nothing but the act of God or the vote of the Senate can remove a man who holds the office of United States judge. His dignity is great; his responsibility is correspondingly great. The people who complain, the people who lack confidence in their judges, can look to the Senate and can look here alone for relief. If they can not get it here they can not get it anywhere.

2012. Argument of Mr. Anthony Higgins, counsel, that impeachable offenses by a judge are confined to acts done on the bench in discharge of his duties.—On February 24, 1905,[14] in the Senate, sitting for the impeachment trial of Judge Charles Swayne, Mr. Anthony Higgins, of counsel for the respondent, said in final argument:

Mr. President, I conceive it is of no slight interest or importance to the Senate that of the four learned managers who have now taken part in the presentation of the prosecution of this case three of them have devoted as much time as they have to the question whether the offenses charged in the first seven articles constitute impeachable offenses—the alleged offense or crime of the respondent of making a false claim, or obtaining money by false pretenses; of using a car belonging to a railroad company, contrary to good morals, and, third, in not obeying the statute to reside in his district. All three have united in presenting the argument of ab inconvenienti—one which seldom weighs much with courts, and one which, it seems to us, after the conclusive discussion of the subject in the argument which it has been our privilege to present to the Senate on the constitutional question, is not left in the case really for discussion. That argument shows beyond peradventure that the framers of the Constitution in leaving out of the Constitution any provision for the removal of an official subject to impeachment by address did it purposely and with a view of giving stability to those who hold the offices, and especially the judges.

"Mr. Dickinson," says Elliott in his Debates on the Constitution, "moved, as an amendment to Article XI, section 2, after the words 'good behavior,' the words '*Provided*, That they may be removed by the Executive on the application by the Senate and House of Representatives.'"

This was in respect of the judges.

Mr. Gerry seconded the motion. Mr. Gouverneur Morris thought it a contradiction in terms to say that the judges should hold their offices during good behavior and yet be removable without a trial. Besides, it was fundamentally wrong to subject judges to so arbitrary an authority.

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[14] Third session Fifty-eighth Congress, Record, pp. 3258–3259.

"Mr. Randolph opposed the motion as weakening too much the independence of the judges.

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"Delaware alone voted for Mr. Dickinson's motion."

Says Judge Lawrence in a paper on this subject, which he filed in the Johnson impeachment case:

"Impeachment was deemed sufficiently comprehensive to cover every proper case for removal.

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"The first proposition was to use the words 'to be removable on impeachment and conviction for malpractice and neglect of duty.' It was agreed that these expressions were too general. They were therefore stricken out."

* * * * * * *

Mr. Mason said:

"Treason, as defined in the Constitution, will not reach many great and dangerous offenses. Hastings is not guilty of treason. Attempts to subvert the Constitution may not be treason as above defined."

He moved to insert after "bribery" the words "or maladministration."

Mr. Madison replied:

"So vague a term will be equivalent to a tenure during the pleasure of the Senate."

Mr. Mason withdraw "maladministration" and substituted "other high crimes and misdemeanors against the State."

Mr. President, there are in the State of Pennsylvania, Delaware, South Carolina, Alabama, Arkansas, Florida, Illinois, Kentucky, Louisiana, and Texas provisions substantially the same as those contained in the constitutions of Pennsylvania and of Delaware. The constitution of the State of Pennsylvania of 1790 provides:

"ARTICLE V.

"SEC. 2. The judges of the supreme court and of the several courts of common pleas shall hold their offices during good behavior. But for any reasonable cause, which shall not be sufficient ground of impeachment, the governor may remove any of them on the address of two-thirds of each branch of the legislature."

The clause of the constitution of Delaware is similar. The Pennsylvania constitution as amended in 1838 provides:

"SEC. 3. The governor and all other civil officers under this Commonwealth shall be liable to impeachment for any misdemeanor in office, but judgment in such cases shall not extend farther than to removal from office and disqualification to hold any office of honor, trust, or profit under the Commonwealth. The party, whether convicted or acquitted, shall, nevertheless, be liable to indictment, trial, judgment, and punishment according to law." (Page 1561.)

So that there are in those constitutions the direct provision that power of removal by address is given as punishment for cases which by the very words of the constitution are said not to be the subject of impeachment.

An examination of the constitutions of the several States will show that there are not more than two or three State constitutions which do not contain the power of removal by address. That power was placed in the English constitution by a great and famous historic statute—the Act of Settlement—passed early in the reign of William and Mary, or of Anne, at the time when the present dynasty of the British throne was placed upon the authority of an act of Parliament. Then it was that the provision was placed in the statute that judges should be removable by address for causes that were not the subject of impeachment. Therefore, in the face of this state of the constitutional law and of the terms and provisions of the Constitution, where is there room for an argument that that construction shall not hold because there is no other way of getting rid of judges but by impeachment?

Now, but one word more on this, and that is in respect to the case that was cited by the learned manager, Mr. Olmsted, of an impeachment in Massachusetts. I call attention to the fact that the constitution of Massachusetts of 1780 makes provision for the impeachment of judges broader than the other States, or at least most of them.

"ART. VIII. The Senate shall be a court with full authority to hear and determine all impeachments made by the house of representatives against any officer or officers of the Commonwealth for misconduct and maladministration in their offices."

So in Massachusetts the judge who took illegal fees upon the ministerial side of his probate court was clearly impeachable under the provision of the Massachusetts constitution, which extended to ministerial functions.

2013. Argument from review of English impeachments that the phrase "high crimes and misdemeanors," as applied to judicial conduct, must mean only acts of the judge while sitting on the bench.

History of removal by address in England and the States as bearing on the nature of impeachable offenses on the part of a judge.

On February 22, 1905,[15] in the Senate sitting for the impeachment trial of Judge Charles Swayne, Messrs. Anthony Higgins and John M. Thurston, of counsel for the respondent, offered a brief in support of their plea of jurisdiction as to the first seven articles. This brief, which was signed by them as counsel, but which, as they said, had been prepared by another, covered many questions relating to impeachments, the following being among them:

The only pertinent definitions of the term "high crimes and misdemeanors," as contained in Article II, section 4, of the Federal Constitution, must be drawn (1) from the law of Parliament as it existed in 1787; (2) from the contempo-

[15] Third session Fifty-eighth Congress, Record, pp. 3028–3081.

raneous expositions of that law embodied in the constitutions of the several States. In order to present anything like an adequate statement of the English law of impeachment as it existed at the time in question, some account must be given of the process of growth through which it had passed prior to that time. The history of that growth is divided into two epochs, easily distinguishable from each other. The first begins with the proceedings against the Lords Latimer and Neville, which took place in the Good Parliament in the fiftieth of Edward III (1376). These proceedings are regarded by the constitutional historians as the earliest instances of a trial by lords upon a definite accusation made by the Commons. (Hallam, M. A., Vol. III, p. 56; Stubbs, Const. Hist., Vol. II, p. 431.) Not until early in the reign of Edward III was Parliament definitely and finally divided into two houses that deliberated apart; not until near the close of that reign did the Commons, as the grand jury of the whole realm, attempt to present persons accused of grave offenses against the State to the Lords for trial. At the outset, the new method of accusation was rivaled by what were known as "appeals," which have been thus defined: "It was the regular course for private persons, even persons who were not members of Parliament, to bring accusations of a criminal nature in Parliament, upon which proceedings were had." (Stephen, Hist. of the Criminal Law of England, Vol. I, 151.)

The results of the private warfare thus instituted were so inconvenient that "appeals" were finally abolished by the statute of I Hen. 4, c. 14. Thus left without a rival, proceedings by impeachment were occasionally employed during the reigns of Richard II, Henry IV, Henry V, and Henry VI. In the reign last named Lord Stanley was impeached in 1459 for not sending his troops to the battle of Bloreheath. That trial terminates the first epoch in the history of the law of impeachment in England. It was not again employed during the period that divides 1459 from 1621, an interval of one hundred and sixty-two years. The primary cause for the suspension is to be found in the fact that during that interval it was that the decline in the prestige and influence of Parliament was such that the directing power in the state passed to the King in council, the judicial aspect of which was known as "the star chamber." There it was that the great state trials took place during the reign of Edward IV and during the following reigns of the princes of the house of Tudor. Such impeachment trials as did take place during the first or formative epoch are not as distinctly defined as those that occurred during the later period, and have now only an antiquarian interest.

VIII. IMPEACHMENTS IN ENGLAND: SECOND EPOCH.

With the revival of the powers of Parliament in the reign of James I, impeachment was resumed as a weapon of constitu-

tional warfare. From that time its modern history, with which this discussion is concerned, really begins. The first impeachment case to occur during the second epoch was that of Sir Giles Mompesson in 1621, the last that of Lord Melville in 1805. Including the first and last the total is 54. [Here follows the list.]

An examination of the foregoing list reveals the fact that many of the impeachments in question were directed against private individuals, it having always been the law of England that all subjects, as well out of office as in office, might be thus accused and tried. A good illustration may be found in the notable case of Doctor Sacheverell, rector of St. Savior's, Southwark, who was impeached by the Commons and convicted by the Lords for having preached two sermons inculcating the doctrine of unlimited passive obedience. (State Trials, XV, p. 1.) As that branch of the law of impeachment which authorized the accusation of private individuals out of office was never reproduced in this country, cases of that class may be dismissed from consideration. By far the greater number of the remaining cases are what are known as "political impeachments," whereby one party in the State would attempt to crush its adversaries in office by impeaching them for high treason, which generally involved commitment to the Tower.

As illustrations, reference may be made to the case of Portland, Halifax, and Somers, three Whig peers impeached of high treason by a Tory House of Commons for their share in promoting the Spanish partition treaties in 1700; and to that of Oxford, Bolingbroke, and Ormond, Tory ministers impeached by the triumphant Whigs in the Commons for their share in negotiating the peace of Utrecht in 1713. (State Trials, Vol. XIV, p. 233. Parl. Hist., Vol. VII, p. 105.) A well-known English writer has described the latter as "the last instance of purely political impeachment." (Taswell-Langmead, English Const. Hist., p. 549, note.) Cases of that class shed but a dim light upon the definition of the term "high crimes and misdemeanors" as applied to those offenses for which English judges have been punished for misbehavior in office. No clear or authoritative definitions of the term in question can be found, as applied to that subject, outside of what are known as judicial impeachments as contradistinguished from political. As the purely judicial impeachment cases which have occurred in England are very few in number, their results may be stated within narrow limits.

The earliest of the accusations which have been made against English judges have been for the crime of bribery, the crime for which Lord Bacon was impeached by the Commons in 1621. The charges against Bacon particularly set forth instances of judicial corruption by the acceptance of bribes, and in his "confession and submission" he said: "I do plainly and ingeniously confess that I am guilty of corruption, and do renounce all defense." (State Trials, Vol. 11, 106.) Such cases, though rare, had occurred before Bacon's

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time. In the words of Sir J. F. Stephen, Coke "gives two instances in which judges were punished for taking bribes, namely, Sir. William Thorpe, in 1351, who took sums amounting in all to £90 for not awarding an exigent against five persons at Lincoln assizes, and certain commissioners (probably special commissioners) of oyer and terminer, who were fined 1,000 marks each for taking a bribe of £4. I have elsewhere referred to the impeachment of the Chancellor Michael de la Pole, by Cavendish, the fishmonger, for taking a bribe of £40, 3 yards of scarlet cloth, and a quantity of fish, in the time of Richard II. * * *

"Lord Macclesfield was also impeached and removed from his office for bribery in 1725." (Hist. of the Crim. Law of Eng., Vol. III, pp. 251–52, citing as to the case of Lord Macclesfield Sixteen State Trials, p. 767.) That case was the last judicial impeachment in England. It is not, therefore, strange that bribery, as a distinct and substance offense, should have been named, side by side with treason, as an impeachable crime, in the Constitution of the United States. After the bribery cases of Lord Chancellor Bacon and Lord Chancellor Macclesfield have been subtracted from the foregoing list, but two judicial impeachments remain in the entire history of the English people. Only in those two cases have the Commons impeached and the Lords tried English judges upon charges of judicial misconduct other than bribery.

IX. IMPEACHMENT OF SIR ROBERT BERKLEY AND OTHER JUDGES

In 1635 Charles I announced his attention to extend the exaction of ship money to the inland counties. When the writs of that year were resisted, the judges gave answers in favor of the prerogative. When in 1636 another set of ship writs were issued, Hampden made a test case by refusing to pay the assessment on his lands at Great Missenden, and the issue thus raised was argued in November and December, 1637, before a full bench. The contention made in favor of the Crown was sustained by seven of the judges—Finch, chief justice of the common pleas; Bramston, chief justice of the king's bench; Berkley, one of the justices of that court; Crawley, one of the judges of the common pleas; Davenport, lord chief baron of the exchequer; Weston and Trevor, barons of that court. When the day of reckoning came, Finch fled to Holland, and the remaining six were impeached by the Commons for their judgments rendered in favor of the royal contention, the charges being delivered to the Lords July 6, 1641. As Berkley's opinion in favor of the legality of ship money was the most emphatic, he was made the special object of attack in articles which charged him not only with the ship-money opinion, but with other acts of judicial misconduct on the bench. The nature of the accusations against him can be best explained by extracts from the articles themselves, which open with the general statement "that the said Sir Robert Berkley, then being one of the justices of the said

court of king's bench, hath traitorously and wickedly endeavored to subvert the fundamental laws and established government of the realm of England, and instead thereof to introduce an arbitrary and tyrannical government against law, which he hath declared, by traitorous and wicked words, opinions, judgments, practices, and actions appearing in the several articles ensuing."

The following are a fair sample of the special charges: "4. That he, the said Robert Berkley, then being one of the justices of the king's bench, and having taken an oath for the due administration of justice, according to the laws and statutes of the realm, to His Majesty's liege people, on or about the last of December subscribed an opinion, in haec verba: 'I am of opinion, that where the benefit doth more particularly redound to the good of the ports,' etc. * * * 6. That he the said Sir Robert Berkley, then being one of the justices of the court of king's bench, and duly sworn as aforesaid, did on———deliver his opinion in the exchequer chamber against John Hampden, esq., in the case of ship money. * * * 7. That he, the said Sir Robert Berkley, then being one of the justices of the court of king's bench, and one of the justices of the assize for the county of York, did, at the assizes held at York in Lent, 1636, deliver his charge to the grand jury, 'that it was a lawful and inseparable flower of the Crown for the King to command, not only the maritime counties, but also those that were inland, to find ships for the defense of the kingdom.' * * * 8. The said Sir. R. Berkley then being one of the justices of the court of king's bench, in Trinity term last, then sitting on the bench in said court, upon debate of the said case between the said chambers and Sir E. Bromfield, said openly in the court, 'that there was a rule of law, and a rule of government'; and that 'many things which might not be done by the rule of law might be done by the rule of government'; and would not suffer the point of legality of ship money to be argued by chambers' counsel. * * * 9. The said Sir R. Berkley, then and there sitting on the bench, did revile and threaten the grand jury returned to serve at the said session, for presenting the removal of the communion table in All Saints Church in Hertford aforesaid. * * * 11. He, the said Sir R. Berkley, being one of the justices of the said court of king's bench, and sitting in said court, deferred to grant a prohibition to the said Court-Christian in said cause, although the counsel did move in the said court many several times and several times for a prohibition." (State Trials, vol. 3, pp. 1283–1291.) The impeachment against Berkley ended in his paying a fine of £10,000.

x. IMPEACHMENT OF SIR WILLIAM SCROGGS, CHIEF JUSTICE OF THE KING'S BENCH

In the reign of Charles II, Sir William Scroggs, chief justice of the king's bench, was impeached of high crimes and misdemeanors, the nature of which may be best explained by

the following extracts from the articles themselves. The general accusation is "that the said William Scroggs, then being chief justice of the court of king's bench, hath traitorously and wickedly endeavored to subvert the fundamental laws, and the established religion and government of this Kingdom of England; and instead thereof to introduce popery and arbitrary and tyrannical government against law; which he has declared by divers traitorous and wicked words, opinions, judgments, practices, and actions." Chief among the special charges are the following: II. "That he, the said Sir William Scroggs, in Trinity term last, being then chief justice of the said court, and having taken an oath duly to administer justice according to the laws and statutes of this realm, in pursuance of his said traitorous purposes, did, together with the rest of the justices of the said court, several days before the end of said term, in an arbitrary manner, discharge the grand jury which then served for the hundred of Oswaldston, in the county of Middlesex, before they had made their presentments, etc. * * * III. That, whereas one Henry Carr had, for some time before, published every week a certain book, entitled 'The Weekly Pacquet of Advice from Rome, or The History of Popery,' wherein the superstitions and cheats of the Church of Rome were from time to time exposed, he, the said Sir William Scroggs, then chief justice of the court of king's bench, together with the other judges of the said court, before any legal conviction of the said Carr, of any crime did in the said Trinity term, in a most illegal and arbitrary manner, make and cause to be entered a certain rule of that court against the printing of said book, in hæc verba. * * * IV. That the said Sir William Scroggs, since he was made chief justice of the king's bench, hath, together with the other judges of the said court, most notoriously departed from all rules of justice and equality in the imposition of fines upon persons convicted of misdemeanors in said court." The result was that the chief justice was removed from office and given a pension for life. (State Trials, Vol. VIII, pp. 195, 216.)

XI. PROCEEDING AGAINST LORD CHIEF JUSTICE KEELING

Intervening between the case of Berkley and other judges (1640) and that of Sir William Scroggs (1680) are proceedings by the Commons against Lord Chief Justice Keeling, which occurred in 1667, notable for the reason that they clearly illustrate what kind of judicial acts were considered as impeachable high crimes and misdemeanors at that time. "A copy of Judge Keeling's case, taken out of the Parliament Journal, December 11, 1667: 'The House resumed the hearing of the rest of the report touching the matter of restraint upon juries; and that upon the examination of divers witnesses, in several causes of restraints put upon juries, by the Lord Chief Justice Keeling; whereupon the committee made their resolutions, which are as follows: 1. That the proceedings of

the Lord Chief Justice, in the cases now reported, are innovations in the trial of men for their lives and liberties; and that he hath used an arbitrary and illegal power, which is of dangerous consequence to the lives and liberties of the people of England, and tends to the introducing of an arbitrary government. 2. That in the place of judicature, the Lord Chief Justice hath undervalued, vilified, and condemned Magna Carta, the great preserver of our lives, freedom, and property. 3. That he be brought to trial, in order to condign punishment in such manner as the House shall judge most fit and requisite.'" (State Trials, vol. 6, p. 991, seq.)

"On the 16th of October, 1667, the House being informed 'that there have been some innovations of late in trials of men for their lives and deaths, and in some particular cases restraints have been put upon juries in the inquiries,' this matter is referred to a committee. On the 18th of November this committee are empowered to receive information against the Lord Chief Justice Keeling for any other misdemeanors besides those concerning juries. And on the 11th of December, 1667, the committee report several resolutions against the Lord Chief Justice Keeling of illegal and arbitrary proceedings in his office. The chief justice desiring to be heard, he is admitted on the 13th of December and heard in his defense to the matters charged against him, and being withdrawn, the House resolve 'that they will proceed no further in the matter against him.'" (4 Hatsel Prec., pp. 123–4, cited in Chase's Trial, Vol. II, p. 461.)

XII. REMOVAL BY ADDRESS PROVIDED BY THE ACT OF SETTLEMENT

By the foregoing analysis of the only English precedents to which we can look for expositions of the meaning of the phrase "high crimes and misdemeanors," as applied to the conduct of English judges, the fact is put beyond all question that the only judicial acts which the House of Commons ever regarded as failing within that category are such acts as a judge performs while sitting upon the bench, administering the laws of the realm, either between private persons or between the Crown and the subject. In the case of Mr. Justice Berkley the gravamen of the charge was that he rendered a judgment in the matter of ship money in conflict with what his triers considered the law of the realm to be. In the case of Chief Justice Scroggs the gravamen of the charge was that he arbitrarily discharged grand juries; that in a libel case he rendered an illegal judgment, and that he imposed unjust fines upon those convicted of misdemeanors. In the proceedings against Chief Justice Keeling the gravamen of the charge was that he had put "restraint" upon juries by fining them for their verdicts. "Wagstaff and others of a jury were fined an hundred marks a piece by Lord Chief Justice Keeling." (4 Hatsell Prec., p. 124, note.) Excepting bribery there is no case in the parliamentary law of England which gives color to the idea that the personal misconduct of a

judge, in matters outside of his administration of the law in a court of justice, was ever considered or charged to constitute a high crime and misdemeanor. When the question is asked, By what means is the personal misconduct of an English judge, not amounting to a high crime and misdemeanor, punished? the answer is easy.

Prior to the passage in 1701 of the famous Act of Settlement (12 and 13 Will. III, C. 2) neither the tenure nor the compensation of English judges rested upon a firm or definite foundation. Hallam (Const. Hist., Vol III, p. 194) tells us that "it had been the practice of the Stuarts, especially in the last years of their dynasty, to dismiss judges, without seeking any other pretense, who showed any disposition to thwart government in political prosecutions." As the hasty and imperfect Bill of Rights had failed to provide a remedy for that condition of things, it became necessary for the authors of the Act of Settlement, "the complement of the Revolution itself and the Bill of Rights," to provide that English judges should hold office during good behavior (quandiu se bene gesserint), and that they should receive ascertained and established salaries. But while the judges were being thus entrenced in their offices, the fact was not forgotten that the remedy by impeachment extended only to high crimes and misdemeanors which did not embrace personal misconduct. Therefore a method of removal was provided by address, which was intended to embrace all misconduct not included in the term "high crimes and misdemeanors."

In the light of that statement it will be easier to understand the full purport of that section of the Act of Settlement which provides "that after the said limitations shall take effect as aforesaid, judges' commissions be made quandiu se bene gesserint, and their salaries ascertained and established; but upon the address of both Houses of Parliament it may be lawful to remove them." Thus, for seventy-five years prior to the severance of the political tie which bound the English colonies in America to the parent State, the twofold method for the removal of English judges was clearly defined and perfectly understood on both sides of the Atlantic. The twofold method embraced (1) the removal by impeachment for all acts constituting "high crimes and misdemeanors," a term then clearly defined in English parliamentary law; (2) the removal by address for all lesser acts of personal misconduct not embraced within that term. That such was the general and accepted view on this side of the Atlantic in 1776 of the English parliamentary law on impeachment and address will be put beyond all question by the following references to the several State constitutions in which that law reappeared.

XIII. IMPEACHMENT AND ADDRESS AS DEFINED IN THE CONSTITUTION OF THE SEVERAL STATES

On May 10, 1776, the Continental Congress recommended to the several conventions and assemblies of the colonies the

establishment of independent governments "for the maintenance of internal peace and the defense of their lives, liberties, and properties." (Charters and Constitutions, vol. 1, p. 3.) Before the end of the year in which that recommendation was made the greater part of the colonies had adopted written constitutions, in which were restated, in a dogmatic form, all of the vital principles of the English constitutional system. Illustrations of the adoption of the English plan for the removal of judges by impeachment and address may be drawn from the following State constitutions: The constitution of Pennsylvania of 1776, Article V, section 2, provides that "the judges of the supreme court and of the several courts of common pleas shall hold their offices during good behavior. But for any reasonable cause, which shall not be sufficient ground for impeachment, the governor may remove any of them, on the address of two-thirds of each branch of the legislature."

The constitution of Delaware of 1792, Article VI, section 2, provides that "the chancellor and the judges of the supreme court of common pleas shall hold their offices during good behavior; but for any reasonable cause, which shall not be sufficient ground for impeachment, the governor may in his discretion, remove any of them on the address of two-thirds of all the members of each branch of the legislature." The constitution of South Carolina of 1868, Article VII, section 4, provides that "for any willful neglect of duty or other reasonable cause, which shall not be sufficient ground of impeachment, the governor shall remove any executive or judicial officer on the address of two-thirds of each house of the general assembly." Here are explicit and dogmatic statements of the settled rule of English parliamentary law that judges may be removed by impeachment for grave offenses of judicial misconduct, and by address for lesser offenses of personal misconduct. As this distinction was so well known, many of the State constitutions simply presuppose it without stating it in express terms. The constitution of Massachusetts of 1780, Chapter III, article 1, after providing for removal by impeachment, declares that "all judicial officers duly appointed, Commissioned, and sworn shall hold their offices during good behavior, excepting such concerning whom there is different provision made in this constitution: Provided, nevertheless, the governor, with consent of the council, may remove them upon the address of both houses of the legislature."

The constitution of Georgia of 1798, Article III, section 1, provides that "the judges of the superior court shall be elected for the term of three years, removable by the governor on the address of two-thirds of both houses for that purpose, or by impeachment and conviction thereon." The constitution of New Hampshire of 1784, Article I, part 2, provides that "all judicial officers, duly appointed, commissioned, and sworn, shall hold their offices during good behavior, excepting those concerning whom there is a different provision made in this constitution; Provided, nevertheless, the presi-

dent, with the consent of council, may remove them upon the address of both houses of the legislature." The constitution of Connecticut of 1818, Article V, section 3, provides that "the judges of the supreme court and of the superior court shall hold their offices during good behavior; but may be removed by impeachment, and the governor shall also remove them on the address of two-thirds of the members of each house of the general assembly." It is said that the constitution of New York of 1777 was the model from which the impeachment clauses of the Constitution of the United States were copied. (6 Am Law Reg., N.S., 277.)

The New York constitution of that date expressly limited impeachment to persons in office, and omitted removal by address. Such an omission was, however, exceptional. The rule was to introduce into the State constitutions both processes of removal by impeachment and address. And if it were not for fear of wearying the court by reiteration, the list of instances could be greatly lengthened in which both methods were introduced into later State constitutions not here mentioned, together with the recognized distinction between impeachable offenses and the lesser acts of misconduct justifying only removal by address, expressed in the words "not sufficient ground of impeachment." (See Appendix.)

2014. Argument that Congress might not by law make nonresidence a high misdemeanor in a judge.

Discussion of the intent of a judge as a primary condition needed to justify impeachment.

On February 22, 1905,[16] in the Senate sitting for the impeachment trial of Judge Charles Swayne, Messrs. Anthony Higgins and John M. Thurston, of counsel for the respondent, offered a brief in support of their plea of jurisdiction as to the first seven articles. This brief, which was signed by them as counsel, but which, as they said, had been prepared by another, covered many questions relating to impeachments, the following being among them:

First. That the definition of the term "high crimes and misdemeanors," as employed in Article II, section 4, of the Constitution, must be drawn from the parliamentary law of England as it existed in 1787, construed in the light of the contemporaneous expositions of that law embodied in the provisions of the constitutions of the several States as to impeachment and address.

Second. That the definition of that term, as thus fixed at the time of the adoption of the Federal Constitution is organic and unchangeable by subsequent Congressional legislation; that no act not an impeachable offense when the Constitution was adopted can be made so by a subsequent act of Congress.

Third. That the "high crimes and misdemeanors" for which English judges were impeachable in 1787 can only be clearly ascertained from an examination of what are known as the

[16] Third session Fifty-eighth Congress, Record, pp. 3033–3034.

English judicial impeachment cases, as contradistinguished from the political.

Fourth. That English judges have never been impeached except for bribery, or for judicial misconduct occurring in the actual administration of justice in court, either between private individuals or between the Crown and the subject.

Fifth. That since the act of settlement (1701), when the tenure and compensation of English judges was first fixed on a definite basis, such judges have been removable for judicial misconduct not amounting to an impeachable high crime and misdemeanor, by address.

Sixth. That the plain distinction between the acts for which a judge may be impeached and the acts for which he may be removed by address was clearly recognized and defined in the constitutions of many of the States.

Seventh. That after careful consideration and debate the Federal Convention of 1787, with only one dissenting vote, rejected the proposition to embody the removal of Federal judges by address in the Constitution of the United States "as weakening too much the independence of the judges." After rejecting the more ample provisions upon the subject of impeachment embodied in some of the State constitutions, it was resolved that Federal judges should only be removed by impeachment for and conviction of "high crimes and misdemeanors" in the limited sense in which that phrase was defined in the parliamentary law of England as it existed in 1787.

Eighth. That in no one of the four judicial impeachments which have taken place since the adoption of our Federal Constitution has the House of Representatives ever attempted to impeach a Federal judge for "high crimes and misdemeanors," except in those cases in which he would have been impeachable under the English parliamentary precedents. That is to say, the proceedings against Justice Berkley and other judges (1640), the proceedings against Chief Justice Keeling (1667), the proceedings against Chief Justice Scroggs (1680), the proceedings against Judge Pickering (1803), the proceedings against Judge Chase (1804), the proceedings against Judge Peck (1830), the proceedings against Judge Humphreys (1862), so far as they relate to judicial misconduct, rest upon a single proposition, which is this: In English and American parliamentary and constitutional law the judicial misconduct which rises to the dignity of a high crime and misdemeanor must consist of judicial acts, performed with an evil or wicked intent, by a judge while administering justice in a court, either between private persons or between a private person and the government of the State. All personnel misconduct of a judge occurring during his tenure of office and not coming within that category must be classed among the offenses for which a judge may be removed by address, a method of removal which the framers of our Federal Constitution refused to embody therein.

When the allegations contained in articles 1, 2, and 3, presented against this respondent, are examined, it appears that they set forth in three forms an identical charge, which is in substance that the respondent, in settling his accounts with certain United States marshals under a certain act of Congress providing for the reasonable expenses for travel and attendance of a district judge, when lawfully directed to hold court outside of his district, exacted and received in payment for such expenses from the said marshals sums in excess of the amounts contemplated in said act. It is charged that such acts constitute "a high crime, to wit, the crime of obtaining money from the United States by a false pretense, and a high misdeameanor in office." The short answer to such a charge is that no such offense was ever thought of or defined in the parliamentary law of England as a high crime and misdeameanor in 1787, or at any other time; that it bears no relation whatever to the acts known in English parliamentary law as an impeachable offense. If it be true, as alleged, that the respondent was guilty in making such settlements of "obtaining money from the United States by a false pretense," then the remedy is by indictment by a grand jury and a trial by a petit jury, as in the case of any other citizen of the country. The Constitution expressly provides, Article I, section 3, that persons subject to impeachment "shall nevertheless be liable and subject to indictment, trial, judgment, and punishment according to law." While it is quite possible to understand how such personal misconduct upon the part of a judge, entirely disconnected with the conduct of judicial business on the bench, might subject him to removal by address in a State which had adopted that plan of removal for nonimpeachable offenses, it is hard to conceive how any effort of the imagination could reach the conclusion that such an act constitutes an impeachable high crime and misdemeanor as defined in English parliamentary law.

The same comments are applicable to the charges made in articles 4 and 5 as to the use by the respondent of a certain car belonging to a certain railroad, "the said railroad company being at the time in the possession of a receiver appointed by said Charles Swayne, judge as aforesaid, on the petition of creditors." Even if it could be established that the circumstances attending such a transaction would warrant removal by address, no advance would be made toward the conclusion that such acts constitute an impeachable high crime and misdemeanor as defined in English parliamentary law, because the further allegation that "the said Charles Swayne, acting as judge, allowed the credit claimed by the said receiver for and on account of the said expenditure as part of the necessary expenses of operating said road" falls far short of the English and American rule as to the evil or wicked intent which must accompany a judgment or opinion delivered on the bench in order to render it impeachable. Nothing is better settled than the fact that a judge is not impeachable even for a judgment, order, or opinion rendered contrary to law unless

it is alleged and proved that it was rendered with an evil, wicked, or malicious intent. Justice Berkley was impeached not simply because he decided in favor of ship money, but because he "traitorously and wickedly endeavored to subvert the fundamental laws" of the realm thereby. Chief Justice Scroggs was impeached not simply for imposing "fines upon persons convicted of misdemeanors in said court," but because he imposed them "for the further accomplishing of his said traitorous and wicked purposes."

Justice Chase was impeached because he, "with intent to oppress and procure the conviction of the said Callender, did overrule the objection of John Bassett, one of the jury;" "that, with intent to oppress and procure the conviction of the prisoner, the evidence of John Taylor, a material witness on behalf of the aforesaid Callender, was not permitted by the said Samuel Chase to be given in." Judge Peck was impeached not because he punished Lawless for contempt, but because he did so "with intention wrongfully and unjustly to oppress, imprison, and otherwise injure the said Luke Edward Lawless under color of law, * * * under the color and pretense aforesaid and with the intent aforesaid, in the said court then and there did unjustly, oppressively, and arbitrarily order and adjudge, etc. If further illustrations of the necessity for averments as to the wicked and malicious intent with which a judicial act must be performed need be given, they may be drawn from articles 8, 9, 10, 11, and 12, presented against this respondent, in which impeachable offenses are properly charged under the rule which the Constitution prescribes—that is to say, the rule of English parliamentary law. It is charged in one article that the said Charles Swayne "did maliciously and unlawfully adjudge guilty of contempt of court and impose a fine of $100 upon and commit to prison for a period of ten days E. T. Davis, an attorney at law, for an alleged contempt of the circuit court of the United States;" and in another that he "did maliciously and unlawfully adjudge guilty of a contempt of court and impose a fine of $100 upon and commit to prison for a period of ten days Simeon Belden, an attorney and counselor at law, for an alleged contempt of the circuit court of the United States."

With the plain and settled rule thus recognized clearly in view, the draftsmen of articles 4 and 5 have not only failed to charge that the respondent "allowed the credit claimed by said receiver for and on account of the said expenditure," etc., "maliciously and unlawfully," but, what is more to the point, they have failed to charge that he did so "knowingly." There is no reason to suppose, in the absence of such an allegation, that a judge, approving the mass of accounts presented to the court by a receiver of a railroad, would have personal knowledge of every trivial item which such accounts contain. The presumption is clearly to the contrary. In articles 4 and 5 there is no charge either that the respondent ever "knowingly" passed upon the items of expense in question or

that he approved them "maliciously and unlawfully." In the absence of such allegations articles 4 and 5 fall to the ground.

The charge of nonresidence contained in article 6 presupposes the validity of section 551, Revised Statutes of the United States, which provides that "a district judge shall be appointed for each district, except in cases hereinafter provided. Every judge shall reside in the district for which he is appointed, and for offending against this provision shall be deemed guilty of a high misdemeanor." If the foregoing argument proves anything, it is the fact that when the phrase "high crimes and misdemeanors" was embodied in the Federal Constitution in 1787 it drew along with it, as an integral parliamentary law at that time. The phrase, coupled with part of it, the definition which fixed its meaning in English the definitions of it, thus became organic and unchangeable by subsequent Congressional legislation, just as the definition of the original and appellate jurisdiction of the Supreme Court became organic and unchangeable. The convention pointedly refused to make impeachable offenses an uncertain or changeable quantity. "The first proposition was to use the words 'to be removable on impeachment and conviction for malpractice and neglect of duty.' It was agreed that these expressions were too general. They were therefore stricken out. * * * Colonel Mason said: 'Treason, as defined in the Constitution, will not reach many great and dangerous offenses. Hastings is not guilty of treason. Attempts to subvert the Constitution may not be treason as above defined.' He moved to insert after 'bribery' the words 'or maladministration.' Madison: 'So vague a term will be equivalent to a tenure during the pleasure of the Senate.' Mason withdrew 'maladministration' and substituted 'other high crimes and misdemeanors against the State.'" (American Law Review, vol. 16, p. 804.)

The fathers knew exactly the limitations of the phrase adopted, and they repelled the idea that it was ever to be enlarged or diminished. If nonresidence of a judge in his district could be added by Congress to the list of impeachable offenses, that list could be thus indefinitely extended; or, by the same authority, every impeachable offense as understood in 1787 could be abolished. If it is admitted that Congress can change the organic definition, either by addition or subtraction, it follows as clearly as a mathematical demonstration that the scheme of impeachment provided in the Constitution can be entirely remodeled by legislation. The validity of the section in question, making nonresidence a high misdemeanor, can not be supported by serious argument. Even if it could be, the fact can not be lost sight of that its plain provision is that "every such judge shall reside in the district for which he is appointed." It will not be disputed that Judge Swayne was so residing in the district for which he was appointed at the time that subsequent legislation excluded the place of his residence from such district. Certainly nothing more can be put forward by those who assert the validity of

section 551 than the contention that it was respondent's duty to remove, within a reasonable time, from the district for which he was appointed into the new one for which he was not appointed. It follows, therefore, that the accusation now made amounts to nothing more than the charge that respondent did not act with sufficient alacrity; that he did not remove his residence into the new district with sufficient promptness. How could such laches possibly constitute an impeachable high crime and misdemeanor?

2015. Argument that an impeachable offense is any misbehavior that shows disqualification to hold and exercise the office, whether moral, intellectual or physical.

Answer to the argument that a judge may be impeached only for acts done in his official capacity.

Answer to the argument that Congress might not make nonresidence a high misdemeanor.

By permission, before the final arguments in the Swayne trial, the managers filed a brief on the respondent's plea to jurisdiction.

On February 23, 1905,[17] in the Senate sitting for the impeachment trial of Judge Charles Swayne, Manager Henry W. Palmer, of Pennsylvania, filed, by permission the following brief:

A BRIEF OF AUTHORITIES ON THE LAWS OF IMPEACHMENT

The purpose of this brief is to show—

First. That the framers of the Constitution intended that the House of Representatives should have the right to impeach and the Senate the power to try a judicial officer for any misbehavior that showed disqualification to hold and exercise the office, whether moral, intellectual, or physical.

The provisions of the Constitution relating to the subject of impeachment are as follows:

"The House of Representatives shall choose their Speaker and other officers, and shall have the sole power of impeachment. (Art. I, sec. 2.)

"Judgment in cases of impeachment shall not extend further than to removal from office and disqualification to hold and enjoy any office of honor, trust, or profit under the United States; but the party convicted shall, nevertheless, be liable and subject to indictment, trial, judgment, and punishment, according to law. (Art. II, sec. 1.)

"The President * * * shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment. (Art. II, sec. 2.)

"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, and other high crimes and misdemeanors. (Art. II, sec. 4.)

"The trial of all crimes, except in cases of impeachment, shall be by jury." (Art. 3, sec. 2.)

[17] Third session Fifty-eighth Congress, Record, pp. 3179–3181.

The convention that framed the Constitution did not define words, but used them in the sense in which they were understood at that time.

The convention did not invent the remedy by impeachment, but adopted a well-known and frequently used method of getting rid of objectionable public officers, modifying it to suit the conditions of a new country.

In England all the King's subjects were liable to impeachment for any offense against the sovereign or the law. Floyd was impeached for speaking lightly of the Elector Palatine and sentenced to ride on horseback for two successive days through certain public streets with his face to the horse's tail, with the tail in his hands; to stand each day two hours in pillory; to be pelted by the mob, then to be branded with the letter "K" and be imprisoned for life in the Tower. The character and extent of the punishment was in the discretion of the House of Lords.

The Constitution modified the remedy by confining it to the President, Vice-President, and all civil officers, and the punishment to removal from office and disqualification to hold office in future.

That it was not intended as a punishment of crime clearly appears when we read that a party convicted shall nevertheless be liable and subject to indictment, trial, judgment, and punishment according to law.

Said Mr. Bayard, in Blount's trial:

"Impeachment is a proceeding of a purely political nature. It is not so much designed to punish the offender as to secure the State. It touches neither his person nor his property, but simply divests him of his political capacity." (Wharton's State Trials, 263.)

Subject to these modifications and adopting the recognized rule, the Constitution should be construed so as to be equal to every occasion which might call for its exercise and adequate to accomplish the purposes of its framers. Impeachment remains here as it was recognized in England at and prior to the adoption of the Constitution.

These limitations were imposed in view of the abuses of the power of impeachment in English history.

These abuses were not guarded against in our Constitution by limiting, defining, or reducing impeachable crimes, since the same necessity existed here as in England for the remedy of impeachment, but by other safeguards thrown around it in that instrument. It will be observed that the sole power of impeachment is conferred on the House and the sole power of trial on the Senate by Article I, sections 2 and 3. These are the only jurisdictional clauses, and they do not limit impeachment to crimes and misdemeanors. Nor is it elsewhere so limited. Section 4 of Article II makes it imperative when the President, Vice-President, and all civil officers are convicted of treason, bribery, or other high crimes and misdemeanors that they shall be removed from office. There may be cases appropriate for the exercise of the power of impeachment where no crime or misdemeanor has been committed.

Whatever crimes and misdemeanors were the subjects of impeachment in England prior to the adoption of our Constitution, and as understood by its framers, are, therefore, subjects of impeachment before the Senate of the United States, subject only to the limitations of the Constitution.

"The framers of our Constitution, looking to the impeachment trials in England, and to the writers on parliamentary and common law, and to the constitutions and usages of our own States, saw that no act of Parliament or of any State legislature ever undertook to define an impeachable crime. They saw that the whole system of crimes, as defined in acts of Parliament and as recognized at common law, was prescribed for and adapted to the ordinary courts." (2 Hale, P'l. Crown, ch. 20, p. 150; 6 Howell State Trials, 313, note.)

They saw that the high court of impeachment took jurisdiction of cases where no indictable crime had been committed, in many instances, and there was then, as there yet are, two parellel modes of reaching some, but not all offenders—one by impeachment, the other by indictment.

With these landmarks to guide them, our fathers adopted a Constitution under which official malfeasance and nonfeasance, and, in some cases, misfeasance, may be the subject of impeachment, although not made criminal by act of Congress, or so recognized by the common law of England, or of any State of the Union. They adopted impeachment as a means of removing men from office whose misconduct imperils the public safety and renders them unfit to occupy official position. All American text writers support this view.[18]

"Congress have unhesitatingly adopted the conclusion that no previous statute is necessary to authorize an impeachment for any official misconduct; and the rules of proceeding and the rules of evidence, as well as the principles of decision, have been uniformly regulated by the known doctrines of the common law and parliamentary usage. In the few cases of impeachment which have hitherto been tried no one of the charges has rested upon any statutable misdemeanors. It seems, then, to be the settled doctrine of the high court of impeachment that, though the common law can not be a foundation of a jurisdiction not given by the Constitution or laws, that jurisdiction, when given, attaches, and is to be exercised according to the rules of the common law, and that what are and what are not high crimes and misdemeanors is to be ascertained by a recurrence to that great basis of American jurisprudence. The reasoning by whch the power of the House of Representatives to punish for contempts (which are breaches of privileges and offenses not defined by any positive laws) has been upheld by the Supreme Court stands upon similar grounds: for if the House had no jurisdiction to punish for contempts until the acts had been previously defined and ascertained by positive law it is clear that the process of arrest would be illegal.

[18] Story on the Constitution, p. 585.

"In examining the parliamentary history of impeachments it will be found that many offenses not easily definable by law, and many of a purely political character, have been deemed high crimes and misdemeanors worthy of this extraordinary remedy. Thus lord chancellors, and judges, and other magistrates have not only been impeached for bribery and acting grossly contrary to the duties of their offices, but for misleading their sovereign by unconstitutional opinions, and for attempts to subvert the fundamental laws and introduce arbitrary power. So where a lord chancellor has been thought to have put the great seal to an ignominious treaty, a lord admiral to have neglected the safeguard of the sea, an ambassador to have betrayed his trust, a privy councilor to have propounded or supported pernicious and dishonorable measures, or a confidential adviser of his sovereign to have obtained exorbitant grants or incompatible employments—these have been all deemed impeachable offenses. Some of these offenses, indeed, for which persons were impeached in the early ages of British jurisprudence would now seem harsh and severe; but perhaps they were rendered necessary by existing corruptions, and the importance of suppressing a spirit of favoritism and court intrigue.

"Thus persons have been impeached for giving bad counsel to the King, advising a prejudicial peace, enticing the King to act against the advice of Parliament, purchasing offices, giving medicine to the King without advice of physicians, preventing other persons from giving counsel to the King except in their presence, and procuring exorbitant personal grants from the King. But others, again, were founded in the most salutary public justice, such as impeachments for malversations and neglects in office, for encouraging pirates, for official oppression, extortions, and deceits, and especially for putting good magistrates out of office and advancing bad. One can not but be struck, in this light enumeration, with the utter unfitness of the common tribunals of justice to take cognizance of such offenses, and with the entire propriety of confiding the jurisdiction over them to a tribunal capable of understanding and reforming and scrutinizing the policy of the state, and of sufficient dignity to maintain the independence and reputation of worthy public officers.[19]

"The other point is one of more difficulty. In the argument upon Blount's impeachment it was pressed with great earnestness, while there is not a syllable in the Constitution which confines impeachments to official acts, and it is against the plainest dictates of common sense that such restraint should be imposed upon it. Suppose a judge should countenance or aid insurgents in a meditated conspiracy or insurrection against the Government. This is not a judicial act, and yet it ought certainly to be impeachable. He may be called upon to try the very persons whom he has aided. Suppose a judge or other officer to receive a bribe not connected with his judicial office, could he be entitled to any public con-

[19] Story on the Constitution, p. 587.

fidence? Would not these reasons for his removal be just as strong as if it were a case of an official bribe? The argument on the other side was that the power of impeachment was strictly confined to civil officers of the United States, and this necessarily implied that it must be limited to malconduct in office." [20]

"In the United States.—The Constitution of the United States provides that 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. If impeachment in England be regarded merely as a mode of trial for the punishment of common-law or statutory crimes, and if the Constitution has adopted it only as a mode of procedure, leaving the crimes to which it is to be applied to be settled by the general rules of criminal law, then, as it is well settled that in regard to the National Government there are no common-law crimes, it would seem necessarily to follow that impeachment can be instituted only for crimes specifically named in the Constitution or for offenses declared to be crimes by Federal statute. This view has been maintained by very emient authority. But the cases of impeachment that have been brought under the Constitution would seem to give to the remedy a much wider scope than the above rule would indicate.

"In each of the only two cases of impeachment tried by the Senate in which a conviction resulted the defendant was found guilty of offenses not indictable either at common law or under any Federal statute, and in almost every case brought offenses were charged in the articles of impeachment which were not indictable under any Federal statute, and in several cases they were such as constituted neither a statutory nor a common-law crime. The impeachability of the offenses charged in the articles was, in most of the cases, not denied. In one case, however, counsel for the defendant insisted that impeachment would not lie for any but an indictable offense, but after exhaustive argument on both sides this defense was practically abandoned. The cases, then, seem to establish that impeachment is not a mere mode of procedure for the punishment of indictable crimes; that the phrase 'high crimes and misdemeanors' is to be taken, not in its common-law but in its broader parliamentary sense, and is to be interpreted in the light of parliamentary usage; that in this sense it includes not only crimes for which an indictment may be brought, but grave political offenses, corruptions, maladministration, or neglect of duty involving moral turpitude, arbitrary and oppressive conduct, and even gross improprieties, by judges and high officers of state, although such offenses be not of a character to render the offender liable to an indictment either at common law or under any statute. Additional weight is added to this interpretation of the Consti-

[20] American and English Encyclopedia of Law, Vol. XV, p. 1066.

tution by the opinions of eminent writers on constitutional and parliamentary law and by the fact that some of the most distinguished members of the convention that framed it have thus interpreted it." [21]

"Impeachments" are thus introduced as a known definite term, and we must have recourse to the common law of England for the definition of them."

In England the practice of impeachments by the House of Commons before the House of Lords has existed from very ancient times. Its foundation is that a subject intrusted with the administration of public affairs may sometimes infringe the rights of the people and be guilty of such crimes as the ordinary magistrates either dare not or can not punish. Of these, the representatives of the people, or House of Commons, can not judge, because they and their constituents are the persons injured, and can therefore only accuse. But the ordinary tribunals would naturally be swayed by the authority of so powerful an accuser. That branch of the legislature which represents the people, therefore, brings the charge before the other branch, which consists of the nobility, who are said not to have the same interests or the same passions as the popular assembly.

"The delegation of important trusts, affecting the higher interests of society, is always from various causes liable to abuse. The fondness frequently felt for the inordinate extension of power, the influence of party and of prejudice, the seductions of foreign states, or the basest appetite for illegitimate emoluments are sometimes productive of what are not inaptly termed political offenses, which it would be difficult to take cognizance of in the ordinary course of judicial proceedings." [22]

"The purpose of impeachment, in modern times, is the prosecution and punishment of high crimes and misdemeanors, chiefly of an official or political character, which are either beyond the reach of the law, or which no other authority in the State but the supreme legislative power is competent to prosecute, and, by the law of Parliament, all persons, whether peers or commoners, may be impeached for any crimes or offenses whatever." [23]

"What is an impeachable offense? This is a preliminary question which demands attention. It must be decided before the court can rightly understand what it is they have to try. The Constitution of the United States declares the tenure of the judicial office to be 'during good behavior.' Official misbehavior, therefore, in a judge is a forfeiture of his office. But when we say this we have advanced only a small distance. Another question meets us. What is misbehavior in office? In answer to this question and without pretending to furnish a definition, I freely admit we are bound to prove that the respondent has violated the Constitution or some

[21] Rawle on the Constitution, p. 210.
[22] Cushing's Law and Practice of Legislative Assemblies, p. 980, par. 2539.
[23] Trial of Judge Peck, p. 427. Mr. Buchanan's argument.

known law of the land. This, I think, was the principle fairly to be deduced from all the arguments on the trial of Judge Chase, and from the votes of the Senate in the articles of impeachment against him, in opposition to the principle for which his counsel in the first instance strenuously contended, that in order to render an offense impeachable it must be indictable. But this violation of law may consist in the abuse as well as in the usurpation of authority.

"The abuse of a power which has been given may be as criminal as the usurpation of a power which has not been granted. Can there be any doubt of this? Suppose a man to be indicted for an assault and battery. He is tried and found guilty, and the judge, without any circumstances of peculiar aggravation having been shown, fines him a thousand dollars and commits him to prison for one year. Now, although the judge may possess the power to fine and imprison for this offense, at his discretion, would not this punishment be such an abuse of judicial discretion and afford such evidence of the tyrannical and arbitrary exercises of power as would justify the House of Representatives in voting an impeachment? But why need I fancy cases? Can fancy imagine a stronger case than is now, in point of fact, before us? A member of the bar is brought before a court of the United States guilty, if you please, of having published a libel on the judge—a libel, however, perfectly decorous in its terms and imputing no criminal intention, and so difficult of construction that though the counsel of the respondent have labored for hours to prove it to be a libel still that question remains doubtful. If in this case the judge has degraded the author by imprisonment and deprived him of the means of earning bread for himself and his family by suspending him from the practice of his profession for eighteen months, would not this be a cruel and oppressive abuse of authority, even admitting the power to punish in such a case to be possessed by the judge?

"A gross abuse of granted power and an usurpation of power not granted are offenses equally worthy of and liable to impeachment. If, therefore, the gentleman could establish, on the firmest foundation, that the power to punish libels as contempts may be legally exercised by all the courts of the United States, still he would not have proceeded far toward the acquittal of his client.

"It has been contended that even supposing the judge to have transcended his power and violated the law, yet he can not be convicted unless the Senate should believe he did the act with a criminal intention. It has been said that crime consists in two things, a fact and an intention; and in support of this proposition the legal maxim has been quoted that 'actus non fit reum, nisi mens rea.' This may be true as a general proposition, and yet it may have but a slight bearing upon the present case.

"I admit that if the charge against a judge be merely an illegal decision on a question of property in a civil case, his

error ought to be gross and palpable, indeed, to justify the interference of a criminal intention and to convict him upon an impeachment. And yet one case of this character has occurred in our history. Judge Pickering was tried and condemned upon all the four articles exhibited against him, although the three first contained no other charge than that of making decisions contrary to law in a cause involving a mere question of property, and then refusing to grant the party injured an appeal from his decision, to which he was entitled.

"And yet am I to be told that if a judge shall do an act which is in itself criminal; if he shall, in an arbitrary and oppressive manner and without the authority of law, imprison a citizen of this country and thus consign him to infamy, you are not to infer his intention from the act?" [24]

"It is necessary to a right understanding of the impeachment to ascertain and define what offenses constitute judicial misdemeanors. A judicial misdemeanor consists, in my opinion, in doing an illegal act colore officii with bad motives, or in doing an act within the competency of the court or judge in some cases, but unwarranted in a particular case from the facts existing in that case, with bad motives. To illustrate the last proposition: The eighth article of the amendments of the Constitution forbids the requirement of excessive bail, the imposition of excessive fines, or the infliction of cruel or unusual punishment. If a judge should disregard these provisions, and from bad motives violate them, his offense would consist, not in the want of power, but in the manner of his executing an authority intrusted to him and for exceeding a just and lawful discretion." [25]

"By the third article of the Constitution of the United States it is declared that the judges of the supreme and inferior courts shall hold their office during good behavior.

"I maintain the proposition that any official act committed or omitted by the judge, which is a violation of the condition upon which he holds office, is an impeachable offense under the Constitution.

"The word misdemeanor, used in its parliamentary sense as applied to offenses, means maladministration, misconduct not necessarily indictable, not only in England, but in the United States.

"In the Senate, July 8, 1797, it was resolved that William Blount, esq., one of the Senators of the United States, having been guilty of a high misdemeanor, entirely inconsistent with his public trust and duty as a Senator, be, and he hereby is, expelled from the Senate of the United States.' (Wharton's State Trials, 202.)

"He was not guilty of an indictable crime. (Story on the Constitution, sec. 799, note.)

"The offense charged, Judge Story remarks, was not defined by any statute of the United States. It was an attempt to seduce a United States Indian interpreter from his duty,

[24] Judge Spencer's argument, p. 290.
[25] Mr. Wickliffe's argument, p. 308.

and to alienate the affections and conduct of the Indians from the public officers residing among them."

Blackstone says: "The fourth species of offense more immediately against the King and Government are entitled 'misprisions and contempts.' Misprisions are, in the acceptance of our law, generally understood to be all such high offenses as are under the degree of capital, but nearly bordering thereon. * * * Misprisions which are merely positive are generally denominated contempts or high misdemeanors, of which the first and principal is maladministration of such high offices as are in public trust and employment. This is usually punished by the method of parliamentary impeachment." (Vol. 4, p. 121. See Prescott's trial, Mass., 1821, pp. 79–80, 109, 117–120, 172–180, 191.)

On Chase's trial the defense conceded that to misbehave or to disdemean is precisely the same. (2 Chase's Trial, 145.)

The Constitution declares that judges, both of the Supreme and inferior courts, shall hold their commissions during good behavior. This tenure of office was introduced into the English law to enable a removal to be made for misbehavior. (Chase's Trial, 357.)

At common law, an ordinary violation of a public statute, even by one not an officer, though the statute in terms provides no punishment, is an indictable misdemeanor. (Bishop, Constitutional Law, 3d ed., 187, 535.)

The term "misdemeanor" covers every act of misbehavior in a popular sense. Misdemeanor in office and misbehavior in office mean the same things. (7 Dame Abgt., 365.) Misbehavior, therefore, which is a mere negative of good behavior, is an express limitation of the office of a judge.

We may therefore conclude that the House has the right to impeach and the Senate the power to try a judicial officer for any misbehavior or misconduct which evidences his unfitness for the bench, without reference to its indictable quality. All history, all precedent, and all text writers agree upon this proposition. The direful consequences attendant upon any other theory are manifest.

For this first time in impeachment trials in this or any other country the claim is made that a judge can be impeached only for acts done in his official capacity.

If that position is well taken, a judge might be a common drunkard, an open frequenter of disreputable resorts; he might be a common thief, an embezzler of trust funds, a gambler, even a murderer. If he could manage to keep out of jail and attend to his judicial duties, the remedy by impeachment would not reach him. To state the proposition, is to argue it.

Removal of a judge for misbehavior or lack of good behavior is impossible unless it can be done through the impeaching power. Otherwise the people are powerless to rid themselves of the most unworthy, disgraceful, and unfit official.

But the exigencies of this case do not demand even a discussion of the proposition that a judge can be impeached only for acts done in his official capacity.

The claim is in the nature of a demurrer to the first seven articles. It admits the truth of the averments contained in them. It admits that the respondent, as judge of the district court he held at Waco, Tex., that as judge he knowingly made a false certificate; that as judge he receipted for and received money to which he was not entitled as reimbursement for expenses incurred as judge which he never did incur. All these acts were done in his official capacity. If he had not been a judge, he could not have held the court, incurred any expense, or receipted for or received any money. The stamp of his official character is on every act. His official position enabled him to do what he did do; without it he could not have violated the law.

In the case of the use of the property of the bankrupt corporation, which was in his hands for preservation, it was because he was judge that he had the opportunity to use the property. It was to bring him to hold court that the car was sent. An officer of his court sent it. He had the right and it was his duty to approve the account covering the expenses of the trip. If he had not been a judge, he could not have used the property of the railroad company. The article charges that Charles Swayne, judge, appropriated the property to his own use without making compensation under a claim of right, viz, that what he did was done in his official capacity.

The articles that charge him with violating the residence law assert that he did it while exercising his office of judge. The act is directed against judges; a private person can not violate it. The act commands a judge to reside in his district—that is, the official must live there; it is to be his official residence, so that he will be where he is wanted to perform his official duty. The violation of the law is the violation of an official duty, which the law imposes on him in his official character. All this the demurrer confesses, and yet the argument is made that for a violation of the act a judge is not impeachable, because it is not an official act.

But the proposition is seriously advanced that no act of Congress can create an impeachable offense or make a crime or misdemeanor the subject of impeachment for which impeachment would not lie in England before the adoption of the Constitution.

Impeachable offenses were not defined in the English law by act of Parliament or otherwise; any offense was impeachable that Parliament chose to so consider. Therefore when Congress makes that a crime or misdemeanor which was not so denominated at the time of the adoption of the Constitution it does not follow that the acts made crimes were not the subject of impeachment before the adoption of the Constitution.

For example, suppose no English law condemned the making of false certificates by a judge for the purpose of obtaining money from the Treasury. Can it be said that if an Eng-

lish judge had been guilty of such an offense that he would not have been subject to impeachment? If so, then neither can it be said that Congress created new impeachable offenses when the act was passed pertaining to false certificates.

The power to impeach for misbehavior of civil officials is vested in the House and the power to try in the Senate as fully as it was exercised by the English Parliament before 1787. That power covered every offense from high treason to slander against a ruler. Subject only to the limitation that the remedy by impeachment is confined to civil officers—for high crimes and misdemeanors—the power was conferred and may be exercised as fully now as then.

We have seen that according to the law of Parliament misdemeanor and misbehavior of public officers are synonymous terms. Another proposition advanced by counsel for respondent is that no judge was ever impeached in England for a misbehavior not committed in the discharge of his judicial functions. This is believed to be an error; judges were impeached for giving extrajudicial opinions. But suppose the fact to be as stated, the conclusion would not follow that because no English judge ever so misbehaved himself outside of his official duties as to make him a subject of impeachment that therefore he could not have been impeached if he had so misbehaved.

But however interesting discussion of such question may be it is quite unimportant in this case. All the charges against this respondent grow out of the official acts. Nothing that he did of which complaint is made could have been done by a private person, or by anyone who did not hold a judicial office. Because the respondent was a judge he had the right to make a certificate upon which to draw money from the Treasury; because he was a judge a private car was sent to bring him from Guyencourt to hold court at Jacksonville; because he was a judge the law imposed upon him the duty of living in a certain district; because he violated the law in all these cases in his official capacity he is charged.

The conclusion is therefore not to be resisted that even if the contention of the respondent's counsel is correct a judge can be impeached for nothing but official misconduct, these offenses are within the rule, and of them this court has jurisdiction.

2016. Argument of Mr. Manager Clayton that a judge may be impeached for misbehavior not necessarily connected with his judicial functions.—On February 24, 1905,[26] the Senate sitting for the impeachment trial of Judge Charles Swayne, Mr. Manager Henry D. Clayton, of Alabama, said in final argument:

Mr. President, I desire to call attention to the fact that repeatedly in impeachment trials before the Senate it has been asserted that civil officers can not be impeached except for the commission of indictable offenses, but it was never before this time seriously contended that a judge can not be impeached

[26] Third session Fifty-eighth Congress, Record, pp. 3249–3250.

except for wrongful conduct committed strictly in the performance of an act purely judicial.

Therefore in this case we are brought to a consideration of what is an impeachable offense. The Constitution denounces impeachable offenses under the terms of "treason, bribery, and other high crimes and misdemeanors." "Other high crimes and misdemeanors" are general terms, and for their import and meaning reference may be had to English jurisprudence and parliamentary law, to the provisions of the constitutions of the several States relating to impeachments in existence prior to and at the time of the adoption of the Federal Constitution, and to the interpretation put upon the words in the debates in and by the action of the United States in impeachment cases which have heretofore been tried.

In the present case the House of Representatives has charged this judge with crimes and misdemeanors, and also contends that he has forfeited his tenure of office because he has not conformed to the good behavior required by Article III, section 1, upon which his right to hold office is predicated. The judge is entitled to hold his office during good behavior, but not otherwise. The provision of the Constitution conversely stated would be that he shall not hold office after having been guilty of misbehavior. If I understand the contention of the counsel for the respondent here, they insist that high crimes and crimes and misdemeanors and the words "the judges both of the Supreme and inferior courts shall hold their offices during good behavior" are limited or restricted to such acts as may be committed by a judge in his purely judicial capacity. In other words, however serious the crime, the misdemeanor or misbehavior of the judge may be, if it can be said to be extrajudicial he can not be impeached. To illustrate this contention, the judge may have committed murder or burglary and be confined under a sentence in a pentitentiary for any period of time, however long, but because he has not committed the murder or burglary in his capacity as judge he can not be impeached. That contention, carried out logically, might lead to the very defeat of the performance of the function confided to the judicial branch of the Government.

In the History of the Construction of the United States, by George Ticknor Curis, in volume 2, page 260, is found this language:

"The purposes of an impeachment lie wholly beyond the penalties of the statute or the customary law. The object of the proceeding is to ascertain whether cause exists for removing a public officer from office. Such a cause may be found in the fact that, either in the discharge of his office or aside from its functions, he has violated a law or committed what is technically denominated a crime. But a cause for removal from office may exist when no offense against positive law has been committed, as when the individual has from immorality or imbecility or maladministration become unfit to exercise the office."

In the Commentaries on the Constitution of the United States, by Roger Foster, volume 1, page 569, this statement is made:

"The object of the grant of the power of impeachment was to free the Commonwealth from the danger caused by the retention of an unworthy public servant."

Again, on page 586, this statement:

"The Constitution provides that the judges, both of the Supreme and inferior courts, shall hold their office during good behavior."

"This necessarily implies that they may be removed in case of bad behavior. But no means, except impeachment, is provided for their removal, and judicial misconduct is not indictable by either a statute of the United States or the common law."

Again, on page 591, this statement:

"An impeachable offense may consist of treason, bribery, or a breach of official duty by malfeasance or misfeasance, including conduct such as * * * an abuse or reckless exercise of a discretionary power."

In Rawle on The Constitution, page 201, in speaking of the court of impeachment, it is said:

"The subjects of its jurisdiction are those offenses which proceed from the misconduct of public men, or, in other words, from the abuse or violation of some public trust."

In Story on The Constitution (5th edition), section 796, it said:

"Is the silence of the statute book to be deemed conclusive in favor of the party until Congress have made a legislative declaration and enumeration of the offenses which shall be deemed high crimes and misdemeanors? If so, then, as has been truly remarked (citing Rawle on The Constitution), the power of impeachment, except as to the two expressed cases, is a complete nullity and the party is wholly dispunishable, however enormous may be his corruption or criminality. It will not be sufficient to say that, in the cases where any offense is punished by any statute of the United States, it may and ought to be deemed an impeachable offense. It is not every offense that by the Constitution is so impeachable. It must not only be an offense, but a high crime and misdemeanor."

The further answer to this contention may be that it is repugnant to the Constitution, which especially provides for the impeachment of a civil officer for high crimes and misdemeanors, and especially provides that the judge shall hold his office during good behavior.

Again, it is repugnant to the spirit and genius of our institutions; and if it were correct, it would be to throw around the judge, as a civil officer, a protection not afforded any other precedents in impeachment trials before the Senate, to the precedents in impeachment trials in the different States that had similar provisions in their constitutions and had

had impeachment trials before the adoption of the Federal Constitution.

Any civil officer can be impeached. The President of the United States can be impeached. The removal from office can be had in respect to any officer under the Government, and it would be anomaly to say that in a free representative government the people are deprived of the power and the right to remove from office an unworthy officer. If it be true that a judge can not be impeached except for what he may have done strictly in his capacity as judge, then this extraordinary protection is afforded to him: He is put upon a pedestal by himself; he is raised above the military, because they can be tried and gotten rid of; he is raised above the Executive, for he can be tried by impeachment and removed from office; he is raised above the members of the Senate and the Members of the House of Representatives, for they may be expelled upon a two-thirds vote of the members of their respective bodies. I say it would be anomaly. So far as the power of getting rid of an unworthy official is concerned, if that contention be correct it would be a hiatus in the power of government.

Did the fathers intend that it should ever come to pass that an unworthy officer, although a judge, guilty of murder or burglary or any other disgraceful crime which brings his high position into disrepute, can wrap a mantle of protection around him and say, "Although I am guilty of an infamous crime, I did not commit it in my judicial capacity, and therefore, convicted felon though I am, I can continue to be judge and to draw the emoluments of that high office?" I do not believe that this contention has ever been made in any of the cases heretofore presented to the Senate.

In Judge Pickering's case it will be remembered that he was accused of drunkenness. He was also accused of releasing a ship which had been libeled without requiring bond. It might be argued that he did not get drunk in his official capacity; and yet the Senate in that case did impeach him and remove him from office, and that was one of the charges.

In the case of Judge Humphreys, the other judge who was convicted and removed from office, the charge was that he had made secession speeches and that he had acted as a judge of a Confederate court. Certainly he did not make secession speeches in his capacity as a judge of the United States court; it was not done in the trial of any cause before him. He did that in his individual capacity, and yet the Senate did vote to convict him, and did remove him from office, because, among other things, he had made these speeches and had held and exercised the office of a Confederate judge during the civil war.

I have here Foster on the Constitution. I will not tax the patience of the Senate by reading it; but, availing myself of the privilege heretofore referred to, I shall ask to have inserted in the Record that portion of the text which I have marked.

The extract referred to is as follows:

"The only difficulty arises in the construction of the term, 'other high crimes and misdemeanors.' As to this, four theories have been proposed: That, except treason or bribery, no offense is impeachable which is not declared by a statute of the United States to be a crime subject to indictment. That no offense is impeachable which is not subject to indictment by such a statute or by the common law. That all offenses are impeachable which were so by that branch of the common law known as the 'law of Parliament.' And that the House and Senate have the discretionary power to remove and stigmatize by perpetual disqualification an officer subject to impeachment for any cause that to them seems fit. The position that, except treason or bribery, no offense is impeachable which is not indictable by law was maintained by the counsel for the respondents on the trials of Chase and Johnson. * * *

"The first two theories are impracticable in their operation, inconsistent with other language of the Constitution, and overruled by precedents. If no crime, save treason and bribery, not forbidden by a statute of the United States, will support an impeachment, then almost every kind of official corruption or oppression must go unpunished. Suppose the Chief Justice of the United States were convicted in a State court of a felony or misdemeanor, must he remain in office unimpeached and hold court in a State prison?

"The term 'high crimes and misdemeanors' has no significance in the common law concerning crimes subject to indictment. It can be found only in the law of Parliament, and is the technical term which was used by the Commons at the bar of the Lords for centuries before the existence of the United States.

"The Constitution provides that—

" 'The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior.'

"This necessarily implies that they may be removed in case of bad behavior. But no means except impeachment is provided for their removal, and judicial misconduct is not indictable by either a statute of the United States or the common law.

"In 1803 Pickering, a district judge of the United States, was convicted on impeachment for his official action in surrendering to the claimant, without requiring the statutory bond, a vessel libeled by the United States, for refusing to allow an appeal from this order, and for drunkenness and profane language on the bench.

"None of these offenses was indictable by the common law or by statute.

"Humphreys, a district judge of the United States, was convicted on impeachment, not only for treason, but also for refusing to hold court, for holding office under the Confederate States, and for imprisoning citizens for expressing their sympathy with the Union. The managers of the House of

Representatives who opened the case admitted that none of these offenses except the treason was indictable.

"Some advocates have gone so far as to maintain by a misapplication of a term of the common law that the proceedings on an impeachment are not a trial, but a so-called 'inquest of office,' and that the House and Senate may thus remove an officer for any reason that they approve. That Congress has the power to do so may be admitted. For it is not likely that any court would hold void collaterally a judgment on an impeachment where the Senate had jurisdiction over the person of the condemned. And undoubtedly a court of impeachment has the jurisdiction to determine what constitutes an impeachable offense. But the judgments of the Senate of the United States in the cases of Chase and Peck, as well as those of the State senates in the different cases which have been before them, have established the rule that no officer should be impeached for any act that does not have at least the characteristics of a crime. And public opinion must be irremediably debauched by party spirit before it will sanction any other course.

"Impeachable offenses are those which were the subject of impeachment by the practice in Parliament before the Declaration of Independence, except in so far as that practice is repugnant to the language of the Constitution and the spirit of American institutions. An examination of the English precedents will show that, although private citizens as well as public officers have been impeached, no article has been presented or sustained which did not charge either misconduct in office or some offense which was injurious to the welfare of the State at large.

"In this class of cases, which rests so much in the discretion of the Senate, the writer would be rash who were to attempt to prescribe the limits of its jurisdiction in this respect.

"An impeachable offense may consist of treason, bribery, or a breach of official duty by malfeasance or misfeasance, including conduct such as drunkenness, when habitual or in the performance of official duties, gross indecency, and profanity, obscenity, or other language used in the discharge of an official function which tends to bring the office into disrepute, or an abuse or reckless exercise of a discretionary power, as well as a breach or omission of an official duty imposed by statute or common law; or a public speech when off duty which encourages insurrection. It does not consist in an error in judgment made in good faith in the decision of a doubtful question of law, except, perhaps, in the violation of the Constitution."

2017. Review of impeachments in Congress to show that judges have been impeached only for acts of judgment performed on the bench, as contradistinguished from personal acts performed while in office.—On February 22, 1905,[27] in the Senate sitting for the impeachment trial of Judge Charles Swayne, Messrs. Anthony Higgins and

[27] Third session Fifty-eighth Congress, Record, pp. 3032, 3033.

John M. Thurston, of counsel for the respondent, offered a brief in support of their plea of jurisdiction as to the first seven articles. This brief, which was signed by them as counsel, but which, as they said, had been prepared by another, covered many questions relating to impeachments, the following being among them:

> Seven impeachment trials have taken place under the machinery provided for that purpose by the Constitution of the United States: That of William Blount (1798), that of John Pickering (1803), that of Samuel Chase (1804), that of James H. Peck (1830), that of West H. Humphreys (1862), that of Andrew Johnson (1868), and that of William W. Belknap (1876). Three of the foregoing were political impeachments and four judicial, as those terms are related in English parliamentary law. The articles presented by the House of Representatives against the four judges—Pickering, Chase, Peck, and Humphreys—illustrate in the most emphatic manner possible that the popular branch of Congress has heretofore always perfectly understood the meaning of the term "high crimes and misdemeanors," as applied to the misconduct for which a judge may be impeached. When placed side by side with the English precedents on that subject heretofore examined they agree in every particular. The House of Representatives, in the only four cases of the kind ever tried, limited its accusations, with the greatest strictness, to the acts of judgment performed by the judges on the bench, as contradistinguished from personal acts performed by the judge while in office, which might have been the ground of removal by address.

Turning first to the case against John Pickering, judge of the district court of New Hampshire, for practical illustrations, we find that judge charged with misconduct while adjudicating a certain admiralty case pending in said district court: "Yet the said John Pickering, being then judge of the said district court, and then in court sitting, with intent to defeat the just claims of the United States, did refuse to hear the testimony of the said witnesses so as aforesaid produced in behalf of the United States, and without hearing the said testimony so adduced in behalf of the United States in the trial of said cause did order and decree the ship *Eliza*, with her furniture, tackle, and apparel, to be restored to the said Eliphalett Ladd, the claimant, contrary to his trust and duty as judge of the said district court, in violation of the laws of the United States and to the manifest injury of their revenue." (Art. II.) Again (Art. III), when an appeal was prayed in open court in behalf of the United States, the charge is that "the said John Pickering, judge of the said district court, disregarding the authority of the laws, and wickedly meaning and intending to injure the revenues of the United States, and thereby to impair their public credit, did absolutely and positively refuse to allow the said appeal as prayed for."

And again (Art. IV), after the statement was made that said Pickering was "a man of loose morals and intemperate habits," he was thus accused: "On the eleventh and twelfth days of November, in the year one thousand eight hundred and two, being then judge of the district

court in and for the district of New Hampshire, did appear upon the bench of said court, for the purpose of administering justice, in a state of total intoxication, produced by the free and intemperate use of inebriating liquors, and did then and there frequently, in a most profane and indecent manner, invoke the name of the Supreme Being, to the evil example of all good citizens of the United States, and was then and there guilty of other high misdemeanors, disgraceful to his own character as a judge and degrading to the honor and dignity of the United States." It should be specially noted here that no pretense was made that "loose morals and intemperate habits" or profanity constituted a high crime and misdemeanor. Upon the contrary, the accusation was strictly limited to acts done "upon the bench of the said court" while "administering justice in a state of total intoxication." There was no attempt in Pickering's case to claim that personal misconduct, which might have been the ground of removal by address, was an impeachable offense.

The articles of impeachment presented against Judge Samuel Chase contain equally pointed illustrations. In Article I he is charged with delivering an opinion in writing on the question of law, on the construction of which the defense of the accused materially depended, tending to prejudice the minds of the jury against the said John Fries, the prisoner, before the counsel had been heard in his defense; in Article II The charge is that "the said Samuel Chase, with intent to oppress and procure the conviction of the said Callender, did overrule the objection of John Bassett, one of the jury, who wished to be excused from serving on said trial;" in Article III the charge is that on the trial the judge refused to permit a witness to testify; in Article IV the charge is of various acts of judicial misconduct during a trial; and in the remaining articles the charges are of various acts of judicial misconduct on the bench in charging and refusing to discharge grand juries.

The accusation against Judge James H. Peck was contained in a single article, based upon the judicial conduct of the judge while sitting upon the bench in a case of contempt against Luke E. Lawless, who had published a newspaper article criticising a judgment rendered by Judge Peck in a case in which Lawless was plaintiff's counsel. The gravamen of the charge was this: "The said James H. Peck, judge as aforesaid, did afterwards, on the same day, under the color and pretenses aforesaid, and with intent aforesaid, in the said court, then and there unjustly, oppressively, and arbitrarily order and adjudge that the said Luke Edward Lawless, for the cause aforesaid, should be committed to prison for the period of twenty-four hours, and that he should be suspended from practicing as an attorney or counsellor at law in the said district court for the period of eighteen calendar months from that day; and did then and there further cause the said unjust and oppressive sentence to be carried into execution."

The impeachment of Judge West H. Humphreys was begun and concluded during the civil war. He was tried and

condemned in his absence and without a hearing. While such an anomalous proceeding can have but little weight as a precedent, what it does contain of matter relevant to a judicial impeachment supports the contention made herein. The first charge contained in the articles presented against Judge Humphreys was that he was guilty of treason, in that he "then being district judge of the United States, as aforesaid, did then and there, to wit, within said State, unlawfully and in conjunction with other persons, organize armed rebellion against the United States and levy war against them." When the allegations incident to the accusation of treason are subtracted from the articles, all that remains is a charge of judicial misconduct upon the part of Judge Humphreys while sitting in a court of the Confederate States.

The words of the accusation are that the said Humphreys "did unlawfully act as judge of an illegally constituted tribunal within said State, called the district court of the Confederate States of America, and as judge of said tribunal last named, said West H. Humphreys, with the intent aforesaid, then and there assumed and exercised powers unlawful and unjust, to wit, in causing one Perez Dickinson, a citizen of said State, to be unlawfully arrested and brought before him, as judge of said alleged court of said Confederate States of America, and required him to swear allegiance to the pretended government of said Confederate States of America; * * * In decreeing within said State, and as judge of said illegal tribunal, the confiscation to the use of said Confederate State of America of property of citizens of the United States, and especially of property of one Andrew Johnson and one John Catron." Thus in this anomalous proceeding, carried on amid the passions of a great civil war, the idea was not for one moment lost sight of that the misconduct upon the part of a judge, which constitutes an impeachable high crime and misdemeanor, must occur while he is actually presiding in a judicial tribunal and abusing its powers.

2018. Review of the deliberation of the Constitutional Convention as bearing on the use of the words "high crimes and misdemeanors."—On February 22, 1905,[28] in the Senate sitting for the impeachment trial of Judge Charles Swayne, Messrs. Anthony Higgins and John M. Thurston, of counsel for the respondent, offered a brief in support of their plea of jurisdiction as to the first seven articles. This brief which was signed by them as counsel but which as they said had been prepared by another, covered many questions relating to impeachment, the following being among them.

After reviewing the accepted meaning of the words "high crimes and misdemeanors," as used in England and the colonies, the argument proceeds:

Before the Federal Convention of 1787 met the original States constitutions had been in operation for at least ten years. As a general rule the framers looked to that source of light when the adoption of a principle of English constitutional law was concerned.

[28] Third session Fifty-eighth Congress, Record, pp. 3031, 3032.

The questions that constantly arose were: In what form has such a principle reappeared in the several States? Is its operation an effect satisfactory therein? Such examples were sometimes taken, however, not as guides but as warnings. It did not always follow that a principle adapted to the wants of a single State was to be ingrafted without modification upon the constitution of a Federal State. The debates touching the adoption of impeachment and address pointedly illustrate that fact, as the Convention resolved to adopt the one without the other. The record is specially clear and direct upon that point. In the Madison papers (pp. 481–482) the following appears:

"Article XI being taken up, Doctor Johnson suggested that the judicial power ought to extend to equity as well as law, and moved to insert the words 'both in law and equity' after the words 'United States' in the first line of the first section."

Mr. Read objected to vesting these powers in the same court.

On the question, New Hampshire, Connecticut, Virginia, South Carolina, Georgia, aye—6; Delaware, Maryland, no—2; Massachusetts, New Jersey, North Carolina, absent.

On the question to agree to Article XI, section 1, as amended, the States were the same as on the preceding question.

Mr. Dickinson moved, as an amendment to Article XI, section 2, after the words "good behavior," the words "Provided that they may be removed by the Executive on the application by the Senate and House of Representatives." (The words of the act of settlement are, "but upon the address of both Houses of Parliament it may be lawful to remove them.") Mr. Gerry seconded the motion. Mr. Gouverneur Morris thought it a contradiction, in terms, to say the judges should hold their offices during good behavior, and yet be removable without a trial. Besides, it was fundamentally wrong to subject judges to so arbitrary an authority.

Mr. Sherman saw no contradiction or impropriety if this were made a part of the constitutional legislation of the judiciary establishment. He observed that a like provision was contained in the British statutes.

Mr. Rutledge. If the Supreme Court is to judge between the United States and particular States, this alone is an insuperable objection to the motion.

Mr. Wilson considers such a provision in the British Government as less dangerous than here; the House of Lords and House of Commons being less likely to concur on the same occasions. Chief Justice Holt, he remarked, had successively offended, by his independent conduct, both Houses of Parliament. Had this happened at the same time, he would have been ousted. The judges would be in a bad situation if made to depend on any gust of faction which might prevail in the two branches of our Government. Mr. Randolph opposed the motion as weakening too much the independence of the judges.

Mr. Dickinson was not apprehensive that the legislature, composed of different branches, constructed on such different principles, would improperly unite for the purpose of displacing a judge.

On the question for agreeing to Mr. Dickinson's motion, it was negatived.

Connecticut, aye; all the other States present, no.

Thus the proposition to ingraft upon our Federal Constitution that provision of the act of settlement, specially referred to in the debate by Mr. Sherman, was rejected with only one dissenting voice. When, at another time, Mr. Dickinson attempted to provide that the President should be removed by address, his proposal was rejected by the same majority. As Mr. William Lawrence (Impeachment of Andrew Johnson, Vol. I, p. 135) has stated it: "Removal on the address of both Houses of Parliament is provided for in the act of settlement (3 Hallam, 262). In the convention which framed our Constitution, June 2, 1787, Mr. John Dickinson, of Delaware, moved 'that the Executive be made removable by the National Legislature on the request of a majority of the legislatures of individual States.' Delaware alone voted for this and it was rejected. Impeachment was deemed sufficiently comprehensive to cover every proper case for removal." The last sentence states the essence of the whole matter. The Convention resolved that neither the executive nor judicial officers of the United States should be removed from office except "on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors."

As a well-known authority has expressed it: "The first proposition was to use the words, 'to be removable on impeachment and conviction of malpractice and neglect of duty.' It was agreed that these expressions were too general. They were therefore stricken out. It was voted that the clause should be simply 'removable on impeachment.' The debate shows that the Members did not wish the Senate to be able to remove a civil officer whenever he acted in a way detrimental to the public service, for such a power was expressly refused. (Citing Madison Papers, p. 481, heretofore quoted.) A general debate took place on a clause in one draft which made the President triable only for treason and bribery. It was urged that the jurisdiction was too limited. The following are extracts from the debate which ensued: Colonel Mason said: 'Treason, as defined in the Constitution, will not reach many great and dangerous offenses. Hastings is not guilty of treason. Attempts to subvert the Constitution may not be treason as above defined.' He moved to insert after 'bribery' the words 'or maladministration.' Madison: 'So vague a term will be equivalent to a tenure during the pleasure of the Senate.' Mason withdrew 'maladministration' and substituted 'other high crimes and misdemeanors against the State.' In the final draft the words 'against the State' were omitted, doubtless as surplusage, and the expressions finally adopted, 'crimes' and 'misdemeanors,' were words which had

a well-defined signification in the courts of England and in her colonies as meaning criminal offenses at common (parliamentary) law." (American Law Review, vol. 16, p. 804, article on "Impeachable offenses under the Constitution of the United States.") The term "common" instead of "parliamentary" law is carelessly used in that excellent statement, as it often is elsewhere. After quoting Rawle on Constitution (200. Lawrence (Johnson's Imp., Vol. I, p. 125)) remarks: "This author says in reference to impeachments, 'we must have recourse to the common law of England for the definition of them;' that is, to the common parliamentary law. (3 Wheaton, 610; 1 Wood and Minot, 448.)"

2019. Abandonment of the theory that impeachment may be only for indictable offenses.

Discussion of the theory that an impeachable offense is one in its nature or consequence subversive of some fundamental or essential principle of government or highly prejudicial to the public interest.

On February 22, 1905,[29] in the Senate sitting for the impeachment trial of Judge Charles Swayne, Messrs. Anthony Higgins and John M. Thurston, of counsel for the respondent, offered a brief in support to their plea of jurisdiction as to the first seven of the articles. This brief, which was signed by them as counsel, but which, as they said, had been prepared by another, covered many questions relating to impeachments, the following being among them:

> When sitting as a high court impeachment the Senate is the sole and final judge of the meaning of the phrase "high crimes and misdemeanors." It has been well said that "'Treason, bribery, and other high crimes and misdemeanors' are of course impeachable. Treason and bribery are specifically named. But 'other high crimes and misdemeanors' are just as fully comprehended as though each was specified. The Senate is made the sole judge of what they are. There is no revising court. The Senate determines in the light of parliamentary law. Congress can not define or limit by law that which the Constitution defines in two cases by enumeration and in others by classification, and of which the Senate is sole judge." (Lawrence, Johnson's Imp., Vol. I, p. 136.) And yet the Senate sitting as a court of impeachment has in no one of the seven cases tried before it ever attempted to define the momentous phrase in question, and probably never will. When a new case arises nothing can be learned except what may be gleaned from the individual utterances of Senators, and from the arguments of counsel made in preceding cases, too often under the temptation to bend the precedents to the necessities of the particular occasion. One good result has, however, been the outcome of such discussion, and that is the elimination of two propositions which have perished through their own inherent weakness. On the one hand, a grotesque attempt has been made to narrow unreasonably the jurisdiction of the Senate sitting as a court of impeachment by the claim that the power of impeachment is limited to offenses

[29] Third session, Fifty-eighth Congress, Record, pp. 3034, 3035.

positively defined by the statutes of the United States as impeachable crimes and misdemeanors.

Apart from its other infirmities, this contention loses sight of the fact that Congress has no power whatever to define a high crime and misdemeanor. On the other hand, an equally untenable attempt has been made to widen unreasonably the jurisdiction of the Senate sitting as a court of impeachment by the claim that, under the general principles of right, it can declare that an impeachable high crime or misdemeanor is one in its nature or consequence subversive of some fundamental or essential principle of government or highly prejudicial to the public interest, and this may consist of a violation of the Constitution, of law, of an official oath, or of duty, by an act committed or omitted, or, without violating a positive law, by the abuse of discretionary powers for improper motives or for an improper purpose. This expansive and nebulous definition embodies an attempt to clothe the Senate sitting as a court with such a jurisdiction as it would have possessed had the Federal Convention seen fit to extend impeachment "to malpractice and neglected of duty," or to "maladministration," a proposition rejected with a single dissent because, as Madison expressed it, "So vague a term will be equivalent to a tenure during the pleasure of the Senate."

Even that school which gives the widest possible interpretation to the Federal Constitution will hardly be willing to go so far, even under the general-welfare clause, as to write into the Constitution phrases and meanings which the framers expressly rejected, in order to accomplish what may be considered by some a convenient end. Certainly that school which still respects the canons of strict construction can not listen to such an argument. Between the two extremes, those who have made a careful study of the subject find no difficulty in reaching the obvious conclusion that the term "high crimes nad misdemeanors" embraces simply those offenses impeachable under the parliamentary law of England in 1787, subject to such modifications as that law suffered in the process of reproduction. When the objection is made that the phrase thus construed covers too narrow an area, the answer is that it was the expressly declared purpose of the framers so to restrict it within narrow limits perfectly understood at the time. In the first place, the proposition to adopt removal by address was rejected with only one dissent; in the second, the proposal to adopt such a comprehensive term as "maladministration" was rejected and the limited phrase in question substituted. The declaration was clearly made at the time that there must be no undue weakening of the independence of the Federal judiciary. The necessity for such a precaution was soon justified by events.

A leading authority upon the subject tells us that upon the destruction of the Federalist party on the election of Jefferson "An assault upon the judiciary, State and Federal, was made all along the lines. In some States, as New Hampshire, old courts were abolished and new ones, with similar juris-

diction, created for the sole purpose of obtaining new judges. In Pennsylvania an abnoxious Federal judge was removed from the common pleas by impeachment; and an impeachment of all the Federal judges of the highest court was made, but failed through the uprising of the entire bar, irrespective of party lines, in defense of their official chiefs. A similar attack was made upon the Federal judiciary." (Foster on the Constitution, Vol. I, p. 531.) With the possibility of such an assault impending it is not strange that the makers of our Federal Constitution should have confined the power of removing judges by impeachment within the well-known limits which the English constitution had defined.

2020. Mr. Manager Olmsted's argument that impeachment is not restricted to offenses indictable under Federal law and that judges may be impeached for breaches of "good behavior."

Discussion of English and American precedents as bearing on the meaning of the phrase "high crimes and misdemeanors."

On February 23, 1905,[30] in the Senate sitting for the impeachment trial of Judge Charles Swayne, Mr. Manager Marlin E. Olmsted, of Pennsylvania, in final argument, said:

Although it would seem that the question must now be considered settled, nevertheless in nearly every impeachment trial the question is raised as to the character of and offenses for which impeachment will lie. In times past men of great learning and authority have contended that no officer can be impeached except for indictable offenses, and that as there are no common-law offenses against the United States, it follows that there can be no impeachment except for an offense expressly declared and made indictable by act of Congress. This view of the matter fades away in the bright light of reason and precedent.

Such a construction would render the constitutional provision practically a nullity. Congress has defined and made indictable by statute comparatively few offenses. It would be impossible in any statute to define or describe all the various ways in which a judge or other civil officer might so notably and conspicuously misbehave himself as to justify and require his removal. Even murder is not defined in any act of Congress. When it so appears, reference to some other source must be had to ascertain the meaning of the term. Murder is not made indictable by any act of Congress, nor has any Federal court jurisdiction of that crime unless committed upon the high seas.

Suppose a judge to commit murder upon the dry land within the confines of a State. That would not be a high crime or misdemeanor within the provision of any act of Congress. Could it successfully be maintained that it was not a high crime and misdemeanor within the meaning of Article II, section 4, of the Constitution, or that it was not such a breach of good behavior as would justify removal from

[30] Third session Fifty-eighth Congress, Record, pp. 3182–3184.

office? If that be the proper construction, then it is possible to imagine that as the respondent transacted official business at and dated his communications from "United States district court, northern district of Florida, judge's chambers, Guyencourt, Del.," so a more violent and vicious man might conduct business at "Judge's chambers, State penitentiary," and still be free from all danger of impeachment or removal from the judicial office.

I have shown, Mr. President, that men have formerly argued that only indictable offenses are subjects for impeachment; that as there were no common-law offenses against the United States there can be no impeachment except for crimes declared and defined by act of Congress. But now, in the 48-page brief served upon us last evening, bearing the names of the honorable counsel for respondent, but the authorship of which they distinctly disavowed—and I now know the reason why—we find the astounding doctrine that no man can be impeached for any offense declared by Congress. Therefore no officer can be impeached, no matter what he does, unless we can find that in England some judge had been impeached for the same specific offence prior to the adoption of our Constitution, which borrowed something from the mother country in this matter.

Now, we admit, Mr. President, that the term "impeachment" is imported from the English law, and so is the constitutional phrase "high crimes and misdemeanors" used in relation thereto. They are both without definition, either in the Constitution or in any act of Congress. Where, then, shall their definition and construction be found? Our Supreme Court has declared that—

"Where English statutes—such, for instance, as the statute of frauds and the statute of limitations—have been adopted into our legislation, the known and settled construction of those statutes by courts of law has been considered as silently incorporated into the acts or has been received with all the weight of authority." (Pennock *v.* Dialogue, 2 Peters, 2–18.)

That was a unanimous decision in which Chief Justice John Marshall participated and concurred, and the opinion was written by Mr. Justice Story.

To the same effect is the case of United States *v.* Jones (3 Wash. C. C. R., 209), and many other authorities that might be cited.

We may therefore look to the law of England for the meaning of the term "impeachment" and of the phrase "high crimes and misdemeanors," as used in connection therewith—not so much to the statute law, nor to the common law, as generally understood, but to the common parliamentary law of England, as found in the precedents and reports of impeachment cases.

The Senate has always been governed in impeachment cases by the lex et consuetudo parliamenti. It requires but a brief investigation to show that according to the English parliamentary practice in vogue at and prior to the adoption of

the Constitution, the greatest possible variety of offenses, not indictable, were nevertheless held proper causes for impeachment.

In II Wooddeson's Law Lectures, an acknowledged authority, the learned author, in his lecture upon "Parliamentary Impeachment," says (p. 596):

"It is certain that magistrates and officers intrusted with the administration of public affairs may abuse their delegated powers to the extensive detriment of the community and at the same time in a manner not properly cognizable before the ordinary tribunals. The influence of such delinquents and the nature of such offenses may not unsuitably engage the authority of the highest court and the wisdom of the sagest assembly. The Commons, therefore, as the grand inquest of the nation, become suitors for penal justice, and they can not consistently, either with their own dignity or with safety to the accused, sue elsewhere but to those who share with them in the legislature.

"On this policy is founded the origin of impeachments, which began soon after the constitution assumed its present form."

And again (p. 601):

"Such kind of misdeeds, however, as peculiarly injure the commonwealth by the abuse of high offices of trust, are most proper, and have been the most usual grounds for this kind of prosecution. Thus, if a lord chancellor be guilty of bribery, or of acting grossly contrary to the duty of his office; if the judges mislead their sovereign by unconstitutional opinions; if any other magistrate attempt to subvert the fundamental laws or introduce arbitrary power, these have been deemed cases adapted to parliamentary inquiry and decision. So where a lord chancellor has been thought to have put the seal to an ignominous treaty, a lord admiral to neglect the safeguard of the sea, an ambassador to betray his trust, a privy counselor to propound or support pernicious and dishonorable measures, or a confidential adviser of his sovereign to obtain exorbitant grants or incompatible employments, these imputations have properly occasioned impeachments, because it is apparent how little the ordinary tribunals are calculated to take cognizance of such offenses or to investigate and reform the general policy of the state."

In several cases English judges were impeached for giving extrajudicial opinions and misinterpreting the law. (4 Hatsell, 76.)

Such is the undoubted parliamentary law of England, from which our process and practice of impeachment and the very term itself are derived. That it has been adopted and followed here is equally certain.

Judge Curtis, in his History of the Constitution (pp. 260–261), says:

"The purposes of an impeachment lie wholly beyond the penalties of the statute or the customary law. The object of the proceeding is to ascertain whether cause exists for remov-

ing a public officer from office. * * * Such a cause may be found in the fact that either in the discharge of his office or aside from its functions he has violated a law or committed what is technically denominated a crime, but a cause for removal from office may exist where no offense against positive law is committed, as where the individual has from immorality, imbecility, or maladministration become unfit to exercise the office."

And Judge Story says, in section 799 of his work on the Constitution:

"Congress has unhesitatingly adopted the conclusion that no previous statute is necessary to authorize an impeachment for any official misconduct. * * * In the few cases of impeachment which have hitherto been tried no one of the charges has rested upon any statutable misdemeanor." (1 Story on Con., sec. 799.)

Such writers as Cooley and Wharton and Rawle maintain the same position and support it not only by reason, but by authority and precedent. For a very able discussion of this subject I refer to the brief of Mr. Lawrence, adopted by the managers and published among the proceedings in the impeachment of Andrew Johnson and also in 6 American Law Register, new series, page 641.

Every impeachment case ever presented to the United States Senate has been founded upon articles, some or all of which charged offenses not indictable; and Judge West, of Tennessee, as well as Judge Pickering, were convicted and removed for offenses not subject to indictment under either State or Federal laws.

We agree with respondent's brief, the authorship of which his counsel disavow, that the general character of offenses impeachable may be studied to advantage by a consideration of the English precedent, but I can never agree that in order to convict an American judge we must first show that some English judge has been convicted of the same specific offense.

No English judge has been impeached for murder, or perjury, or forgery, or larceny; and yet they were undoubtedly impeachable offenses in England as they are here today. They, or any of them, would certainly constitute a breach of that "good behavior" during which Federal judges hold their commissions. Surely an offense which would have been impeachable without a statute is none the less so because Congress has declared it a misdemeanor. Taking money out of the Treasury on a false certificate would have been impeachable in England before our Constitution. It is none the less so here, statute or not statute.

JURISDICTION OF FIRST ARTICLES

Respondent denies that the offenses charged in the first seven articles are proper subjects of impeachment on the ground, as we understand it, that they were committed by him in his private and not in his official capacity; or, in other

words, that the articles do not charge misbehaviors or misdemeanors in office. We labor under the impression that the respondent is "in office," and that any misdemeanor committed by him, either in his private or official capacity, since he accepted the President's commission was a disdemeanor "in office." He may have been out of his court room and out of his district, but he has never been out of office.

The Constitution and his commission each defines his term as "during good behavior," and provides for his removal from office for "treason, bribery, and other high crimes and misdemeanors," meaning thereby misbehavior, for misbehavior is misdemeanor, and misdemeanor is misbehavior. There is no limitation to offenses actually committed upon the bench, nor to those committed while in the performance of any judicial or official function, or in any way under color of office.

The Century Dictionary gives this definition:

"During good behavior: As long as one remains blameless in the discharge of one's duties or the conduct of one's life; as, an office held during good behavior."

Judge Curtis, in his History of the Constitution (pp. 260–261), says:

"The purposes of an impeachment lie wholly beyond the penalties of the statute or the customary law. The object of the proceeding is to ascertain whether causes exists for removing a public officer from office. * * * Such a cause may be found in the fact that either in the discharge of his office or aside from its functions he has violated a law or committed what is technically denominated a crime, but a cause for removal from office may exist where no offense against positive law is committed, as where the individual has from immorality, imbecility, or maladministration become unfit to exercise the office."

Such is manifestly the intention of the Constitution. That instrument says "during good behavior." It does not, as some of the State constitutions do, add the words "in office." It says "high crimes and misdemeanors," but it does not add "in office." In the brief of respondent's honorable counsel the authorship of which they disavow, they tell us, and it is entirely true, that at one stage of its formation the provision read "misdemeanors against the State." But as the words "against the State" were stricken out they argue that it must be construed as if they had been left in.

JUDGE HUMPHREY'S CASE

Mr. President, there are plenty of authorities, both English and American, that in order to be the subject of impeachment it is not necessary that an offense shall be committed even under color of office, and just here I take issue in the most emphatic manner with the statements of that 48-page brief as to the causes for which convictions have been had in impeachment. It is full of historical inaccuracies. It declares,

for instance, that Judge West H. Humphreys, of Tennessee, was convicted only for offenses committed in his judicial capacity.

I say that he was convicted upon each one of the seven articles, only one of which—the fifth—had any relation at all to his duties as a Federal judge. The very first article charged him with advocating secession. Where? Upon the bench? No. In the court room? No. In a written opinion? No; but in a public speech in the city of Nashville. Five other of those counts were of the same character. How could a judge commit that offense upon the bench? He did not speak as a judge, but as a citizen at a public meeting.

Mr. President, Andrew Johnson came within one vote of being impeached upon the eleventh article in his case, a portion of which I will read:

"That said Andrew Johnson, President of the United States, unmindful of the high duties of his office, and of his oath of office, and in disregard of the Constitution and laws of the United States, did, heretofore, to wit, on the 18th day of August, A.D. 1866, at the city of Washington and the District of Columbia, by public speech, declare and affirm, in substance, that the Thirty-ninth Congress of the United States was not a Congress of the United States."

Upon that article the vote against him was 35 to 10. A change of one vote would have expelled him from the Presidency.

"Treason against the United States shall consist only of levying war against them or adhering to their enemies, giving them aid and comfort."

It would hardly be possible for a judge, sitting upon the bench, or in any other way except entirely aside from any function of his office, to be guilty of this offense. But suppose that, disassociating himself as far as possible from his judicial position, he should in his individual capacity participate in "levying war against them or in adhering to their enemies, giving them aid and comfort."

That would surely be treason, as constitutionally defined, and yet, upon the argument of the honorable counsel for respondent, he could not be impeached and removed from office for that offense. Think of that. A traitor to his country, sitting securely upon the bench, secure from removal by any power on earth, for in no way can he be removed except by the Senate, upon impeachment by the House of Representatives. A Federal judge, upon that reasoning, might commit murder upon the public highway, or be convicted of housebreaking, or forgery, or perjury, or in any other way bring into contempt his high office, and yet we are told that if the offense be not committed upon the bench, nor in the court room, nor in any way relating to his judicial duties, he can not be impeached and removed.

It is hardly necessary to prolong this branch of the discussion, in view of the fact that the question has already been determined by the Senate itself.

BLOUNT'S CASE

In 1797 William Blount was expelled from the Senate for attempting to seduce a United States Indian interpreter from his duty and to alienate the affections and conduct of the Indians from the public officers residing among them. That was not a statutory offense, nor committed in the Senate Chamber, nor in the exercise or omission of any Senatorial function, nor under color of office; but the Senate, nevertheless, resolved that he "having been guilty of a high misdemeanor entirely inconsistent with his public trust and duty as a Senator, be, and he is hereby, expelled from the United States Senate."

That was not upon an impeachment proceeding, but the principle involved was precisely the same, and later it was sustained in the impeachment case of Judge Humphreys, as I have shown.

THE ARTICLES DO CHARGE OFFENSES HAVING STRICT RELATION TO HIS OFFICIAL OFFICE

It is difficult in any event to see any force in respondent's plea to the jurisdiction. The offenses charged in the first seven as well as in all the other articles do relate entirely to his judicial office and not to his private conduct.

2021. Argument of Mr. Manager De Armond that Congress may make nonresidence of a judge in a high misdemeanor.

Argument that a judge may be impeached for misbehavior generally.

On February 25, 1905,[31] in the Senate, sitting for the impeachment trial of Judge Charles Swayne, Mr. Manager David A. De Armond, of Missouri, in final argument, said:

Thirty days before Judge Swayne was born the Congress of the United States enacted a law, now embodied in section 551, Revised Statutes, requiring a district judge to reside in his district. The question of the enactment of such a law arose years earlier. The discussion was participated in by makers of the Constitution as well as by contemporaries of those illustrious men. In the body which passed the law were those who had gathered in the spirit of the Constitution, not merely from the lips of those who had made it, but through participation in the making of it. The law was passed in the full belief, unchallenged by anybody, that the power rested in the Congress to pass such a law, and it was declared that a violation or disregard of that law should constitute a high misdemeanor, employing the very language of the Constitution itself.

And yet we find, thanks to the facile pen of some modern essayist whose product is embodied in the record in this case, some unknown great man, that it is impossible for Congress to add to or take from the category of "high crimes and misdemeanors" as embodied in the Constitution in the clause relating to impeachments.

[31] Third session Fifty-eighth Congress, Record, pp. 3376, 3377.

Those who lived in that early day, those who participated in the discussions that led up to that early legislation, and those who enacted that law did not think just as this modern writer and essayist does think. This graceful writer, but, as he has demonstrated, evidently poor lawyer, confesses that he can not define, and he says nobody can define, just what was meant by "high crimes and misdemeanors," but he insists that there was such a fixed, settled, immovable, unchangeable, ever-enduring meaning and limitation attached to and embodied in it that nothing can be added to it or taken from it; and yet he does not know what it is; he does not tell us, and he says nobody else can tell, what it is.

The doctrine, aside from this authority which the respondent's counsel quoted with so much approval and indorsed so fully the doctrine of other essayists and other commentators upon the Constitution, the doctrine of men whose names have gone into our history as illustrating it in its best phases and as demonstrating the greatest capacity and the highest achievements of the human mind, was and is that Congress could add to what might be embraced in the term, and that the Senate of the United States, on the trial of an impeachment, was made by the Constitution itself, and ever must be, the final authorized judge of the meaning.

Suppose that this Republic were to endure, as all of us most sincerely hope it will, for centuries and multiplied centuries, and suppose that a thousand years hence, or five thousand years hence, after agencies and forces undreamed of to-day, as those playing important parts in the drama of to-day were undreamed of a short time ago, were brought into requisition, and out of their use and development new and strange conditions, unthought of and unthinkable to-day, should arise, and that the Congress, in its enlightened wisdom, should conclude to declare this, that, or the other thing arising out of the development of these new conditions high crimes and misdemeanors. These wise commentators of the school of this essayist and their successors, if they are to have succession in a more enlightened age of the world and of the country, would say: "You can not impeach for that. You must go back into the English parliamentary law for the chart of your powers. At the adoption of the Constitution you were confined within the Englishman's definition of high crimes and misdemeanors, and confined to his catalogue of them; but what his definition was or is and what was or is embraced within his catalogue we do not know, and nobody knows. Those who framed the Constitution meant to deny and did deny to the Congress all power whatsoever to declare anything a high crime or misdemeanor which was not such when the Constitution was made."

Then if you or your successors should modestly say to these gentlemen, "Pray tell us, then, what are the things for which an impeachment will lie? What is comprehended within the term 'high crimes and misdemeanors?' What, within the meaning of the Constitution, made by those short-sighted

men so long, long ago in their graves, is embodied in these words?" They would answer then, I suppose, as this wise commentator of to-day answers, "I do not know; nobody ever has said, and nobody will ever be able to say."

Drifting back to English history, counsel claim to have discovered—and it is a discovery of something which does not exist, I think; but I pass that by—that no judge in English history ever was impeached or tried on impeachment except for an offense committed in the actual discharge of the duties of a judge, sitting on the bench itself. Well now, if that were true, what does it prove? It proves nothing—absolutely nothing.

Reflect upon it for a moment. Suppose all these trials had been with reference to some particular offense. It would be just as logical to contend that for no other offense committed upon the bench in the discharge of judicial duty would impeachment lie. How many cases must there be before this is settled? They say there have been but few, and that is true. How many are necessary to fix it that there can not be a trial by impeachment for any other offense? There again they can not answer.

The truth of the matter is that this question of impeachment and the right and power to impeach, and the things for which people could be impeached in Great Britain, shifted and changed with the shifting and changing judgment and legislation of the times. At one time it was supposed to be legitimate and proper, and the supposed power was exercised, to impeach and convict and remove from office and imprison for the advocacy of religious views and the propagation of religious doctrines which, at another time, where held to be the correct views and the sound doctrines relating to the subject of religion in that great realm. So it has been and so it is and so it will be.

These gentlemen ignore entirely the question as to good conduct—"during good behavior." They say that the provision for removing judges by address is not embodied in the Constitution. What do they say then? They say there is no way of removing them except in a few cases to which, they say, the constitutional provision respecting impeachment implies.

As was said by Mr. Morris, when that matter was under discussion in the Constitutional Convention, the judges ought not to be removed on the ground of lacking in good behavior except upon a trial. What trial is provided? The kind of trial you have here now. The trial before the Senate of the United States, on impeachment by the House of Representatives. There has been embodied in that one method all the power that resides in the Government in all its branches—all the power of the people of this vast country, this great and mighty Republic—to remove from office an offending civil officer. And precisely the same provision that applies to the judges applies to all other civil officers.

The gentlemen discriminate respecting the judges. Where do they get the ground for the discrimination? It is not in the Constitution. There is nothing in the Constitution suggesting that a judge can be removed from office only for offending on the bench, and that as to other civil officers they may be removed for offenses off duty, or not so narrowly official.

The learned counsel for the respondent who closed the case on the other side seemed to take lightly the suggestion of Mr. Manager Palmer in the brief which he filed, and of my other colleagues who argued this case, that according to the commentators upon the Constitution, according to the spirit of the Constitution, according to the just principles of law governing impeachment, it is within the power of the House of Representatives to vote impeachment, and it is within the just and constitutional powers of the Senate to convict, for conduct in a judge off the bench and away even from his judicial transactions. The logical conclusion from the contention of respondent's counsel is that no matter how vile any civil officer of the Government may be, no matter how great the sum total of the individual items of his offending, so long as the offending is not on the bench or in the active technical conduct of his office the whole power of the Government is too weak, the arm of the House of Representatives too short, and the judgment of the Senate too puny to reach the offender and protect the public from the vile contamination of his continued presence in office. We do not take that view of the matter.

(B) CANNON'S PRECEDENTS OF THE HOUSE OF REPRESENTATIVES, EXTRACTS FROM VOLUME 6—CHAPTER CXCIII

454. Discussion by English and American authorities of the general nature of impeachment.

On January 3, 1913,[1] in the Senate sitting for the trial of the impeachment of Judge Robert W. Archbald, Mr. Manager Henry D. Clayton, of Alabama, submitted on behalf of the House of Representatives, a brief from which the following is an excerpt:

THE GENERAL NATURE OF IMPEACHMENTS

The fundamental law of impeachment was stated by Richard Wooddeson, an eminent English authority, in his Law Lectures delivered at Oxford in 1777, as follows (pp. 499 and 501, 1842 ed.):

"It is certain that magistrates and officers intrusted with the administration of public affairs may abuse their delegated powers to the extensive detriment of the community and at the same time in a manner not properly cognizable before the ordinary tribunals. The influence of such delinquents and the nature of such offenses may not unsuitably engage the authority of the highest court and the wisdom of the sagest assembly. The Commons, therefore, as the grand inquest of the nation, became suitors for penal justice, and they can not consistently, either with their own dignity or with safety to the accused, sue elsewhere but to those who share with them in the legislature.

"On this policy is founded the origin of impeachments, which began soon after the constitution assumed its present form.

* * * * * * *

"Such kind of misdeeds, however, as peculiarly injure the commonwealth by the abuse of high offices of trust, are most proper—and have been the most usual—grounds for this kind of prosecution."

Referring to the function of impeachments, Rawle, in his work on the Constitution (p. 211), says:

"The delegation of important trusts affecting the higher interests of society is always from various causes liable to abuse. The fondness frequently felt for the inordinate extension of power, the influence of party and of prejudice, the seductions of foreign states, or the baser appetite for illegiti-

[1] Third session Sixty-second Congress, record of trial, p. 1051.

mate emoluments are sometimes productions of what are not unaptly termed 'political offenses' (Federalist, No. 65), which it would be difficult to take cognizance of in the ordinary course of judicial proceeding.

"The involutions and varieties of vice are too many and too artful to be anticipated by positive law."

In Story on the Constitution (vol. 1, 5th ed., p. 584) the parliamentary history of impeachments is briefly stated as follows:

"800. In examining the parliamentary history of impeachments it will be found that many offenses not easily definable by law, and many of a purely political character, have been deemed high crimes and misdemeanors worthy of this extraordinary remedy. Thus, lord chancellors and judges and other magistrates have not only been impeached for bribery, and acting grossly contrary to the duties of their office, but for misleading their sovereign by unconstitutional opinions and for attempts to subvert the fundamental laws and introduce arbitrary power. So where a lord chancellor has been thought to have put the great seal to an ignominious treaty, a lord admiral to have neglected the safeguard of the sea, an ambassador to have betrayed his trust, a privy councilor to have propounded or supported pernicious and dishonorable measures, or a confidential adviser of his sovereign to have obtained exorbitant grants or incompatible employments—these have been all deemed impeachable offenses. Some of the offenses, indeed, for which persons were impeached in the early ages of British jurisprudence, would now seem harsh and severe; but perhaps they were rendered necessary by existing corruptions, and the importance of suppressing a spirit of favoritism and court intrigue. Thus persons have been impeached for giving bad counsel to the King, advising a prejudicial peace, enticing the King to act against the advice of Parliament, purchasing offices, giving medicine to the King without advice of physicians, preventing other persons from giving counsel to the King except in their presence, and procuring exorbitant personal grants from the King. But others, again, were founded in the most salutary public justice, such as impeachments for malversations and neglects in office, for encouraging pirates, for official oppression, extortions, and deceits, and especially for putting good magistrates out of office and advancing bad. One can not but be struck, in this slight enumeration, with the utter unfitness of the common tribunals of justice to take cognizance of such offenses, and with the entire propriety of confiding the jurisdiction over them to a tribunal capable of understanding and reforming and scrutinizing the polity of the State, and of sufficient dignity to maintain the independence and reputation of worthy public officers."

455. Discussion as to what are impeachable offenses.

Argument as to whether impeachment is restricted to offenses which are indictable, or at least of a criminal nature.

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On January 8, 1913,[1] in the Senate sitting for the impeachment trial of Judge Robert W. Archbald, Mr. Manager John A. Sterling, of Illinois, said in final argument:

Mr. President, the record which has been made proves the charges set forth in the articles of impeachment constitute impeachable offenses. It is plain from the statement made by counsel for respondent, and from the brief which was filed that they rely for acquittal on the single proposition that these offenses do not constitute impeachable offenses for the reason that, as they claim, they do not constitute indictable offenses.

In their brief, counsel for the respondent lay down, as the first proposition, that no offense is impeachable unless it is indictable; and, as a second proposition, and the only other proposition that they submit, is that, if the offense in order to be impeachable need not be indictable, it must at least be of a criminal nature.

As to the first proposition, the contention of counsel for the respondent is not sustained either by the language of the Constitution, by the decisions of the Senate in former impeachment cases, by the decisions of other tribunals in this country which have tried impeachment cases, or by the decisions of the English Parliament; nor is that contention sustained, so far as I have been able to read the authorities and the law writers on constitutional law, by a single American writer. The language of the Constitution so far as it relates to the trial of this case is this:

"The Senate shall have the sole power to try all impeachments.

* * * * * * *

"Judgment in cases of impeachment shall not extend further than to removal from office and disqualification to hold and enjoy any office of honor, trust, or profit under the United States.

* * * * * * *

"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.

* * * * * * *

"The judges * * * shall hold their offices during good behavior."

I have stated all the language of the Constitution with which the Senate has to deal in determining the case now before it. I ask the Senate to consider that nowhere in that language is there any limitation as to the nature or extent of the crimes,

[1] Third session Sixty-second Congress, Record, p. 1209.

misdemeanors, and misbehaviors in office. The Constitution does not undertake to define those terms with reference to the jurisdiction of the Senate in removing public officers for the violation of those provisions of that instrument, nor does it limit the time as to the commission of these offenses. It does not provide that the offenses shall be committed during the service from which it is sought to remove him, nor does it limit Congress as to when it may proceed to impeach and try an offending servant. Under the plain language of the Constitution the House of Representatives has the power to impeach, and the Senate has the power to try and convict for offenses of the character described in the Constitution, let them have been committed at any time during the term of office from which the respondent is sought to be removed, during his service in some other office, or during some other term, or for offenses committed before he became an officer of the United States and while he was a private citizen.

If the Constitution puts no limitation on the House of Representatives or the Senate as to what constitutes these crimes, misdemeanors, and misbehaviors, where shall we go to find the limitations? There is no law, statutory nor common law, which puts limitations on or makes definitions for the crimes, misdemeanors, and misbehaviors which subject to impeachment and conviction.

It will not be maintained either by the managers or by the counsel for the respondent that precedents bind, and yet we may well consider them, because they are so uniform on the question as to what constitutes impeachable offenses. The decisions of the Senate of the United States, of the various State tribunals which have jurisdiction over impeachment cases, and of the Parliament of England all agree that an offense, in order to be impeachable, need not be indictable either at common law or under any statute.

I desire to read briefly from some of the law writers of this country, giving their conclusions as to what constitute impeachable offenses, after they had reviewed and considered cases that have been tried in the Senate and in other forums where impeachment cases have been tried.

After reading from Tucker on the Constitution, page 416, Cooley's Principles of Constitutional Law, page 178, and volume 15 of the American and English Encyclopedia of Law, paragraph 2, page 1066, Mr. Sterling concluded:

And so, Mr. President, I say, that outside of the language of the Constitution which I quoted there is no law which binds the Senate in this case today except that law which is prescribed by their own conscience, and on that, and on that alone, must depend the result of this trial. Each Senator must fix his own standard; and the result of this trial depends upon whether or not these offenses we have charged against Judge Archbald come within the law laid down by the conscience of each Senator for himself.

On January 9, 1913,[1] Mr. Alexander Simpson, of counsel for respondent, quoting the last statement in this address, said:

> Sirs, if that be so, I want to know what has become of the Constitution in this case? Of what use was it to write into the Constitution that a man shall be impeached only for "treason, bribery, or other high crimes and misdemeanors" if there is no law to govern you, and if you may, out of your own consciences, evolve the thought that you will dismiss this respondent from the public service simply because you wish to get rid of him? You need no proof of "treason, bribery, or other high crimes and misdemeanors" to discharge him if that is the position you are to take in this case, for those words, under such circumstances, are unnecessary and meaningless.
>
> I submit that that is not and can not be the true legal position. It must be precisely the reverse of that. You must find somewhere, whether it is under the "good behavior" clause of the Constitution, or whether it is under the article relating to impeachments themselves, that upon which you can lay your finger and say this this respondent has violated that thing, or you must under your oaths of office say that he shall go free.
>
> And that is the position which Mr. Manager Sterling, speaking for the managers, asks you to take here. He asks you not to look to the law of the land for that which shall govern the rights of the parties here; but he asks you, out of your own conscience, whether your conscience agrees with mine or his or anybody's, to evolve a law which shall apply to this case and which when this case is over shall cease ever thereafter to be the law. In this, as in everything else, the Constitution is only a frame of government. It remains for the Congress to vivify many of its provisions. It remains for Congress to write on the statute books what shall constitute "high crimes and misdemeanors," and there are already in the Revised Statutes many provisions upon that point.

On January 9, 1913,[2] Mr. A. S. Worthington, of counsel on behalf of the respondent, also referred to the position taken by Mr. Sterling in this address and said:

> It has been insisted here by the managers on the part of the House of Representatives that the question of Judge Archbald's guilt or innocence is to be determined by what you individually consider to be an offense which justifies his removal from office; not that he has been brought here charged with anything of that kind, but having brought him here charged with certain specific offenses for which he and his counsel have prepared themselves and have summoned their witnesses he is now to be disgraced and forever branded as a criminal because you may find that he is not fit to be a judge.
>
> I might humbly suggest that if there is ever to be presented to this great body the question whether or not you have the right to impeach an officer of the United States and remove

[1] Record, p. 1269.
[2] Record, page 1282.

him from his office because you think that on general principles he is not fit to hold his office, there might be presented an article of impeachment which would charge that that was the case and that he and his counsel might be prepared to meet it. But instead of that we have him charged with a certain number of specific acts, and when he comes here to meet those and the evidence is closed and the verdict is about to be reached, then we are told for the first time that you individually—each for himself—are to decide whether upon what you have heard here in evidence you think that on general principles he ought to be ejected from his office.

The Constitution of the United States says that civil officers of the United States may be impeached for treason, bribery, or other high crimes and misdemeanors.

If this were the first time that that sentence was heard by the Members of this body, I should like to know whether there is one of you to whose mind it would ever have occurred for a moment that it meant anything except an offense punishable in a court of justice. I do not like the word "indictability," because a great many crimes are punished by information and not upon indictment. When I use that term I mean it in the sense of punishment in any way in a criminal court.

Now, my friend Mr. Manager Sterling when he read certain provisions of the Constitution at the outset of his argument said those were all that were necessary to be considered in this matter.

The sixth amendment says:

"In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

Where is the man in this United States of America who would suggest that Judge Archbald could be required to answer without being informed of what is the accusation against him? Where is the man who would suggest that it is not necessary to confront him with the witnesses against him? Where is the man who would say he is not entitled to have subpoenas issued to bring his witnesses here to testify for him? Where is the person who will say that you could turn his counsel out of this Chamber and say he has to defend himself? Why? Because it is a criminal prosecution, and if it be not a criminal prosecution, then it is nothing known to the laws of this land.

On this subject Mr. Manager Edwin Yates Webb, of North Carolina, said by way of rebuttal.[1]

Mr. President, the respondent's counsel in his brief devotes 26 pages to a discussion of this proposition:

[1] Record, p. 1215.

"Impeachment lies only for offenses which are properly the subject of a prosecution by indictment or information in a criminal court."

In those 26 pages of argument most of the quotations are from counsel who have appeared for respondents in various impeachment trials. I do not remember just at present a single noted constitutional authority that counsel quotes to maintain that proposition.

I wish to quote authority in opposition to this position.

Mr. Webb here quoted from Wooddeson (p. 355); Rawle, on the Constitution; Story, on the Constitution; Tucker, on the Constitution; Christian, Fourth Blackstone, footnote, p. 5, Lewis's ed.; Cooley's Principles of Constitutional Law, p. 178; Constitutional History of the United States, George Ticknor Curtis, vol. 1, pp. 481–482; Watson, on the Constitution, vol. 2, p. 1034; Wharton's State Trials, 263; Story, on the Constitution, page 583; and American and English Encyclopedia of Law, vol. 15, p. 1066.

One can not but be struck in this slight enumeration with the utter unfitness of the common tribunals of justice to take cognizance of such offenses and with the entire propriety of confiding jurisdiction over them to a tribunal capable of understanding and reforming and scrutinizing the policy of the State and of sufficient dignity to maintain the independence and reputation of worthy public officers.

The cases, then, seem to establish that impeachment is not a mere mode of procedure for the punishment of indictable crimes; that the phrase of "high crimes and misdemeanors" is to be taken not in its common-law but in its broader parliamentary sense, and is to be interpreted in the light of parliamentary usage; that in this sense it includes not only crimes for which an indictment may be brought, but grave political offenses, corruptions, maladministration, or neglect of duty involving moral turpitude, arbitrary and oppressive conduct, and even gross improprieties by judges and high officers of State, although such offenses be not of a character to render the offender liable to an indictment either at common law or under any statute.

456. Argument that a civil officer of the United States may be impeached for an unindictable offense.

Discussion of the nature of impeachable offenses in minority views submitted in the Daugherty case.

On January 25, 1923,[1] Mr. R. Y. Thomas, Jr., of Kentucky, from the Committee on the Judiciary, submitted the following minority views to accompany the report of that committee on the investigation into the conduct of Attorney General Harry M. Daugherty:

It was strongly intimated if not directly contended by several members of the committee that the Attorney General could not be impeached except for an indictable offense. I think this view is absolutely incorrect. Impeachment is an ex-

[1] Fourth session Sixty-seventh Congress, House, Report No. 1372.

traordinary remedy born in the parliamentary procedure of England, and the principles which govern it have long been enveloped in clouds of uncertainty. The practice of impeachment began in the reign of Edward the Third of England, and statutes for prosecutions for offenses of this character were first enacted in the reign of Henry the Fourth.

By usage of the English Parliament so far back that the memory of man runneth not to the contrary, offenses were impeachable which were not indictable or punishable as crimes at common law. Therefore, the phrase "high crimes and misdemeanors" must be as broad and extended as the offense against which the process of impeachment affords protection. Every case of impeachment must stand alone, and while certain general principles control the judgment and conscience, the Senate alone must determine the issue.

In my opinion, the conclusion is irresistible that an impeachment proceeding by a committee of the House is only an inquiry into the charges like a grand jury investigation, and an official can be impeached for high crimes and misdemeanors which are not indictable offenses. If there ever was any doubt of this, that question has been entirely set at rest in the impeachment proceedings in 1912 against Robert W. Archbald, United States circuit judge. None of the articles exhibited against Judge Archbald, on which he was impeached, charged an indictable offense, or even a violation of positive law.

457. Summary of deductions drawn from judgments of the Senate in impeachment trials.

The Archbald case removed from the domain of controversy the proposition that judges are only impeachable for the commission of crimes or misdemeanors against the laws of general application.

On January 13, 1914,[2] on motion of Mr. Elihu Root, of New York, a monograph by Wrisley Brown, of counsel on behalf of the managers in the impeachment trial of Judge Robert W. Archbald, was printed as a public document. The following is an excerpt:

The impeachments that have failed of conviction are of little value as precedents because of their close intermixture of fact and law, which makes it practically impossible to determine whether the evidence was considered insufficient to support the allegation of the articles, or whether the acts alleged were adjudged insufficient in law to constitute impeachable offenses. The action of the House of Representatives in adopting articles of impeachment in these cases has little legal significance, and the deductions which have been drawn from them are too conjectural to carry much pursuasive force. Neither of the successful impeachments prior to the case of Judge Archbald was defended, and they are not entitled to great weight as authorities. In the case of Judge Pickering, the first three articles charged violations of statutory law, although such violations were not indictable. Article

[2] Second session Sixty-third Congress, Senate Document No. 358, p. 16.

four charged open and notorious drunkenness and public blasphemy, which would probably have been punishable as misdemeanors at common law. In the case of Judge Humphreys, articles three and four charged treason against the United States. The offense charged in articles one and two probably amounted to treason, inasmuch as the ordinance of secession of South Carolina had been passed prior to the alleged secessionary speeches of the respondent, and the offenses charged in articles five to seven, inclusive, savored strongly of treason. But, it will be observed, none of the articles exhibited against Judge Archbald charged an indictable offense, or even a violation of positive law. Indeed, most of the specific acts proved in evidence were not intrinsically wrong, and would have been blameless if committed by a private citizen. The case rested on the alleged attempt of the respondent to commercialize his potentiality as a judge, but the facts would not have been sufficient to support a prosecution for bribery. Therefore, the judgment of the Senate in this case has forever removed from the domain of controversy the proposition that the judges are only impeachable for the commission of crimes or misdemeanors against the laws of general application. The case is constructive, and it will go down in the annals of the Congress as a great landmark of the law.

458. Argument as to whether a judge may be impeached for offenses committed in prior judicial capacity.

On January 8, 1913,[1] in the Senate sitting for the impeachment trial of Judge Robert W. Archbald, Mr. Manager Edwin Yates Webb, of North Carolina, said in final argument:

There is no merit in the argument that this respondent can not be impeached at present for acts committed by him while he was district judge. It is true that he is now a circuit judge, but it is also true that immediately before he became a circuit judge he was a district judge. He never ceased to be a judge or civil officer of the United States.

This question was raised in the impeachment trial of Judge D. M. Furches, in North Carolina, in 1901. There the respondent was impeached while he was chief justice of North Carolina for acts committed while he was an associate justice, two distinct and separate offices, but his defense did not avail. Both the authorities and reason compelled the repudiation of such a defense, and, to use the language of Judge William R. Allen, now of the supreme court of our State, then one of the managers in the Furches impeachment trial—

"The purpose of impeachment is to remove an officer whose conduct is a menace to the public interest, and it would be strange indeed if he could escape punishment by being elevated to a higher official position. If such a defense could be sustained one could by resignation avoid an investigation into his conduct by a court of impeachment, and if he was of the same political faith as the head of the executive depart-

[1] Third session Sixty-second Congress, Record, p. 1218.

ment and in sympathy with it, he could be transferred from one office to another and thus avoid impeachment altogether. The effect of such defense would be to practically destroy the power of impeachment, and at any rate it would be greatly impaired. We believe that the authorities are practically unanimous in sustaining our contention that the change of office does not affect the power of impeachment. He is now exercising the same powers that he exercised when he was an associate justice. He is performing the same duties; he is practically filling the same office."

Mr. Foster, on this subject, says:

"The power of impeachment is granted for the public protection in order to not only remove but perpetually disqualify for office a person who has shown himself dangerous to the Commonwealth by his official acts. The object of this salutary constitutional provision would be defeated could a person by resignation from office obtain immunity from impeachment. State senates have sustained articles of impeachment for offenses committed at previous and immediately preceding terms of the same or a similar office."

Is it not true that Judge Archbald now holds a similar office to that which he held in 1908? He is now a circuit judge, and the powers and duties of district and circuit judges are almost identical. State *v.* Hill, Thirty-seventh Nebraska Reports.

We have, then, five precedents—one by the Senate of the United States, one by the senate of New York, one by the senate of North Carolina, one by the State of Wisconsin, and another by the court of impeachment of Nebraska, indorsed by the Supreme Court of Nebraska, and by Foster in his work on the Constitution.

We therefore confidently maintain that the respondent in this trial is now impeachable for acts which he committed while district judge of the middle district of Pennsylvania.

I shall not go into the discussion of the origin of impeachment trials, but will just quote this excerpt from one constitutional writer. Mr. Foster, in his splendid work on the Constitution, says:

"Impeachment trials are a survival of the earliest kinds of jurisprudence, when all cases were tried before an assembly of the citizens of the tribe or State. Later, ordinary cases, both civil and criminal, were assigned to courts created for that purpose, but matters of great public importance were still reserved for a decision of the whole body of citizens or subsequently of the council of elders, heads of families, or holders of fiefs."

This arrangement could be preserved in earlier times when population was sparse and business intercourse small and human affairs were not intricate; but as civilization became more complex, and the division of labor in administering judicial affairs became more urgent, the right to decide and pass upon various questions was allotted to different officers, and so to-day we have a judicial system in which all judicial power is

lodged, but distributed to different courts, but in all this evolution and distribution of judicial power there is one great right which the people have always reserved unto themselves, and that is the right to supervise the conduct of public officials and, through their representatives, to remove such officials from office for misconduct or misbehavior, and so, Senators, you sit to-day, theoretically at least, as the court of 90,000,000 people who have commanded us through the popular branch of Congress to bring this respondent before you to inquire into his conduct, and ascertain if the condition on which he was appointed to the high office which he now holds has not been broken by him.

Quoting Foster again:

"What, it may be asked, is the true spirit of the institution itself? Is it not designed as a method of national inquest into the conduct of public men?"

This right to inquire into the conduct of public officials has been reserved to the people themselves, and this great Senate is the tribunal in which such questions must be tried, and necessarily and properly the powers of this court are "broad, strong, and elastic, so that all misconduct may be investigated and the public service purified." The fathers of the Constitution realized the importance of reserving unto the people the right to remove an unworthy or unsatisfactory official, and they were indeed wise in not attempting to define or limit the powers of the court of impeachment, but left that power so plenary that no misconduct on the part of a public official might escape its just punishment.

In reply, Mr. Alexander Simpson, jr., counsel for respondent, in his concluding argument on January 9[1] said:

The first question which arises is whether or not the Senate can now consider an article of impeachment which relates to acts done while Judge Archbald was a district judge before his appointment to and confirmation as a judge of the Commerce Court. The managers in their brief say this in referring to this question:

"In this respect the case here presented seems to be unique in the annals of impeachment proceedings under our Constitution."

And they say further in that regard that they can justify the articles of impeachment, notwithstanding the change of office, because the two offices are substantially the same within the contemplation of the constitutional provisions relating to impeachments.

That argument necessarily concedes the points decided in the Blount case and considered and voted upon in the Belknap case, that he who is out of office can no longer be impeached. It necessarily also concedes that the constitutional provision has for its primary purpose the removal of the delinquent from the particular office in which he is said to have done a wrong. That is the necessary conclusion from the provision of Article I, section 3, of the Constitution, which provides what

[1] Record, p. 1278.

shall be the penalty in case of impeachment. It is considered also by Judge Story in his work on the Constitution, and if the argument which was presented by Judge Story is sound it must necessarily follow that the similarity of the two offices is not and can not be of any moment whatsoever. Can it be said that if a civil officer, say in the Cabinet of the President, is transferred from one portfolio to the other and continues steadily in office, that he may be impeached while holding the second office for that which was done in the first, and yet if he passes from the Cabinet to the Senate or into private life he can not be impeached at all? There is no logic or sound reasoning in any such proposition as that, nor is it in accord with any well-settled principles. In the provision which the managers quote in their brief from Mr. Foster he says this in regard to that:

"It includes such action by an officer when acting as a member ex officio of a board of commissioners; and such action in the same or a similar office at an immediately preceding term."

Now, I want to know why limit it to the immediately preceding term if the similarity of the office is the test in determining whether the impeachment will lie or not. Of course, that can not be sound; and the only reason why Foster wrote in his commentaries the "immediately preceding term" was because he felt that the line must be drawn somewhere. He knew that in certain of the State courts, under the language of their constitutions, it had been held that in a succeeding term of the same office there might be an impeachment for that which occurred in the immediately preceding term. But it remained for the managers to evolve the doctrine that it was to be a substantially similar office which was the test in determining the matter.

I submit that the proper test is the one to which I have already adverted. It is that the office, during the incumbency of which the acts were done of which complaint was made, shall be the determinative factor in deciding whether or not impeachment shall lie for the offense charged. If that is not so, there is no logical conclusion from the position which one of the managers assumed, that so long as the man is in public office whether the office is substantially similar or no, or whether there is a continuity of term or no—so long as he is in public office he may be impeached for anything which he has ever done in the past, because, as it was claimed, the purpose of the constitutional provision is to put out of office all those who by their past lives have shown that they are unfit to occupy it. That position would be a logical one; but there can not be a case found to sustain it; and all the authorities decide precisely the reverse.

On January 3, 1913,[1] Messrs. R. W. Archbald, jr., M. J. Martin, Alexander Simpson, jr., and A. S. Worthington, of counsel for the respondent, offered a brief covering various phases of the case, from which the following extract relates to this question:

[1] Record of trial, p. 1087.

III

The last six articles of impeachment in this case must fail, if for no other reason, because they relate to a time when the respondent held the office of district judge of the United States. He may not be impeached for alleged offenses committed prior to January 31, 1911, when he ceased to be district judge by appointment to a different office.

Articles VII, VIII, IX, X, XI, and XII, and Article XIII in part, charge offenses alleged to have been committed by the respondent before he was appointed to his present position as circuit judge and assigned to duty on the Commerce Court. He was a district judge of the United States from March, 1901, until the 31st day of January, 1911.

No useful information on this subject can be obtained from the English precedents, because in England a private citizen could be impeached as well as officers of the Government.

In this country there have been two attempts to impeach persons who had ceased to be officers for acts done by them while they were officers. One of these cases was that of William Blount in 1798; the other that of William W. Belknap in 1876.

In Blount's case when he was called upon to answer the articles he filed a plea which set up in substance these two defenses: (1) That a Senator is not impeachable, and (2) that he had ceased to be a Senator. (3 Hinds' Precedents, 663.)

This double plea was sustained by the Senate by a vote of 14 to 11. (3 Hinds' Precedents, 679.)

There is nothing in the record of the case to enable us to determine whether all the 14 Senators who voted to sustain the plea did so because they held that a Senator is not impeachable, or because Blount was out of office at the time. And, of course, it may be that some voted to sustain the plea on one of those grounds and some on the other.

It will be seen that the managers in that case actually contended that in the United States, as in England, private persons may be impeached as well as officers. It is not thought necessary to consider that question, because that contention has never been made since it was made by the managers in Blount's case. Mr. Ingersoll, of counsel for Blount, said in the course of the argument that he would not contend that an officer might escape an impending impeachment by resigning his office for that purpose.

This admission of Mr. Ingersoll's gave great comfort to the managers and some embarrassment to the counsel for the respondent in Belknap's case. In that case the respondent filed a plea in which he averred:

"That this honorable court ought not to have or take further cognizance of the said articles of impeachment * * * because he says that before and at the time when the said House of Representatives ordered and directed that he, the

said Belknap, should be impeached at the bar of the Senate, and at the time when the said articles of impeachment were exhibited and presented against him * * * he, the said Belknap, was not, nor hath he since been, nor is he now, an officer of the United States; but at the said times was, ever since hath been, and now is, a private citizen of the United States and of the State of Iowa. (3 Hinds' Precedents, 919.)"

To this plea the managers for the House of Representatives filed a replication, in which they set up: (1) That at the time the acts charged in the articles of impeachment were committed, Belknap was Secretary of War; and (2) that Belknap had resigned to escape impeachment, after he had learned that the House of Representatives, by its proper committee, had completed its investigation into his official conduct, and was considering the report it should make to the House upon the same. There were further pleadings, but those above stated set forth sufficiently what the issues were. (3 Hinds' Precedents, 921.)

After much discussion the Senate determined to hear first the question of the sufficiency of the replication. After a long debate, it was decided, by a vote of 37 to 29, that Belknap was amenable to trial by impeachment for acts done as Secretary of War, notwithstanding his resignation before he was impeached. (3 Hinds' Precedents, 964.)

Belknap was called upon to plead to the merits, but declined to do so on the ground, as set forth on the record by his counsel, that, as less than two-thirds of the Senate had sustained the jurisdiction, the respondent was entitled to be discharged, without further proceedings. (3 Hinds' Precedents, 936–937.)

The Senate, however, went on and took evidence in the case, with the result that Belknap was acquitted. The vote on the several articles ranged from 35 to 37 for conviction. On each article 25 voted not guilty. Most of those who voted not guilty stated they did so because they believed the court was without jurisdiction, for the reason that the respondent had ceased to be a civil officer of the United States at the time he was impeached by the House of Representatives.

Hence, in Belknap's case, as in Blount's case, it will be seen that the final vote does not indicate that any of the Senators who voted "guilty" did so on the ground that one who has been a civil officer remains liable to impeachment as long as he lives, for acts done during the time he held the office. The evidence in the case showed that Belknap was advised at 10 o'clock of the morning of the day that he resigned, that the Judiciary Committee of the House was about to report a resolution recommending his impeachment. He hurried to the President, tendered his resignation, and had it accepted, a few hours only before the Judiciary Committee did present to the House the resolution recommending his impeachment. There was much controversy in the discussion of the case before the Senate by the managers and counsel, respectively, as to whether Belknap

was an officer when the resolution of impeachment was presented to the House, on the theory that the law takes no notice of fractions of a day. But, aside from this, it was strenuously contended by the managers that even if the general rule be that an officer ceases to be subject to impeachment when he leaves the office, there should be an exception to that rule when the officer resigns for the very purpose of escaping impeachment.

It is impossible to determine what proportion of the Senators who voted against Belknap at the conclusion of the trial did so on the ground that he could not escape impeachment by resigning for that purpose, even if he would not be subject to impeachment had he not vacated the office in that way and for that purpose. In other words, the case is not a precedent for the proposition that one whose term of office has expired remains subject to impeachment during the whole of his life for acts done while he held the office.

When Manager Hoar was making his argument a Member of the Senate interrupted him and propounded the following question:

"There are no doubt several Members of the Senate who have been in past years civil officers of the United States. Are they liable to impeachment for an alleged act of guilt done in office?"

The manager did not flinch at this question, but said, as he was evidently required to say or abandon his contention: "The logic of my argument brings us to that result."

It will be seen that the contention which was made on behalf of the House in Belknap's case, and which we understand is maintained by the managers in the case at bar, is far-reaching. The present President of the United States at one time held the office of Solicitor General; at another time he was circuit judge of the United States; at another time he was governor of the Philippine Islands; at another time he was Secretary of War. Is it possible that he can now be the subject of impeachment for any act committed by him at the time he held either one of those offices? If so, he may be removed from his present office as President of the United States by a majority of the House and two-thirds of the Senate for alleged offenses charged to have been committed while he held any one of the other positions above mentioned.

And so of any other public man who has ever held office under the United States.

It would seem that a contention which leads to such absurd results can not be sustained.

459. On January 9, 1913,[1] in the Senate sitting for the Archbald impeachment trial, Mr. Manager George W. Norris, of Nebraska, said in concluding argument:

The authorities are practically unanimous that a public official can be impeached for official misconduct occurring while he held a prior office if the duties of that office and the one he holds at the time of the impeachment are practically the same, or are of the same nature. The Senate must bear in

[1] Third session Sixty-second Congress, Record, p. 1265.

mind, as stated by all of the authorities, that the principal object of impeachment proceedings is to get rid of an unworthy public official. In the State of New York it was held in the Barnard case that the respondent could be impeached and removed from office during his second term for acts committed during his first term. And in the State of Wisconsin the court held the same way in the impeachment of Judge Hubbell. To the same effect was the decision in Nebraska upon the impeachment trial of Governor Butler. On this point the respondent relies upon the case of the State *v.* Hill (37 Nebr., p. 80).

In that case the State treasurer of Nebraska was impeached after he had completed his term and retired to private life. The articles of impeachment were not passed on by the legislature—in fact, were not even introduced in the legislature—until after the respondent had served his full term, and the court there held that impeachment did not lie, but it expressly approved the judgment of the New York court in the Judge Barnard case, the judgment of the Wisconsin court in the Judge Hubbell case, and the prior judgment of the Nebraska court in the Butler case.

460. Argument that an impeachable offense is any misbehavior or maladministration which has demonstrated unfitness to continue in office.

On January 9, 1913,[8] in the Senate, sitting for the impeachment trial of Judge Robert W. Archbald, Mr. Manager Paul Howland, of Ohio, in final argument said:

The managers contend that the power to impeach is properly invoked to remove a Federal judge whenever, by reason of misbehavior, misconduct, malconduct, or maladministration, the judge has demonstrated his unfitness to continue in office; that misbehavior on the part of a Federal judge is a violation of the Constitution, which is the supreme law of the land, and a violation also of his oath of office taken in compliance with the requirements of the statute law. If the Senate should adopt this view of the law, then the only question to be passed on by the Senate would be whether the acts alleged and proven constitute such misbehavior as to render the respondent unfit to continue in office.

The learned counsel for the respondent, by insisting that only indictable offenses are impeachable, would seem to be placing himself in the position of holding that the object of impeachment was punishment to the individual. This conception of the object of impeachment is entirely erroneous, and whatever injury may result to the individual is purely incidental and not one of the objects of impeachment in any sense. An impeachment proceeding is the exercise of a power which the people delegated to their representatives to protect them

[8] Third session Sixty-second Congress, Record, p. 1259.

from injury at the hands of their own servants and to purify the public service. The sole object of impeachment is to relieve the people in the future, either from the improper discharge of official functions or from the discharge of official functions by an improper person. This view of impeachment is clearly demonstrated by the judgment which the Constitution authorizes in case of conviction and which shall extend no further than removal from office and disqualification to hold or enjoy any office of honor, trust, or profit under the Government of the United States, leaving the punishment of the individual for any crime he may have committed to the criminal court. (See Art. I, sec. 3, par. 7, Constitution of the United States.)

As bearing upon the question of law raised by the demurrer of the respondent I wish to call attention to two provisions of the Federal Constitution. Section 4, Article II, provides:

"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"—

To which I shall hereafter refer as the removal section, and section 1, Article III, the second sentence thereof, which provides that—

"The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior"—

To which I shall hereafter refer as the judicial-tenure section.

It will be noted that the removal section immediately precedes the judicial-tenure section. The limitation of the judicial tenure to good behavior is the only limitation of that character to be found in the Federal Constitution upon the tenure of any of the civil officers of the Government. I therefore contend that it was the plain intention of the framers of the Constitution that, in so far as the Federal judges were concerned, the removal section was not intended to be antagonistic in its terms to the judicial-tenure section, immediately following it, and that the judicial-tenure section, which provides that the judicial term shall be during good behavior, was not intended to be antagonistic to the removal section, which immediately precedes it. These two sections must be construed together, and when so construed the judicial-tenure section is of necessity either an addition to the enumerated offenses in the removal section or a definition of the term "high crimes and misdemeanors," when applied to the judiciary, as including misbehavior. To say that the judicial tenure shall be limited to good behavior in one section of the Federal Constitution and then contend that the section of the Constitution immediately preceding that has destroyed its force and effect and has left the Federal Government without any machinery to pass upon the question of the forfeiture of the judicial tenure, or to take jurisdiction of acts which constitute misbehavior but are not criminal, is to treat the words "during good behavior" as

surplusage. Such an interpretation violates all rules of construction.

What is the legal status of the judicial tenure and what determines that status? There are some considerations on which to base the claim that the legal status of the judicial tenure should be determined by the same principles that are applicable to a contract of hiring. The parties to the contract are the people of the United States and the candidate for a Federal judgeship. When he has been nominated by the President and confirmed by the Senate the commission tendered or delivered to him is an offer on the part of the people of the United States to the candidate whereby they agree to enter into a contract on certain terms and conditions with the candidate and offer to pay him a fixed sum of money for the performance of certain services for them in accordance with the terms of the offer. No obligation on the part of the Government has yet attached; the candidate need not accept the offer; he is not compelled to qualify; that is a voluntary act on his part. (See Marberry *v.* Madison, 1 Cranch, 137.)

Section 257 of the judicial code provides that the Federal judges shall take a certain prescribed oath before they proceed to perform the duties of their respective offices.

The acceptance of the offer on the part of the candidate is evidenced by his oath, and when the oath is taken the contract of hiring becomes valid and binding on the parties to the same in accordance with the terms and conditions of the contract.

In this case the contracts between the United States and the respondent are evidenced by the various commissions and the various oaths accepting the same.

Under this state of facts, if we were not dealing with the Government as one of the parties to the contract, under constitutional limitations, the contract could be abrogated for breach of condition if necessary and the rights of the parties determined in the courts of law.

If it should be objected that the legal status of the judicial tenure must be placed on a higher ground than an ordinary contract right by reason of the solemnities necessary to create the status and by reason of the important and sacred functions of government with which the judge is charged, we perhaps would be justified in saying that a fiduciary relation of the highest and most sacred character known to the law is created by the commission of appointment and the oath of acceptance of a Federal judge. Under this conception of the status of the judicial tenure the judge is acting as a trustee. The subject matter of the trust is the judicial power of the United States, and the beneficiaries of the trust are the people thereof. Given this status in a court of equity, the trustee, under well-known and well-recognized principles of equitable jurisprudence, can always be removed on application of the beneficiary and a showing that the trustee is not performing his duties as such trustee in such a manner as to satisfy the conscience of the

chancellor that he is acting for the best interest of the beneficiary. Realizing, however, the manifest impropriety of leaving the question of forefeiting the judicial tenure to the judges, the framers of the Constitution wisely provided a different forum, viz, the Congress, to raise and try the question of the forfeiture. We have now seen that whether we apply principles of law or equity to the status created by the appointment of the Federal judge there would be a forum to adjudicate the rights of the parties, and reasoning by analogy we are driven to the conclusion that the framers of the Constitution were not unmindful of the importance of the subject with which they were dealing, and intended to and did provide a forum before which the people of the United States could bring their judges and on proper showing of misbehavior, which demonstrates the unfitness of the judge to continue in office, work a forfeiture of the judicial tenure.

461. Summary of State trials of impeachments with reference to their boldings on the question of whether acts of a judge must be indictable to be impeachable.

On January 9, 1913,[1] in the Senate, sitting for the Archbald impeachment trial, Mr. Manager Paul Howland, of Ohio, filed as part of his final argument a record of impeachment trials in various States, with particular reference to their holdings on the question as to whether an offense in order to be impeachable must be indictable. The summary appears in full in the Congressional Record of that date.

462. Discussion of the meaning in English parliamentary law and in the constitution, of the phrase "high crimes and misdemeanors" as applied to judicial conduct.

Arguments as to whether acts of maladministration which are not indictable are subject to impeachment.

On January 9, 1913,[2] in the Senate, sitting for the trial of the impeachment of Judge Robert W. Archbald, Mr. Manager Paul Howland, of Ohio, in final argument said:

> In the removal section of the Constitution we find the words "high crimes and misdemeanors." These words are used in the same sense that had attached to them for centuries in the impeachment trials of England. They were used as part of the well-recognized terminology of the law of Parliament as distinguished from the common law. We must bear in mind that these terms are used in a section of the Constitution which is plainly intended to protect the State against its own servants.
>
> The two enumerated offenses of treason and bribery are offenses peculiarly against the state as distinguished from offenses against the individual. In construing a clause of this character in the Constitution, where the whole object is to protect and preserve the Government, such a construction should be placed upon the language used as will best accomplish the results desired. To insist that the technical definition

[1] Third session Sixty-second Congress, Record, p. 1261.
[2] Third session Sixty-second Congress, Record, p. 1260.

of the criminal law should be applied in construing the meaning of the term "high crimes and misdemeanors" is to insist on the narrowest possible construction, and loses sight of the object and purpose of this clause in the Constitution. To insist that it is impossible to impeach a judge unless he has committed some indictable offense is to say that the people of this country are powerless to remove a Federal judge so long as he is able to keep out of jail. While no criminal is fit to exercise the judicial function, it does not follow that all other persons are fit to be judges. Such a construction is absolutely repulsive to reason and ought not to be and is not a correct interpretation of the term "high crimes and misdemeanors."

Attention is often called to the discussion that took place in the Constitutional Convention between Colonel Mason and Mr. Madison in which Mr. Madison suggested that the term "maladministration" was too vague and the phrase "high crimes and misdemeanors" was adopted. Attention was called to that by the distinguished counsel for the respondent in his opening statement.

On the strength of this passage in Madison's papers it is contended that Mr. Madison did not construe the phrase "high crimes and misdemeanors" as including maladministration. (3 Madison's Papers, 1528.)

We find, however, that Mr. Madison in a speech in Congress on the 16th day of June, 1789, on the bill to establish a department of foreign affairs, in discussing the possibility of abuse of power by the Executive, said:

"Perhaps the great danger of abuse in the Executive's power lies in the improper continuance of bad men in office. But the power we contend for will not enable him to do this, for if an unworthy man be continued in office by an unworthy President the House of Representatives can at any time impeach him and the Senate can remove him, whether the President chooses or not." (4 Elliot's Debates, 375.)

This language clearly demonstrates that Mr. Madison believed that acts of maladministration which were not indictable were impeachable.

Nowhere in the English law of impeachment or in the Constitution of the United States or any of the States do we find any definition of impeachable offenses. The language of the Federal Constitution attempts no definition of impeachable offenses, and the general term "high crimes and misdemeanors" is not and was not intended to be a definition.

Under the State constitutions we sometimes find the added terms "mal and corrupt conduct," "corruption in office," and "maladministration"—all general terms, without attempting any technical definition. The reason for this is perfectly obvious, and is that the subject matter is not capable of technical definition. Who is wise enough to anticipate every manifestation of fraud that would give a chancellor jurisdiction and write it into a statute? It is the effect of acts under the circumstances of each particular case that confers jurisdiction. So it is with impeachment. No one can tell in advance in what

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way or from what source the danger may arise which demands the exercise of this power. The power of impeachment is recognized and authorized in every one of our constitutions, Federal and State, but the circumstances which warrant the exercise of that power are not defined and the necessity for its exercise is in the first instance left to the discretion of the House of Representatives. It is an indefinite and broad power incident to sovereignty, and its exercise in this country is demanded whenever the agents of sovereignty have acted in such a manner as to destroy their efficiency in the discharge of their duties to the sovereign. The existence of this power is necessary to the permanence of the State, and the exercise of the power is necessary whenever and however the welfare of the State may be threatened by its civil officers.

Mr. Alexander Simpson, counsel for respondent, took issue with this argument, saying:[1]

It was claimed by Mr. Manager Howland to-day, that the words "high crimes and misdemeanors" as used in this provision of the Constitution were taken bodily out of the English practice, the English parliamentary law, as they said. That is unquestionably true. It is not true that in all the impeachments in England they used the words "high crimes and misdemeanors," but those words are used in a number of their impeachments. This being so, you must either accept the constructions placed upon those words in the lex parliamentii, or you must decline to accept that construction. If you decline to accept it, of course that branch of the argument falls by the wayside at once. But if you accept it, then the question arises which of the English precedents are you going to accept, in view of the fact that some hold that an impeachable offense need not be an indictable one, and others held a precisely antagonistic view. Are you going back to the days when a man was impeached simply because he happened to have been put in office by those who have themselves just been turned out? If that is the view you are going to accept then perhaps every four years in this country there will be a wholesale slaughter. But if you are going to accept the best precedents which appear upon the English reports, and especially those down near to the time when the Constitution of the United States was adopted, then those best precedents show that, except for an indictable offense, no impeachment would lie under the laws of England.

But what are you going to do if the matter is to be considered solely under the language of the Constitution itself? The word "misdemeanors" in that clause must be taken either in the technical sense or in the proper sense. If that word is taken in the technical sense everybody knows that a misdemeanor taken technically is a crime pure and simple. If it is taken in the popular sense, then, notwithstanding what some text writers have said, I venture the assertion that if you go

[1] Record, p. 1270.

out into the cars or on the streets or in your homes and ask the people you meet what is meant by the words "treason, bribery, or other high crimes and misdemeanors," you will not find one in a thousand but will say that every one of those words imports a crime. If that is so, then necessarily, when you come to construe those words after this trial is over, you will necessarily have to reach the conclusion that these charges must be indictable or they can not be impeachable.

463. On January 9, 1914,[2] in the Senate, sitting for the Archbald impeachment trial, Mr. Manager John W. Davis, of West Virgina, said in final argument:

The issue narrows itself down to the meaning of the phrase "high crimes and misdemeanors" occurring in Article II, section 4, of the Constitution; and the respondent now renews the oft-repeated contention that this language can be used only with reference to offenses which, either by common law or by some express statute, are indictable as crimes. Every canon of construction which can be applied to this clause of the Constitution negatives the position which counsel for the respondent assume. Test it by the context, by contemporary interpretation, by precedent, by the weight of authority, and by that reason which is the life of every law, and the answer is always the same.

In the first place, when we read this clause of the Constitution, as we are required to do in the light of the context of the instrument, we are confronted at once by the clause fixing the tenure of judges of the Federal courts during good behavior; and if it be difficult, as counsel for respondent assert, to enlarge the phrase "high crimes and misdemeanors" so as to embrace acts not indictable as crimes, it is certainly far more difficult to restrict "good behavior" to the narrow limits fixed by the criminal law. To say that a judge need take as the guide of his conduct only the statutes and the common law with reference to crimes, and that so long as he remains within their narrow confines he is safe in his position, is to overlook the larger part of the duties of his office and of the restraints and obligations which it imposes upon him. We insist that the prohibitions contained in the criminal law by no means exhaust the judicial decalogue. Usurpation of power, the entering and enforcement of orders beyond his jurisdiction, disregard or disobedience of the rulings of superior tribunals, unblushing and notorious partiality and favoritism, indolence and neglect, all are violations of his official oath, yet none may be indictable. Personal vices, such as intemperance may incapacitate him without exposing him to criminal punishment. And it is easily possible to go further and imagine such indecencies in dress, in personal habits, in manner and bearing on the bench; such incivility, rudeness, and insolence toward counsel, litigants, or witnesses; such willingness to use his office to serve his personal ends as to be within reach of no branch of the criminal law, yet calculated

[2] Third session Sixty-second Congress, Record, p. 1266.

with absolute certainty to bring the court into public obloquy and contempt and to seriously affect the administration of justice. Can it be possible that one who has so demonstrated his utter unfitness has not also furnished ample warrant for his impeachment and removal in the public interest?

Stated in its simplest terms, the proposition of counsel is to change the language of the Constitution so that instead of reading that—

"the judges both of the Supreme and inferior courts shall hold their offices during good behavior"—it will read that—"the judges both of the Supreme and inferior courts shall hold their offices so long as they are guilty of no indictable crime."

If the latter were the true meaning, is it conceivable that the careful and exact stylists by whom the Constitution was composed would have used an ambiguous term to express it?

But counsel ask: What shall be done with that clause which provides that in case of impeachment—

the party convicted shall nevertheless be liable and subject to indictment, trial, judgment, and punishment according to law.

This, they insist, is a definition by implication, and signifies that the scope of impeachment and indictment is one and the same, although the mode of trial and the penalty to be inflicted may differ. We submit, on the contrary, that this clause instead of being a declaration that impeachment and indictment occupy the same field, is a recognition of the fact that the field which they occupy may or may not be identical; and, recognizing this fact, it declares merely that when the field of impeachment and the field of indictment overlap there shall be no conflict between them, but that the same offense may be proceeded against in either forum or in both.

The light drawn from contemporary speeches and writings confirms the position for which we contend. It is true, as counsel will point out, that in the Constitution Convention when the word "maladministration" was proposed it was objected to by Mr. Madison as too vague, and the words "high crimes and misdemeanors" were inserted instead; but it is also true that on the 16th day of June, 1789, when debating in the House of Representatives the propriety of giving to the President the right to remove an officer, he said:

"The danger, then, consists merely in this: The President can displace from office a man whose merits require that he should be continued in it. What will be the motives which the President can feel for such abuse of his power and the restraints that operate to prevent it? In the first place he will be impeachable by this House before the Senate for such an act of maladministration; for I contend that the wanton removal of meritorious officers would subject him to impeachment and removal from his own high trust."

Mr. Davis then cited numerous authorities and said:

It can be safely said that nothing was further from the minds of the men who framed the Constitution than the construction here contended for by respondent's counsel.

Again we may look to the precedents only to find that the word "misdemeanor" has always been treated as having a meaning of its own in parliamentary law, and that one impeachment proceeding after another has been based upon offenses not within the law of crimes. I do not repeat the many authorities for this statement which my colleagues have cited. This body, of course, being a law unto itself, is bound by no precedents save those of its own making, and even as to them no doubt has the power which any other court enjoys to overrule a previous decision if convinced of its error.

After citing authorities, Mr. Davis continued:

But, without stopping to multiply precedents further, we next call attention to the long list of eminent authorities and commentators on the Constitution who uphold the construction for which we contend—Story, Curtis, Cooley, Tucker, Watson, Foster—all these and many more have been cited in the course of this discussion. Speaking as a lawyer, it must be said that the weight of authority in our favor is overwhelming.

Last of all we resort to the highest of all canons for the construction of constitutions and statutes alike, viz, "The reason of the thing." It is true that the framers of the Constitution intended to create an independent judiciary, but they never contemplated a judiciary which should be totally irresponsible. Regarding public office as a public trust, they found it necessary to lodge somewhere the power to determine whether that trust had or had not been abused. In the appointment of judges they required that the judgment of the President with reference to individual fitness should be concurred in by the Senate, and quite naturally they gave to the body which had approved the appointment the power to withdraw that approval and dismiss the officer when he had shown himself faithless to his trust. In requiring first of all a majority of the House of Representatives in order to prefer articles of impeachment and then two-thirds of the Members of the Senate present to convict they hedged the power about with all the safeguards necessary to protect the upright official and yet leave it sufficient play to preserve the public welfare. Experience has shown how more than adequate the machinery so provided has been to prevent hasty or intemperate action. Indeed, it would seem that if the fathers erred it was in making too slow and difficult the process of removing the unfaithful and unfit. I hope—indeed, I believe—that this high court will never sanction any construction of the Constitution which will render it practically impotent for the purposes of its creation.

But in the brief filed by counsel for the respondent it is suggested that if an impeachable offense need not be criminal in fact it must still be criminal in its nature. It will at once be clear that it is a definition which does not define, and that the phrase "criminal in its nature" has no more certainty to commend it than has "good behavior." Recognizing this to be true, counsel go on to say, in the attempt to define their own language, that—

"For the same reason, even if the misdemeanors for which impeachment will lie are not necessarily indictable offenses, yet they must be of such a character as might properly be made criminal."

We are not called on to agree with their position as so stated, but have no great cause to fear it.

We understand a crime or misdemeanor to be, in the language of Blackstone:

"An act committed or omitted in violation of a public law either forbidding or commanding it."

If the phrase "criminal in nature" means those things which might be made crimes by legislative prohibition, every act here charged against this respondent comes within the description. Certainly Congress could by express criminal statute forbid a Federal judge to accept gifts of money from members of his bar, to communicate in private either orally or by letter with counsel in reference to cases pending for decision, to request financial favors from parties litigant before him, and as to the Commerce Court might well forbid the members of that court to engage in the business of hunting bargains from railroad companies engaged in interstate commerce. And certainly if such things are not already misdemeanors or misconduct or misbehavior, a statute to forbid them can not come too soon.

464. Discussion of the question of impeachability of a judge for offenses not subject to prosecution by indictment or information in a criminal court.

Argument that impeachment is not restricted to offenses indictable under Federal law, and that judges may be impeached for breaches of "good behavior."

On January 9, 1913,[1] in the Senate, sitting for the impeachment trial of Judge Robert W. Archbald, Mr. Manager George W. Norris, of Nebraska, in the final argument said:

It is strenuously argued by attorneys for respondent that an impeachment lies only for offenses which are criminal in their nature, and which could legally be the subject of prosecution by indictment.

The Constitution provides (Art. I, sec. 2) that the House of Representatives shall have the sole power of impeachment, and in section 3 of the same article it is provided that the Senate shall have the sole power to try all impeachments. It is undisputed, and, indeed, has never been questioned, that

[1] Third session Sixty-second Congress, Record, p. 1264.

to remove a United States judge from office two things are essential: First, he must be impeached by the House of Representatives, and, second, he must be tried and convicted by the Senate upon the articles of impeachment presented by the House. There is no other way provided by the Constitution of the United States for the removal from office of a judge. In the consideration of this subject, I shall draw a distinction between a judge of the United States court and all other civil officers of the United States. I shall demonstrate from the Constitution itself that a judge of the United States court can properly be impeached, convicted, and removed from office for any act from treason down to conduct that tends to bring the judiciary into disgrace, disrespect, or disrepute. Section 4 of Article II of the Constitution reads as follows:

"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."

It will be noted that this provision of the Constitution applies to all civil officers of the United States alike. It is undisputed that it includes judges, and were there no other provision of the Constitution applying particularly to the conduct or the tenure of office of judges, then there would be no distinction between the impeachment and trial of judges and any other civil officer, including the President and Vice President. But section 1, Article III, so far as the same is applicable to this case, provides: "The judges, both of the Supreme Court and inferior courts, shall hold their offices during good behavior." This provision of the Constitution, it will be observed, applies only and exclusively to judges. It has no relation to any other civil officer of the Government, and if we are not to nullify it entirely, we will find that it bears a very important part in the consideration of the particular branch of the case under discussion. I desire the Senate to continually bear in mind and to faithfully observe at all times during the consideration of this subject that in the construction of any legal document or instrument the court will so construe it as to give life and vitality to every part of the instrument, if it can reasonably and logically do so. It is our duty to construe these two provisions of the Constitution together and, if possible, to give equal vitality and life to them both.

Most of the civil officers provided for by the Constitution have a definite fixed term, but the judges hold office during good behavior. Much of the contention arises over what is meant in section 4, Article II, by the word "misdemeanor." It is contended by the respondent that this word is intended only to apply to such offenses as are indictable and punishable under the criminal law, and that a judge can not be impeached and removed from office unless his offense, whatever it may be called, is at least of so high a degree as to make it criminal and indictable. This construction, if adhered to, absolutely

nullifies that provision of section 1, Article III, above quoted which provides that judges shall hold their offices during good behavior. If judges can hold their offices only during good behavior, then it necessarily and logically follows that they can not hold their offices when they have been convicted of any behavior that is not good. If good behavior is an essential to holding the office, then misbehavior is a sufficient reason for removal from office. And, if, therefore, we give full life and vitality to both of these provisions of the Constitution, we must hold that the lack of good behavior, or misbehavior, mentioned in section 1, Article III, is synonymous with the word "misdemeanor" in section 4, Article II, in all cases where the offense is less in magnitude than in indictable one.

This view of these provisions of the Constitution has been sustained by practically all of the leading law writers upon the subject. It has also been sustained by the Senate in the trial of prior impeachment cases that have taken place. (John Randolph Tucker, Commentaries on the Constitution, vol. 1, sec. 200; George Ticknor Curtis, Constitutional History of the United States, p. 481; Watson, on the Constitution, vol. 2, p. 1034.) These citations showed that the Senate has in the past found officials guilty where the crime charged was not an indictable offense.

But suppose, for the sake of argument, it be admitted that misdemeanors" as used in section 4, Article II, was intended by the framers of the Constitution to exclude all offenses that were not indictabe under the law, it would still not necessarily follow that judges could not be impeached and removed from office for misdemeanors of so low a grade that they were not indictable. This section simply provides that all the civil officers of the United States shall be removed from office on impeachment for and conviction of treason, bribery, and other high crimes and misdemeanors. If in any other provision of the Constitution additional reasons for impeachment are given of some of these specified officers, or additional reasons are given why some of them should cease to hold office, then under such provision such specified officers could be tried, impeached, and removed, even though the offense of which they might be guilty was not included in any of those enumerated in section 4, Article II.

While I believe the construction placed on "misdemeanors" by the respondent is wrong, yet they have not made a defense to the various charges of misbehavior in office, even if we accept their construction of the law that misdemeanors in this section means only indictable offenses. If for instance, the President was expressly excluded from the officers named in this section, then I concede there would be no way under the Constitution for him to be impeached, tried, and removed from office, because there is no other provision of the Constitution that provides for any offense on the part of the President or limits his tenure of office, excepting the expiration of his regular term. But if judges were expressly elminated from

this section, and it read, "all civil officers of the United States except judges, etc.," it would not follow that they could not be impeached, convicted of misbehavior, and removed from office, because section 1, Article III, expressly provides that they shall only hold their offices during good behavior. In other words, our forefathers in framing the Constitution have wisely seen fit to provide for a requisite of holding office on the part of a judge that does not apply to other civil officers. The reason for this is apparent. The President, Vice President, and other civil officers, except judges, hold their positions for a definite, fixed term, and any misbehavior in office on the part of any of them can be rectified by the people or the appointing power when the term of office expires. But the judge has no such tenure of office. He is placed beyond the power of the people or the appointing power and is, therefore, subject only to removal for misbehavior. Since he can not be removed unless he be impeached by the House of Representatives, tried and convicted by the Senate, it must necessarily follow that misbehavior in office is an impeachable offense.

Any authority that has been cited by the respondent which shows or tends to show that a President, Vice President, or other civil officer other than a judge can not be impeached except the offense is at least of the grade of a misdemeanor that is indictable, does not apply to the impeachment or trial of a United States judge. To hold that an officer whose tenure of office is definite and fixed and who will necessarily go out of office within the course of a year or two, should not be impeached and removed from office for a misbehavior that does not reach in magnitude an indicatable offense, is entirely different from holding that an officer whose term of office ordinarily lasts for life should not be so impeached and removed. And our forefathers evidently had this distinction in mind when they applied exclusively to judges that provision of the Constitution which provides that judges shall hold their offices during good behavior.

If I am not right in my construction of the Constitution, then the Congress and the country are absolutely helpless in any attempt to get relief from a judge who drags the judicial ermine down into disgrace, but is careful in doing so not to commit any criminal offense. If I am not right in my construction, then that provision of the Constitution which says that judges shall hold office during good behavior is absolutely nullified, and as far as the good behavior part of it is concerned it has no vitality, no life, no effect. The judge who secretly arranges with attorneys on one side of a case to make a private argument—who not only makes such arrangement, but who initiates it—is guilty of a misbehavior. Every lawyer knows this; every Senator will admit it. Are we helpless in the premises simply because such an act is not indictable under the law? The judge who is continually asking favors of litigants in his court, if he is careful can not be convicted of any crime, but he is guilty of a

misbehavior. No one will dispute it. He is perverting the ends of justice. He is bringing the judiciary into disgrace and into disrepute. Carried to its logical conclusion, such conduct would soon mean that our judicial system would fall. It could not survive. Are we helpless? Must we say that, although the Constitution says the judge shall only hold his office during good behavior, the House of Representatives and the Senate are unable to apply those provisions of the Constitution which provide for impeachment, trial, and removal? If our forefathers meant anything when they provided in the Constitution that the judges should hold their offices during good behavior, they certainly intended that when the judge misbehaved he should be removed from office. Such a construction of the Constitution will not violate any principle of law, but, on the other hand, it will give full effect to a constitutional provision that would otherwise be meaningless and a dead letter. Our forefathers wisely, I think, refrained in the Constitution from giving any definition to "crimes and misdemeanors," and likewise refrained from defining what would be an abuse or a violation of "good behavior." Misbehavior, the opposite of good behavior, and I think the proper appellation of any conduct that is not good behavior, implies innumerable offenses of greater or less magnitude.

As to what is misbehavior in office must be determined in the first place by the House of Representatives when they adopt the articles of impeachment. It must be redetermined by the Senate when, after listening to the evidence, they pass judgment upon the case. I think all will agree that any conduct on the part of a judge which brings the office he holds into disgrace or disrepute, or which results or has a tendency to result in the denial of absolute justice to all persons engaged in litigation in his court, is a misbehavior. Certainly such conduct is not good behavior, and the Constitution provides that he shall only hold office during good behavior. Therefore it follows that in the absence of good behavior on the part of the judge he should be removed from office. It is undoubtedly true that the House of Representatives, in passing upon articles of impeachment, and the Senate upon the trial of the offense charged in such articles, where only misbehaving in office was shown, would take into consideration in reaching their conclusions not only the magnitude of such misbehaviors but the frequency of their occurrence. Where the evidence shows that a judge is continually misbehaving by engaging in conduct and practices that bring his office into disrespect and disrepute, the House and the Senate can not avoid their duty or their responsibility by saying that each distinct offense is in itself of small magnitude and not indictable.

465. Discussion of the clause "during good behavior" in relation to tenure of judicial offices, and effect by implication of misbehavior upon such tenure.

On January 8, 1913,[1] in the Senate, sitting for the impeachment trial of Judge Robert W. Archbald, Mr. Manager Edwin Yates Webb, of North Carolina, in final argument said:

> If the Constitution, Article III, section 1, means anything, then we want to bring it before the Senate to-day and ask Senators to say what it does mean when it provides that judges of the Supreme Court and inferior courts shall hold their offices "during good behavior."
>
> The provision in Article II of the Constitution, section 4, Mr. President, refers to impeachment of the President, Vice President, and other civil officers for treason, bribery, or other high crimes and misdemeanors; but later on in that same great instrument, after Article II had been adopted, the constitutional fathers say the judges of the United States shall hold their offices "during good behavior."
>
> It has been pointed out by many constitutional writers, and you yourselves see, that the people have no way of getting rid of a judge who has violated this provision by misbehavior except it is done by this great body. What does "during good behavior" mean?
>
> The Century Dictionary says:
>
> "During good behavior: As long as one remains blameless in the discharge of one's duties or the conduct of one's life; as, an office held during good behavior."
>
> Mr. Foster in his work on the Constitution (p. 586) makes this statement:
>
> "The Constitution provides that 'the judges, both of the Supreme and inferior courts, shall hold offices during good behavior.'"
>
> This necessarily implies that they can be removed in case of bad behavior; but no means except impeachment is provided for their removal, and judicial misconduct is not indictable by either a statute of the United States or the common law.
>
> Says Elliott in his Debates on the Constitution:
>
> "Mr. Dickinson moved as an amendment to Article XI, section 2, after the words 'good behavior,' the words: '*Provided*, That they may be removed by the Executive on the application of the Senate and the House of Representatives.'"
>
> This in respect to the judges. Mr. Gerry seconded the motion. Mr. Gouverneur Morris thought it a contradiction in terms to say that the judges should hold their offices during good behavior and yet be removable without a trial. Besides, it was fundamentally wrong to subject judges to so arbitrary an authority.
>
> But, mark you, the object then was to remove for bad behavior, but to give them a trial, as the Senate is doing in this particular case.
>
> Judge Lawrence, in the Johnson impeachment case (p. 643), says:
>
> "Impeachment was deemed sufficiently comprehensive to cover every proper case for removal."

[1] Third session Sixty-second Congress, Record, p. 1217.

In Watson on the Constitution the proposition is stated as follows (vol. 2, pp. 1036–1037):

"What will those who advocate the doctrine that impeachment will not lie except for an offense punishable by statute do with the constitutional provision relative to judges, which says: 'Judges, both of the Supreme and inferior courts, shall hold their offices during good behavior'? This means that as long as they behave themselves their tenure of office is fixed and they can not be disturbed. But suppose they cease to behave themselves? When the Constitution says 'a judge shall hold his office during good behavior' it means that he shall not hold it when it ceases to be good."

I suppose the argument in the Federalist, Mr. President, had as much to do with the adoption of the Constitution of the United States as any other authority. I quote:

"The principle of this objection would condemn a practice, which is to be seen in all the State governments—if not in all the governments with which we are acquainted—I mean that of rendering those who hold offices during pleasure dependent on the pleasure of those who appoint them." (Federalist, p. 306.)

And that is yourselves, Senators, for the President nominates judges and you appoint them.

"According to the plan of the convention, all the judges who may be appointed by the United States are to hold their offices during good behavior; which is conformable to the most approved State constitutions." (Federalist, p. 355.)

"Upon the whole, there can be no room to doubt that the convention acted wisely in copying from the models of those constitutions which have established good behavior as the tenure of judicial offices in point of duration, and that so far from being blamable on this account their plan would have been inexcusably defective if it had wanted this most important feature of good government." (Federalist, p. 361; Publius.)

Mr. President, after counsel for the respondent has discussed in 26 pages of his brief the proposition that the respondent is not impeachable unless he is indictable, he then makes this concession: That if it is not necessary to prove indictable offenses against the judge it is necessary, at least, to prove some offense of a criminal nature.

Mr. President, after all crime is nothing but misconduct. The only thing that is made criminal in this country is some form of misconduct.

Before proceeding to argue the facts in the case, I maintain that any judge of a high court who will dicker and traffic with litigants in his court while their cases are pending ought to be indictable, because such conduct is criminal in its nature, and the reason it has not been made indictable long ago is because the people of the United States have never thought it necessary to surround the judiciary with such a statute.

In reply to this argument, Mr. Alexander Simpson, counsel for respondent, said:[1]

> Now, I want to know what good behavior means. This is the provision:
>
> "The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation which shall not be diminished during their continuance in office."
>
> If you take that whole clause and consider it, either historically or grammatically, you will find that the words "good behavior" relate to good behavior in office. The compensation which is to be paid is for service in the office. The good behavior which is the tenure is to be good behavior in the office. But, say the managers, it is not good behavior in office which is the test at all, and you may impeach and remove a man even though he has behaved perfectly well in his office. Personally I agree with that; I am not challenging that position, but it answers their proposition now being considered that good behavior in office is the tenure by which the respondent holds, and for a breach of that he may be removed from office without considering the impeachment clause of the Constitution.
>
> I do not think that the good-behavior clause has anything whatever to do with the impeachment. Everybody knows how the good-behavior clause came into being. In the ancient days the judges, like all other civil officers, held their positions at the pleasure of the King. Then the barons wrested from the King his power of dismissal and required that there should a good-behavior tenure rather than a tenure at the pleasure of the King, subject at that time only to the power of impeachment. And then, a little later—I think it was in 1701, after the Revolution—there was added the removal power; so that, upon address, judges might be removed the same as upon impeachment, without a trial. Those are the circumstances under which the good-behavior tenure came into existence.
>
> But what does "good behavior" mean if you are going to take that alone into consideration? A man ill behaves if he speaks unduly cross to his wife and children. May he be removed from office because of that? If he is the happy owner of an automobile he may violate the speed laws and be hailed before some magistrate and fined. Is he to be removed from office because of that? No one would answer "yes" to either of those questions, and hence you must get down to something definite, something upon which you can lay your finger and say, "There is the definite thing which this man should have known, and as he should have known it and has chosen to violate it he must pay the penalty of his violation." That definite thing can be ascertained only by reference to the clause which says that he may be impeached for "treason, bribery, or other high crimes and misdemeanors." In the

[1] Record, p. 1270.

ordinary sense of the term one can understand how a man can be of perfectly good behavior in everything else and still be guilty of treason, but does anybody doubt but that he could be removed from office if he was guilty of treason? In truth, you have to go back from the good-behavior clause to the impeachment clause to find out what are the causes for an impeachment. It is the impeachment clause which is the controlling clause and not the good-behavior clause at all.

The argument that grows out of the claim that a violation of the good-behavior clause is sufficient justification for an impeachment is as clearly reasoning in a circle as anybody can well imagine. Concede that good behavior is the tenure, still you can not remove a man from office, under the Constitution, unless he is guilty of "treason, bribery, or other high crimes and misdemeanors," and hence the determinative factor as to whether or not a judge was of good behavior is whether or not he was guilty of "treason, bribery, or other high crimes and misdemeanors."

On January 3, 1913,[1] Mr. Manager Henry D. Clayton, of Alabama, presented a brief on behalf of the House of Representatives, covering this question, among others, as follows:

THE TENURE OF FEDERAL JUDGES LIMITED TO "DURING GOOD BEHAVIOR"

The provision in Article III, section 1, of our Constitution that "the judges, both of the Supreme and inferior courts, shall hold their offices during good behavior," which was also borrowed from the English laws, must be considered in pari materia with Article IV, section 2, providing that all civil officers of the United States shall be removed from office upon "impeachment for and conviction of treason, bribery, or other high crimes and misdemeanors."

Good behavior is thus made the essential condition on which the tenure to the judicial office rests, and any act committed or omitted by the incumbent in violation of this condition necessarily works a forfeiture of the office. The Constitution provides no method whereby a civil officer of the United States can be removed from office save by impeachment. It follows, therefore, that the framers of our Constitution must have intended that Federal judges, who are civil officers, should be removable from office by impeachment for misbehavior, which is the antithesis of good behavior. Otherwise the constitutional provision limiting the tenure of the judicial office to "during good behavior" would be entirely without force and effect.

466. Review of impeachments in Congress showing the nature of charges upon which impeachments have been brought and judgments of the Senate thereon.

[1] Record, of trial, p. 1051.

On January 3, 1913,[2] in the Senate, sitting for the impeachment trial of Judge Robert W. Archbald, Mr. Manager Henry D. Clayton, of Alabama, filed, on behalf of the House of Representatives, a brief, in which the following appears:

IMPEACHMENT TRIALS IN THE UNITED STATES SENATE

A concise statement of the general character of the several impeachment trials which have been heretofore conducted by the Senate of the United States:

IMPEACHMENT OF WILLIAM BLOUNT

William Blount, a Senator from Tennessee, was impeached in 1797, on a charge of conspiracy to create, promote, and set on foot within the jurisdiction of the United States, and to conduct and carry on from thence, a hostile military expedition against the territories and dominions of Spain in Florida and Louisiana for the purpose of wrestling such territories from Spain and conquering the same for Great Britain, with which Spain was at war; conspiring to incite the Creek and Cherokee Nations of Indians to commence hostilities against the subjects of Spain in violation of the then existing treaty between the United States and Spain, and conspiring to alienate the confidence of these Indian tribes from the principal agent of the United States appointed by the President, in accordance with law, to reside among the tribes; conspiring to seduce the official interpreter appointed by the United States to reside among the said Indian tribes from the duty and trust of his appointment, and conspiring to impair the confidence of the Cherokee Nation in the United States and create discontent among the Indians relative to the ascertainment of the boundary line of the United States and the Cherokee Nation under treaty provisions.

Shortly after Blount had been impeached by the House he was expelled by the Senate, and he was thereafter acquitted of the impeachment on the ground that he was not a civil officer of the United States.

IMPEACHMENT OF JOHN PICKERING

John Pickering, judge of the United States District Court for the District of New Hampshire, was impeached in 1803, on the ground that he had disobeyed the law in the course of proceedings brought by the United States to condemn a ship with its cargo for a violation of the customs laws, in that the judge delivered the ship to the claimant after its attachment by the marshall without requiring a bond, in accordance with the requirements of law; that in such proceedings he had

[2] Third session Sixty-second Congress. Record of trial, p. 1051.

refused to hear the testimony offered in behalf of the United States; that he had refused to grant an appeal by the Government from his arbitrary decree to the circuit court; and that he had attempted to perform his official functions while in a state of intoxication. The respondent did not appear to answer the articles exhibited against him, but his son presented a petition, alleging the insanity of his father and praying an opportunity to adduce evidence in that behalf. Evidence was admitted and considered by the Senate in support of this petition. The facts alleged in the articles of impeachment were proved to the satisfaction of the Senate, and the respondent was convicted on each of the articles against him and removed from office.

IMPEACHMENT OF SAMUEL CHASE

In 1804 the House impeached Samuel Chase, a justice of the United States Supreme Court, on the ground that he had been guilty of certain misconduct to the prejudice of the defendants in the trials of John Fries for treason and James Thompson Callender for breach of the sedition laws; that he had improperly attempted to induce a grand jury in Delaware to find an indictment against the editor of a newspaper for breach of the sedition laws; and for addressing an intemperate and inflammatory harangue to a jury in the State of Maryland.

On a party vote, the respondent was acquitted as to all of the articles exhibited against him.

IMPEACHMENT OF JAMES H. PECK

In 1830 James H. Peck, judge of the United States District Court for the District of Missouri, was impeached on the ground that he had grossly abused his power as a judge in sentencing an attorney to 24 hours imprisonment and suspension from the bar of his court for 18 calendar months for writing and publishing a moderate criticism of one of Judge Peck's decisions in a case in which this attorney had appeared in behalf of the plaintiff, with the result that the attorney was practically prevented from further participation in the case. The respondent was acquitted by the Senate on all of the articles presented against him on the ground that he was justified in assuming that he was legally clothed with the power that he had exercised, and that the element of malice had not been established.

IMPEACHMENT OF WEST H. HUMPHREYS

In 1862 West H. Humphreys, judge of the United States District Court for the District of Tennessee, was impeached for making a public speech declaring the right of secession and inciting revolt and rebellion against the Government of the United States; with the support and advocacy of the ordinance of secession; with aiding in the organization of an armed rebellion against the United States; with conspiring to oppose the authority of the Government of the United States

by force; with refusing to hold his court or perform its functions; and with unlawfully acting as judge of the Confederate district court in causing arrests, imprisonments, and confiscations. The respondent made no appearance, and the trial proceeded in his absence. The respondent was convicted on all the charges, with the exception of the unlawful arrests and confiscations, and was removed and disqualified from holding office.

IMPEACHMENT OF ANDREW JOHNSON

Andrew Johnson, President of the United States, was impeached in 1868 on 11 articles charging the attempted removal of E. M. Stanton, the Secretary of War, in violation of the so-called tenure-of-office act; in attempting to induce a general of the Army to violate the provisions of an act of Congress; and of attempting to bring into contempt and reproach the Congress of the United States by intemperate and inflammatory speeches. The respondent was acquitted on each of the charges by a margin of one vote.

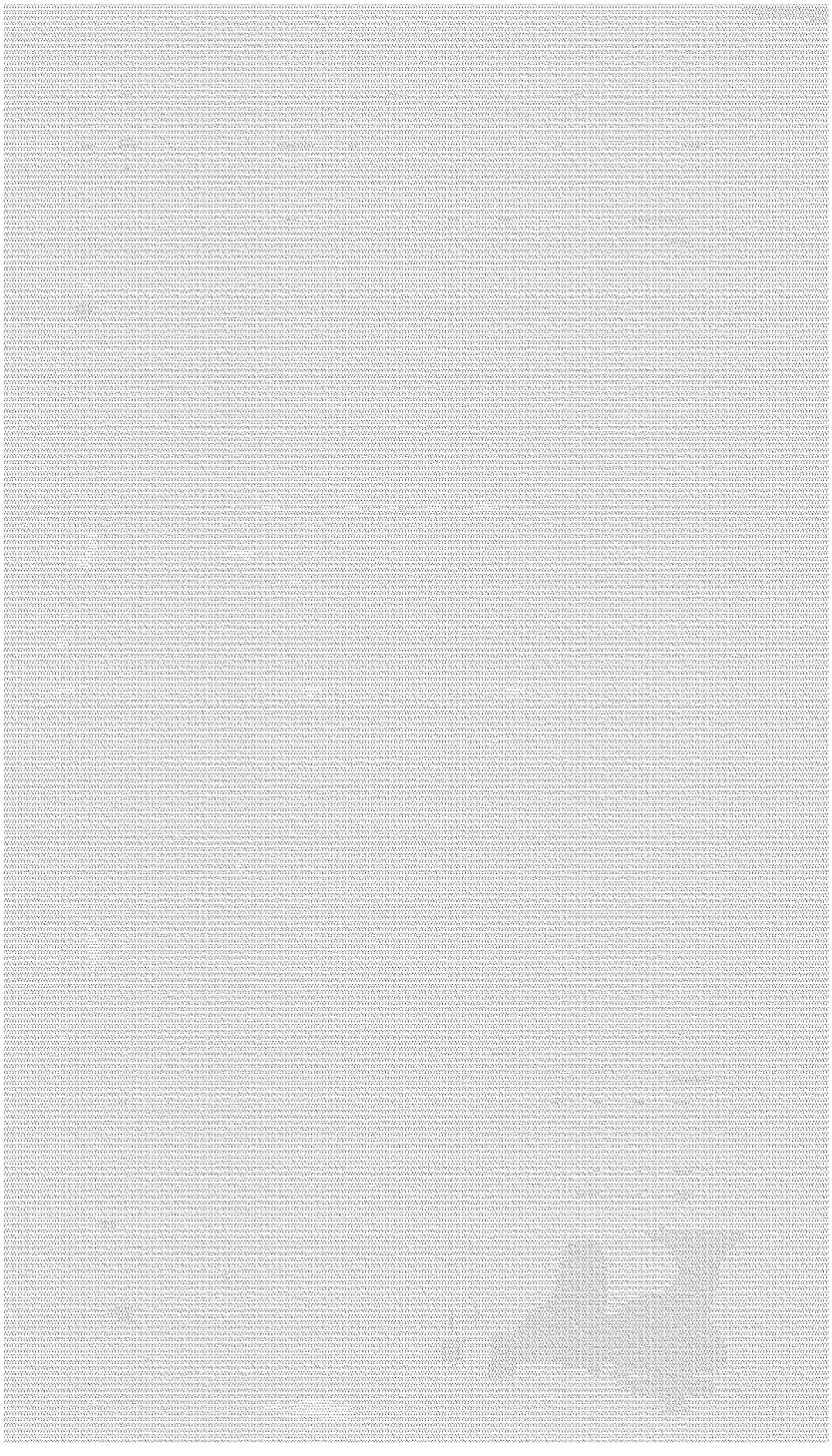
IMPEACHMENT OF WILLIAM W. BELKNAP

In 1876 William W. Belknap, Secretary of War, was impeached on five articles, charging that he had accepted a portion of the profits of an Army post tradership from a post trader whom he had appointed while he held the War portfolio. A few hours before the House formally adopted the articles of impeachment against him, Belknap resigned as Secretary of War and the President accepted his resignation. His counsel interposed a plea to the jurisdiction in the Senate on the ground that the respondent was not a civil officer of the United States at the time of his impeachment. This plea was overruled by a majority of less than two-thirds and the trial proceeded. The respondent was ultimately acquitted by the votes of the Senators who had originally voted in favor of the plea to the jurisdiction.

IMPEACHMENT OF CHARLES SWAYNE

In 1904 Charles Swayne, judge of the United States District Court for the Northern District of Florida, was impeached on 12 articles, charging that he had rendered false claims against the Government in his expense accounts; that he had appropriated to his own use, without making compensation to the owner, a certain railroad car belonging to a railroad company then in the possession of a receiver appointed by the respondent, and that he had allowed the credit claimed by the receiver for and on account of the expenditure incident to the improper use of this car as a part of the necessary expenses of operating the road; that he had resided outside of his district in violation of a statute of the United States; and that he had maliciously adjudged certain parties to be in contempt of court and imposed excessive fines and prison sentences therefor without just cause or warrant of law.

A trial was had and the respondent was ultimately acquitted.



Articles of Impeachment Voted by the House of Representatives

ARTICLES OF IMPEACHMENT VOTED BY THE HOUSE

Impeachment of Senator William Blount

WEDNESDAY, FEBRUARY 7, 1798.

A message from the House of Representatives, by Mr. Condy, their Clerk:

Mr. President: The House of Representatives have resolved that articles agreed by the House to be exhibited in the name of themselves and of all the people of the United States against William Blount, in maintenance of their impeachment against him for high crimes and misdemeanors, be carried to the Senate by the managers, Messrs. Sitgreaves, Bayard, Harper, Gordon, Pinckney, Dana, Sewall, Hosmer, Dennis, Evans, and Imlay, appointed to conduct the said impeachment. And he withdrew.

On motion,

Resolved, That the Senate will at twelve o'clock this day be ready to receive articles of impeachment against William Blount, late a Senator of the United States from the state of Tennessee, to be presented by the managers appointed by the House of Representatives.

Ordered, That the Secretary acquaint the House of Representatives therewith.

A message was announced from the House of Representatives, by the abovementioned managers, who, being introduced, Mr. Sitgreaves, their chairman, addressed the Senate as follows:

Mr. Vice President: The House of Representatives having agreed upon articles, in maintenance of their impeachment against William Blount, for high crimes and misdemeanors, and having appointed on their part managers of the said impeachment, the managers have now the honor to attend the Senate, for the purpose of exhibiting the said articles.

The Vice President then ordered the sergeant-at-arms to proclaim silence, after which he notified the managers that the Senate were ready to hear the articles of impeachment. Whereupon,

The chairman of the managers read the articles of impeachment, and they were received from him at the bar by the sergeant-at-arms, and laid on the table.

The Vice President then informed the managers, that the Senate will take proper order on the subject of the impeachment, of which due notice shall be given to the House of Representatives. And they withdrew.

The Secretary then read the articles of impeachment in the words following:

Articles exhibited by the House of Representatives of the United States, in the name of themselves, and of all the people of the United States, against William Blount, in maintenance of their impeachment against him for high crimes and misdemeanors.

ARTICLE 1. That, whereas the United States, in the months of February, March, April, May, and June, in the year of our Lord one thousand seven hundred and ninety seven, and for many years then past, were at peace with his Catholic Majesty, the king of Spain; and whereas, during the months aforesaid, his said Catholic Majesty and the king of Great Britain were at war with each other; yet the said William Blount, on or about the months aforesaid, then being a Senator of the United States, and well knowing the premises, but disregarding the duties and obligations of his high station, and designing and intending to disturb the peace and tranquillity of the United States, and to violate and infringe the neutrality thereof, did conspire, and contrive to create, promote, and set on foot, within the jurisdiction and territory of the United States, and to conduct and carry on, from thence, a military hostile expedition against the territories and dominions of his said Catholic Majesty in the Floridas and Louisiana, or a part thereof, for the purpose of wresting the same from his Catholic Majesty, and of conquering the same for the king of Great Britain, with whom his said Catholic Majesty was then at war as aforesaid, contrary to the duty of his trust and station as a Senator of the United States, in violation of the obligation of neutrality, and against the laws of the United States, and the peace and interests thereof.

ARTICLE 2. That, whereas, on the twenty-seventh day of October, in the year of our Lord one thousand seven hundred and ninety-five, a treaty of friendship, limits, and navigation, had been made and concluded between the United States and his Catholic Majesty, by the fifth article whereof it is stipulated and agreed, "that the two high contracting parties shall, by all the means in their power, maintain peace and harmony among the several Indian nations who inhabit the country adjacent to the lines and rivers, which, by the preceding articles, form the boundaries of the two Floridas. And the better to obtain this effect, both parties oblige themselves expressly to restrain by force all hostilities on the part of the Indian nations living within their boundary; so that Spain will not suffer her Indians to attack the citizens of the United States, nor the Indians inhabiting their territory; nor will the United States permit these last mentioned Indians to commence hostilities against the subjects of his Catholic Majesty or his Indians, in any manner whatever;" Yet, the said William Blount, on or about the months of February, March, April, May, and June, in the year of our Lord one thousand seven hundred and ninety-seven, then being a Senator of the United States, and well knowing the premises, and that the United States were then at peace with his said Catholic Majesty, and that his Catholic Majesty was at war with the king of Great Britain, but disregarding the duties of his high station, and the stipulations of the said treaty, and the obligations of neutrality, did conspire and contrive to excite the Creek and Cherokee nations of Indians, then inhabiting within the territorial boundary of the United States, to commence hostilities against the subjects and possessions of his Catholic majesty, in the Floridas and Louisiana, for the purpose of reducing the same to the dominion of the King of Great Britain, with whom his Catholic majesty was then at war as aforesaid; contrary to the duty of his trust and station as a Senator of the United States, in violation of the said treaty of friendship, limits, and navigation, and of the obligations of neutrality, and against the laws of the United States, and the peace and interests thereof.

ARTICLE 3. That, whereas, by the ordinances and acts of Congress for regulating trade and intercourse with the Indian tribes, and for preserving peace on the frontiers, it has been made lawful for the President of the United States, in order to secure the continuance of the friendship of the said Indian tribes, to appoint such persons, from time to time, as temporary agents, to reside among the Indians, as he shall think fit; and whereas, in pursuance of the said authority, the President of the United States, on or about the eighth day of September, in the year of our Lord one thousand seven hundred and ninety-six, did appoint Benjamin Hawkins to be principal temporary agent for Indian affairs, within the Indian nations south of the river Ohio, and north of the territorial line of

the United States; and whereas the said Benjamin Hawkins accepted the said appointment, and on the twenty-first day of April, in the year of our Lord one thousand seven hundred and ninety-seven, and for a long time before and afterwards, did exercise the functions, powers, and duties attached to the same, yet the said William Blount, on or about the said twenty-first day of April, in the year of our Lord one thousand seven hundred and ninety-seven, then being a Senator of the United States, and well knowing the premises, did, in the prosecution of his criminal designs and of his conspiracies aforesaid, and the more effectually to accomplish his intention of exciting the Creek and Cherokee nations of Indians to commence hostilities against the subjects of his Catholic majesty, further conspire and contrive to alienate and divert the confidence of the said Indian tribes or nations from the said Benjamin Hawkins, the principal temporary agent aforesaid, and to diminish, impair, and destroy the influence of the said Benjamin Hawkins with the said Indian tribes, and their friendly intercourse and understanding with him, contrary to the duty of his trust and station as a Senator of the United States, and against the ordinances and laws of the United States, and the peace and interests thereof.

ARTICLE 4. That, whereas, by the ordinances and acts of Congress aforesaid, it is made lawful for the President of the United States to establish trading houses at such places and posts on the western and southern frontiers, or in the Indian country, as he shall judge most convenient, for the purpose of carrying on a liberal trade with the several Indian nations within the limits of the United States, and to appoint an agent at each trading house established as aforesaid, with such clerks and assistants as may be necessary for the execution of the said acts: And whereas, by a treaty, made and concluded on the second day of July, in the year of our Lord one thousand seven hundred and ninety-one, between the United States and the Cherokee nation of Indians, inhabiting within the limits of the United States, it is stipulated and agreed, that "the United States will send such, and so many, persons to reside in said nation, as they may judge proper, not exceeding four, who shall qualify themselves to act as interpreters." And whereas the President of the United States, as well in pursuance of the authorities in this article mentioned, as of the acts of Congress referred to in the third article, did appoint James Carey to be interpreter for the United States to the said Cherokee nation of Indians, and assistant at the public trading house established at the Tellico blockhouse, in the state of Tennessee: And whereas the said James Carey did accept the said appointments, and on the twenty-first day of April, in the year of our Lord one thousand seven hundred and ninety-seven, and for a long time before and afterwards, did exercise the functions and duties attached to the same; yet, the said William Blount, on or about the said twenty-first day of April, in the year last aforesaid, then being a Senator of the United States, and well knowing the premises, did, in prosecution of his criminal designs, and in furtherance of his conspiracies aforesaid, conspire and contrive to seduce the said James Carey from the duty and trust of his said appointments, and to engage the said James Carey to assist in the promotion and execution of his said criminal intentions and conspiracies aforesaid, contrary to the duty of his trust and station as a Senator of the United States, and against the laws and treaties of the United States, and the peace and interests thereof.

ARTICLE 5. That whereas certain tribes or nations of Indians inhabit within the territorial limits of the United States, between whom, or many of them, and the settlements of the United States, certain boundary lines have, by successive treaties, been stipulated and agreed upon, to separate the lands and possessions of the said Indians from the lands and possessions of the United States, and the citizens hereof: And whereas, particularly, by the treaty in the last article mentioned to have been made with the Cherokee nation, on the second day of July, in the year of our Lord one thousand seven hundred and ninety-one, the boundary line between the United States and the said Cherokee nation was agreed and defined; and it was further stipulated that the same should be ascertained and marked plainly by three persons appointed on the part of the United States, and three Cherokees on the part of their nation. And whereas, by another treaty made with the said Cherokee nation, on the twenty-sixth day of June, in the year of our Lord one thousand seven hundred and ninety-four, the said hereinbefore recited treaty, of the second day of July, in the year of our Lord one thousand seven hundred and ninety-one, was confirmed and established; and it was mutually agreed that the said boundary line should be actually ascertained and marked in the manner prescribed by the said last mentioned treaty. And whereas in pursuance of the said treaties, commissioners

were duly nominated and appointed, on the part of the United States, to ascertain and mark the said boundary line; yet the said William Blount, on or about the twenty-first day of April, in the year of our Lord one thousand seven hundred and ninety-seven, then being a Senator of the United States, and well knowing the premises, in further prosecution of his said criminal designs, and of his conspiracies aforesaid, and the more effectually to accomplish his intention of exciting the said Indians to commence hostilities against the subjects of his Catholic majesty, did further conspire and contrive to diminish and impair the confidence of the said Cherokee nation in the government of the United States, and to create and foment discontents and disaffection among the said Indians towards the government of the United States in relation to the ascertainment and marking of the said boundary line, contrary to the duty of his trust and station as a Senator of the United States, and against the peace and interests thereof.

And the House of Representatives, by protestation, saving to themselves the liberty of exhibiting, at any time hereafter, any further articles, or other accusation, or impeachment, against the said William Blount, and also of replying to his answers, which he shall make unto the said articles, or any of them and of offering proof to all and every the aforesaid articles, and to all and every other articles of impeachment, or accusation which shall be exhibited by them, as the case shall require, do demand that the said William Blount may be put to answer the said crimes and misdemeanors, and that such proceedings, examinations, trials, and judgments, may be thereupon had and given as are agreeable to law and justice.

Signed by order and in behalf of the House.

JONATHAN DAYTON, *Speaker.*

Attest, JONATHAN W. CONDY, *Clerk.*

Impeachment of Judge John Pickering

The managers on the part of the House of Representatives, Messrs. Nicholson, Early, Rodney, Eustis, John Randolph, jr., Samuel L. Mitchill, George W. Campbell, Blackledge, Boyle, Joseph Clay, and Newton, were admitted; and Mr. Nicholson, the chairman, announced that they were the managers instructed by the House of Representatives to exhibit certain articles of impeachment against John Pickering, district judge of the district of New Hampshire.

They were requested by the President to take seats assigned them within the bar.

The Sergeant-at-Arms was directed to make proclamation, in the words following:

Oyes! Oyes! Oyes! All persons are commanded to keep silence on pain of imprisonment while the grand inquest of the nation is exhibiting to the Senate of the United States, sitting as a court of impeachments, articles of impeachment against John Pickering, judge of the district court of the district of New Hampshire.

The managers then rose, and Mr. Nicholson, their chairman, read the articles, as follows:

Articles Exhibited by the House of Representatives of the United States, in the Name of Themselves and of All the People of the United States, Against John Pickering, Judge of the District Court of the District of New Hampshire, in Maintenance and Support of Their Impeachment Against Him for High Crimes and Misdemeanors

Article 1. That whereas George Wentworth, surveyor of the district of New Hampshire, did, in the port of Portsmouth, in the said district, on waters that are navigable from the sea by vessels of more than 10 tons burden, on the 15th day of October, in the year 1802, seize the ship called the *Eliza*, of about 285 tons burden, whereof William Ladd was late master, together with her furniture, tackle, and apparel, alleging that there had been unladen from on board of said ship, contrary to law, sundry goods, wares, and merchandise, of foreign growth and manufacture, of the value of $400 and upwards, and did likewise seize on land within the said district, on the 7th day of October, in the year 1802, two cables of the value of $250, part of the said goods which were alleged to have been unladen from on board the said ship as aforesaid, contrary to law; and whereas Thomas Chadbourn, a deputy marshal of the said district of New Hampshire, did, on the 16th day of October, in the year 1802, by virtue of an order of the said John Pickering, judge of the district court of the said district of New Hampshire, arrest and detain in custody for trial before the said John Pickering, judge of the said district court, the said ship, called the *Eliza*, with her furniture, tackle, and apparel, and also the two cables aforesaid;

And whereas by an act of Congress, passed on the 2d day of March, in the year 1789, is is among other things provided that "upon the prayer of any claimant to the court that any ship or vessel, goods, wares, or merchandise so seized and prosecuted, or any part thereof, should be delivered to such claimant, it shall be lawful for the court to appoint three proper persons to appraise such ship or vessel, goods, wares, or merchandise, who shall be sworn in open court, for the faithful discharge of their duty; and such appraisement shall be made at the expense of the party on whose prayer it is granted; and on the return of such appraisement, if the claimant shall, with one or more sureties to be approved of by the court, execute a bond in the usual form to the United States for the payment of a sum equal to the sum of which the ship or vessel, goods, wares, or merchandise so prayed to be delivered and appraised and moreover produce a

certificate from the collector of the district wherein such trial is had and of the naval officer thereof, if any there be, that the duties on the goods, wares, and merchandise, or tonnage duty on the ship or vessel so claimed have been paid or secured in like manner as if the goods, wares, or merchandise, ship or vessel, had been legally entered, the court shall, by rule, order such ship or vessel, goods, wares, or merchandise, to be delivered to the said claimant;" yet the said John Pickering, judge of the said district court of the said district of New Hampshire, the said act of Congress not regarding but with intent to evade the same did order the said ship called the *Eliza*, with her furniture, tackle, and apparel, and the said two cables, to be delivered to a certain Eliphalet Ladd, who claimed the same, without his, the said Eliphalet Ladd, producing any certificate from the collector and naval officer of the said district that the tonnage duty on the said ship or the duties on the said cables had been paid or secured, contrary to his trust and duty as judge of the said district court, against the law of the United States and to the manifest injury of their revenue.

ART. 2. That whereas, at a special district court of the United States, begun and held at Portsmouth on the 11th day of November, in the year 1802, by John Pickering, judge of said court, the United States, by Joseph Whipple, the collector of said district, having libeled, propounded, and given the said judge to understand and be informed that the said ship *Eliza*, with her furniture, tackle, and apparel, had been seized as aforesaid, because there had been unladen therefrom, contrary to law, 2 cables and 100 pieces of check, of the value of $400, and having prayed in their said libel that the said ship, with her furniture, tackle, and apparel might by the said court be adjudged to be forfeited to the United States and be disposed of according to law; and a certain Eliphalet Ladd, by his proctor and attorney, having come into the said court, and having claimed the said ship *Eliza*, with her tackle, furniture, and apparel, and having denied that the said 2 cables and the said 100 pieces of check had been unladen from the said ship contrary to law, and having prayed the said court that the said ship, with her furniture, tackle, and apparel, might be restored to him, the said Eliphalet Ladd, the said John Pickering, judge of the said district court, did proceed to the hearing and trial of the said cause thus pending between the United States on the one part, claiming the said ship *Eliza* with her furniture, tackle, and apparel, as forfeited by law, and the said Eliphalet Ladd on the other part, claiming the said ship *Eliza*, with her furniture, tackle, and apparel, in his own proper right; and whereas John S. Sherburne, attorney for the United States in and for the said district of New Hampshire, did appear in the said district, as his special duty it was by law, to prosecute the said cause in behalf of the United States, and did produce sundry witnesses to prove the facts charged by the United States in the libel filed by the collector as aforesaid in the said court, and to show that the said ship *Eliza*, with her tackle, furniture, and apparel, was justly forfeited to the United States, and did pray the said court that the said witnesses might be sworn in behalf of the United States, yet the said John Pickering, being then judge of the said district court, and then in court sitting, with intent to defeat the just claims of the United States, did refuse to hear the testimony of the said witnesses so as aforesaid, produced in behalf of the United States, and without hearing the said testimony so adduced in behalf of the United States in the trial of the said cause did order and decree the said ship *Eliza*, with her furniture, tackle, and apparel, to be restored to the said Eliphalet Ladd, the claimant, contrary to his trust and duty as judge of the said district court, in violation of the laws of the United States and to the manifest injury of the revenue.

ART. 3. That whereas it is provided by an act of Congress, passed on the 24th day of September, in the year 1789, "that from all final decrees of the district court in cases of admiralty and maritime jurisdiction, where the matter in dispute exceeds the sum or value of $300 exclusive of costs, an appeal shall be allowed to the next circuit court to be held in such district;" and whereas on the 12th day of November, in the year 1802, at the trial of the aforesaid cause between the United States on the one part, claiming the said ship *Eliza*, with her furniture, tackle, and apparel, as forfeited for the cause aforesaid and the said Eliphalet Ladd on the other part, claiming the said ship *Eliza*, with her furniture tackle, and apparel, in his own proper right, the said John Pickering, judge of the said district of New Hampshire, did decree that the said ship *Eliza*, with her tackle, and apparel, in his own proper right, the said John Pickering, judge of claimant; and whereas the said John S. Sherburne, attorney for the United States in and for the said district of New Hampshire, and prosecuting the said cause for and on the part of the United States, on the said 12th day of November, in

the year 1802, did, in the name and behalf of the United States, claim an appeal from said decree of the district court to the next circuit court to be held in the said district of New Hampshire, and did pray the said district court to allow the said appeal, in conformity to the provisions of the act of Congress last aforesaid, yet the said John Pickering, judge of the said district court, disregarding the authority of the laws and wickedly meaning and intending to injure the revenues of the United States and thereby to impair their public credit, did absolutely and positively refuse to allow the said appeal as prayed for and claimed by the said John S. Sherburne in behalf of the United States, contrary to his trust and duty of judge of the district court, against the laws of the United States, to the great injury of the public revenue, and in violation of the solemn oath which he had taken to administer equal and impartial justice.

ART. 4. That whereas for the due, faithful, and impartial administration of justice, temperance and sobriety are essential qualities in the character of a judge, yet the said John Pickering, being a man of loose morals and intemperate habits, on the 11th and 12th days of November, in the year 1802, being then judge of the district court in and for the district of New Hampshire, did appear on the bench of the said court for the administration of justice in a state of total intoxication, produced by the free and intemperate use of intoxicating liquors; and did then and there frequently, in a most profane and indecent manner, invoke the name of the Supreme Being, to the evil example of all the good citizens of the United States; and was then and there guilty of other high misdemeanors, disgraceful to his own character as a judge and degrading to the honor of the United States.

And the House of Representatives, by protestation, saving to themselves the liberty of exhibiting at any time hereafter any further articles or other accusation or impeachment against the said John Pickering; and also of replying to his or any answers which he shall make to the said articles, or any of them; and of offering proof to all and every other articles, impeachment, or accusation which shall be exhibited by them as the case shall require, do demand that the said John Pickering may be put to answer the said high crimes and misdemeanors; and that such proceedings, examinations, trials, and judgments may be thereupon had and given as may be agreeable to law and justice.

Signed by order and in behalf of the House.

NATHANIEL MACON, *Speaker.*
JOHN BECKLEY, *Clerk.*

He then delivered the articles at the table; whereupon,

The President notified the managers that the Senate would take proper order on the subject of the impeachment, of which due notice should be given to the House of Representatives, and they withdrew.

The court adjourned to 12 o'clock to-morrow.

In the House,[1] on the same day, Mr. Nicholson, from the managers appointed on the part of this House to conduct the impeachment against John Pickering, judge of the district court of the United States for the district of New Hampshire, reported that the managers did this day carry to the Senate the articles of impeachment agreed to by this House on the 30th ultimo, and the said managers were informed by the Senate that their House would take proper measures relative to the said impeachment, of which this House should be duly notified.

In the Pickering case the rules were reported directly to the court of impeachment and agreed to therein.

Form of summons prescribed to command appearances of respondent in the Pickering impeachment.

Form of precept prescribed by the Senate to be indorsed on the writ of summons to Judge Pickering.

[1] House Journal, p. 515; Annals, p. 802.

In the Pickering case the Senate provided for issuing subpoenas of a specified form on application of managers or of respondent or his counsel.

In the Pickering impeachment the subpoenas were directed to the marshal of the district wherein the witness resided.

The forms of summons and subpoena in the Pickering case were communicated to the House and entered on its Journal.

Form of direction to the marshal for service of subpoenas in the Pickering trial.

IMPEACHMENT OF JUSTICE SAMUEL CHASE

The managers were requested by the President to take seats assigned them within the bar, and the Sergeant-at-Arms was directed to make proclamation in the words following:

Oyes! Oyes! Oyes!
All persons are commanded to keep silence, etc. [In words as prescribed by the resolution.]

After the proclamation the managers rose, and Mr. Randolph, their chairman, read the articles of impeachment, as follows:

Articles exhibited by the House of Representatives of the United States, in the name of themselves and of all the people of the United States, against Samuel Chase, one of the associate justices of the Supreme Court of the United States, in maintenance and support of their impeachment against him for high crimes and misdemeanors.

ART. 1. That unmindful of the solemn duties of his office, and contrary to the sacred obligation by which he stood bound to discharge them, "faithfully and impartially, and without respect to persons," the said Samuel Chase, on the trial of John Fries, charged with treason, before the circuit court of the United States, held for the district of Pennsylvania, in the city of Philadelphia, during the months of April and May, one thousand eight hundred, whereat the said Samuel Chase presided, did, in his judicial capacity, conduct himself in a manner highly arbitrary, oppressive, and unjust, viz:

1. In delivering an opinion in writing, on the question of law, on the construction of which the defense of the accused materially depended, tending to prejudice the minds of the jury against the case of the said John Fries, the prisoner, before counsel had been heard in his defense;

2. In restricting the counsel for the said Fries from recurring to such English authorities as they believed apposite, or from citing certain statutes of the United States, which they deemed illustrative of the positions upon which they intended to rest the defense of their client;

3. In debarring the prisoner from his constitutional privilege of addressing the jury (through his counsel) on the law, as well as on the fact, which was to determine his guilt or innocence, and at the same time endeavoring to wrest from the jury their indisputable right to hear argument and determine upon the question of law, as well as the question of fact, involved in the verdict which they were required to give.

In consequence of which irregular conduct of the said Samuel Chase, as dangerous to our liberties as it is novel to our laws and usages, and said John Fries was deprived of the right, secured to him by the eighth article amendatory of the Constitution, was condemned to death without having been heard by counsel, in his defense, to the disgrace of the character of the American bench, in manifest violation of law and justice, and in open contempt of the right of juries, on which ultimately rest the liberty and safety of the American people.

ART. 2. That, prompted by a similar spirit of persecution and injustice, at a circuit court of the United States, held at Richmond, in the month of May, 1800, for the district of Virginia, whereat the said Samuel Chase presided, and before which a certain James Callender was arraigned for a libel on John Adams, then President of the United States, the said Samuel Chase, with intent to oppress and procure the conviction of the said Callender, did overrule the objection of John Basset, one of the jury, who wished to be excused from serving on the trial, because he had made up his mind as to the publication from which the words charged to be libelous in the indictment were extracted; and the said Basset was accordingly sworn, and did serve on the said jury, by whose verdict the prisoner was subsequently convicted.

ART. 3. That with intent to oppress and procure the conviction of the prisoner, the evidence of John Taylor, a material witness on behalf of the aforesaid Callender, was not permitted by the said Samuel Chase to be given in, on pretense that the said witness could not prove the truth of the whole of one of the charges contained in the indictment, although the said charge embraced more than one fact.

ART. 4. That the conduct of the said Samuel Chase was marked, during the whole course of the said trial, by manifest injustice, partiality, and intemperance, viz:

1. In compelling the prisoner's counsel to reduce to writing, and submit to the inspection of the court, for their admission or rejection, all questions which the said counsel meant to propound to the above-named John Taylor, the witness.

2. In refusing to postpone the trial, although an affidavit was regularly filed stating the absence of material witnesses on behalf of the accused; and although it was manifest that, with the utmost diligence, the attendance of such witnesses could not have been procured at that term.

3. In the use of unusual, rude, and contemptuous expressions toward the prisoner's counsel; and in falsely insinuating that they wished to excite the public fears and indignation, and to produce that insubordination to law to which the conduct of the judge did at the same time manifestly tend.

4. In repeated and vexatious interruptions of the said counsel, on the part of the said judge, which at length induced them to abandon their cause and their client, who was thereupon convicted and condemned to fine and imprisonment.

5. In an indecent solicitude, manifested by the said Samuel Chase, for the conviction of the accused, unbecoming even a public prosecutor, but highly disgraceful to the character of a judge, as it was subversive of justice.

ART. 5. And whereas it is provided by the act of Congress passed on the 24th day of September, 1786, entitled "An act to establish the judicial courts of the United States," that for any crime or offense against the United States the offender may be arrested, imprisoned, or bailed, agreeably to the usual mode of process in the State where such offender may be found; and whereas it is provided by the laws of Virginia that upon presentment by any grand jury of an offense not capital the court shall order the clerk to issue a summons against the person or persons offending to appear and answer such presentment at the next court; yet the said Samuel Chase did, at the court aforesaid, award a capias against the body of the said James Thompson Callender, indicted for an offense not capital, whereupon the said Callender was arrested and committed to close custody, contrary to law in that case made and provided.

ART. 6. And whereas it is provided by the thirty-fourth section of the aforesaid act, entitled "An act to establish the judicial courts of the United States," that the laws of the several States, except where the Constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as the rules of decision in trials at common law in the courts of the United States in cases where they apply; and whereas by the laws of Virginia it is provided that in cases not capital the offender shall not be held to answer any presentment of a grand jury until the court next succeeding that during which such presentment shall have been made, yet the said Samuel Chase, with intent to oppress and procure the conviction of the said James Thompson Callender, did, at the court aforesaid, rule and adjudge the said Callender to trial during the term at which he, the said Callender, was presented and indicted, contrary to law in that case made and provided.

ART. 7. That at a circuit court of the United States for the district of Delaware, held at Newcastle, in the month of June 1800, whereas the said Samuel Chase presided, the said Samuel Chase, disregarding the duties of his office, did descend from the dignity of a judge and stoop to the level of an informer by refusing to discharge the grand jury, although entreated by several of the said jury so to do; and after the said grand jury had regularly declared through their foreman that they had found no bills of indictment, nor had any presentments to make, by observing to the said grand jury that he, the said Samuel Chase, understood "that a highly seditious temper had manifested itself in the State of Delaware among a certain class of people, particularly in Newcastle County, and more especially in the town of Wilmington, where lived a most seditious printer, unrestrained by any principle of virtue, and regardless of social order, that the name of this printer was"—but checking himself, as if sensible of the indecorum which he was committing, added "that it might be assuming too much to mention the name of this person, but it becomes your

duty, gentlemen, to inquire diligently into this matter," or words to that effect; and that with intention to procure the prosecution of the printer in question the said Samuel Chase did, moreover, authoritatively enjoin on the district attorney of the United States the necessity of procuring a file of the papers to which he alluded (and which were understood to be those published under the title of "Mirror of the Times and General Advertiser"), and, by a strict examination of them, to find some passage which might furnish the groundwork of a prosecution against the printer of the said paper, thereby degrading his high judicial functions and tending to impair the public confidence in and respect for the tribunals of justice so essential to the general welfare.

ART. 8. And whereas mutual respect and confidence between the Government of the United States and those of the individual States, and between the people and those governments, respectively, are highly conducive to that public harmony without which there can be no public happiness, yet the said Samuel Chase, disregarding the duties and dignity of his judicial character, did, at a circuit court for the district of Maryland, held at Baltimore in the month of May, 1803, pervert his official right and duty to address the grand jury then and there assembled on the matters coming within the province of the said jury, for the purpose of delivering to the said grand jury an intemperate and inflammatory political harangue, with intent to excite the fears and resentment of the said grand jury and of the good people of Maryland against their State government and constitution, a conduct highly censurable in any, but peculiarly indecent and unbecoming in a judge of the Supreme Court of the United States; and, moreover, that the said Samuel Chase then and there, under pretense of exercising his judicial right to address the said grand jury, as aforesaid, did, in a manner highly unwarrantable, endeavor to excite the odium of the said grand jury and of the good people of Maryland against the Government of the United States by delivering opinions which, even if the judicial authority were competent to their expression on a suitable occasion and in a proper manner, were at that time, and as delivered by him, highly indecent, extrajudicial, and tending to prostitute the high judicial character with which he was invested to the low purpose of an electioneering partisan.

And the House of Representatives, by protestation, saving to themselves the liberty of exhibiting, at any time hereafter, any further articles, or other accusation or impeachment against the said Samuel Chase, and also of replying to his answers which he shall make until the said articles, or any of them, and of offering proof to all and every aforesaid articles, and to all and every other articles, impeachment, or accusation, which shall be exhibited by them as the case shall require, do demand that the said Samuel Chase may be put to answer the said crimes and misdemeanors, and that such proceedings, examinations, trials, and judgments may be thereupon had and given as are agreeable to law and justice.

After the reading of the article[1] the President notified the managers that the Senate would take proper order on the subject of the impeachment, of which due notice should be given to the House of Representatives.

The managers delivered the articles of impeachment at the table and withdrew.

Thereupon the high court of impeachment adjourned.

The managers having returned to the House, Mr. Randolph, their chairman, reported[2] that they did this day carry to the Senate the articles of impeachment agreed to by this House on the 4th instant, and that the said managers were informed by the Senate that their House would take proper measures relative to the said impeachment, of which this House should be duly notified.

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[1] The articles are not given in the Senate Journal (p. 510) on the day of their presentation, so the signatures of the Speaker and Clerk do not appear.

[2] House Journal, p. 47.

Impeachment of Judge James H. Peck

Having laid the article impeaching Judge Peck on the Senate table, the managers returned and reported verbally to the House.

The article of impeachment against Judge Peck having been presented, the Senate ordered a writ of summons to issue, and informed the House thereof.

After which the managers rose, and Mr. Buchanan, their chairman, read the following article, which appears in full in the journal of the impeachment:

Article Exhibited by the House of Representatives of the United States, in the name of themselves, and of all the people of the United States, against James H. Peck, Judge of the District Court of the United States for the district of Missouri, in maintenance and support of their impeachment against him for high misdemeanors in office.

ARTICLE.

That the said James H. Peck, judge of the district court of the United States for the district of Missouri, at a term of the said court, holden at St. Louis, in the State of Missouri, on the 4th Monday in December, 1825, did, under and by virtue of the power and authority vested in the said court, by the act of the Congress of the United States, entitled "An act enabling the claimants to lands within the limits of the State of Missouri and Territory of Arkansas to institute proceedings to try the validity of their claims," approved on the 26th day of May, 1824, render a final decree of the said court in favor of the United States, and against the validity of the claim of the petitioners, in a certain matter or cause depending in the said court, under the said act, and before that time prosecuted in the said court, before the said judge, by Julie Soulard, widow of Antoine Soulard, and James G. Soulard, Henry G. Soulard, Eliza Soulard, and Benjamin A. Soulard, children and heirs at law of said Antoine Soulard, petitioners against the United States, praying for the confirmation of their claim, under the said act, to certain lands situated in the said State of Missouri; and the said court did, thereafter, on the 30th day of December, in said year, adjourn to sit again on the third Monday in April, 1826.

And the said petitioners did, and at the December term of the said court, holden by and before the said James H. Peck, judge as aforesaid, in due form of law, under the said act, appeal against the United States from the judgment and decree so made and entered in the said matter, to the Supreme Court of the United States; of which appeal, so made and taken in the said district court, the said James H. Peck, judge of the said court, had then and there full notice. And the said James H. Peck, after the said matter or cause had so been duly appealed to the Supreme Court of the United States and on or about the 30th day of March, 1826, did cause to be published, in a certain public newspaper, printed at the city of St. Louis, called "The Missouri Republican," a certain communication, prepared by the said James H. Peck, purporting to be the opinion of the said James H. Peck, as judge of the said court, in the matter or cause aforesaid, and purporting to set forth the reasons of the said James H. Peck, as such judge, for the said decree; and that Luke Edward Lawless, a citizen of the United States, and an attorney and counsellor at law in the said district court, and who had been of counsel for the petitioners in the said court, in the matter aforesaid, did, thereafter, and on or about the 8th day of April, 1826, cause to be published in a certain other newspaper, printed at the city of St. Louis, called "The Missouri Advocate and St. Louis Enquirer," a certain article signed "A Citizen," and purporting to contain an exposition of certain errors of doctrine and fact alleged to be contained in the opinion of the said James H. Peck, as before that time so published, which

publication by the said Luke Edward Lawless was to the effect following, viz:

"*To the Editor:*

"SIR: I have read, with the attention which the subject deserves, the opinion of Judge Peck on the claim of the widow and heirs of Antoine Soulard, published in the Republican of the 30th ultimo. I observe that, although the judge has thought proper to decide against the claim, he leaves the grounds of his decree open for further discussion.

"Availing myself, therefore, of this permission, and considering the opinion so published to be a fair subject of examination to every citizen who feels himself interested in, or aggrieved by, its operation, I beg leave to point the attention of the public to some of the principal errors which I think I have discovered in it. In doing so, I shall confine myself to little more than an enumeration of those errors, without entering into any demonstration or developed reasoning on the subject. This would require more space than a newspaper allows, and, besides, is not, as regards most of the points, absolutely necessary.

"Judge Peck, in this opinion, seems to me to have erred in the following assumptions, as well of fact as of doctrine:

"1. That, by the ordinance of 1754, a subdelegate was prohibited from making a grant in consideration of services rendered or to be rendered.

"2. That a subdelegate in Louisiana was not a subdelegate, as contemplated by the said ordinance.

"3. That O'Reilly's regulations, made in February, 1770, can be considered as demonstrative of the extent of the granting power of either the governor-general or the subdelegates, under the royal order of August, 1790.

"4. That the royal order of August, 1770 (as recited or referred to in the preamble to the regulations of Morales, of July, 1799), related exclusively to the governor-general.

"5. That the word 'mercedes,' in the ordinance of 1754, which, in the Spanish language, means 'gifts,' can be narrowed, by anything in that ordinance, or in any other law, to the idea of a grant to an 'ndian, or a reward to an informer, and much less to a mere sale for money.

"6. That O'Reilly's regulations were in their terms applicable, or ever were in fact applied to, or published in, upper Louisiana.

"7. That the regulations of O'Reilly have any bearing on the grant to Antoine Soulard, or that such a grant was contemplated by them.

"8. That the limitations to a square league of grants to new settlers in Opelousas, Attakapas, and Natchitoches (in eighth article of O'Reilly's regulations) prohibits a larger grant in upper Louisiana.

"9. That the regulations of the governor-general, Gayoso, dated 9th September, 1797, entitled 'Instructions to be observed for the admission of new settlers,' prohibit, in future, a grant for services, or have the effect of annulling that to Antoine Soulard, which was made in 1796, and not located or surveyed until February, 1804.

"10. That the complete titles made by Gayoso are not to be referred to as affording the construction made by Gayoso himself, of his own regulations.

"11. That, although the regulations of Morales were not promulgated as law in upper Louisiana, the grantee in the principal case was bound by them, inasmuch as he had notice, or must be presumed, 'from the official station which he held,' to have had notice, of their terms.

"12. That the regulations of Morales 'exclude all belief that any law existed under which a confirmation of the title in question could have been claimed.'

"13. That the complete titles (produced to the court) made by the governor-general, or the intendant-general, though based on incomplete titles, not conformable to the regulations of O'Reily, Gayoso, or Morales, afford no inference in favor of the power of the lieutenant-governor, from whom these incomplete titles emanated, and must be considered as anomalous exercises of power in favor of individual grantees.

"14. That the language of Morales himself, in the complete titles issued by him, on concessions made by the lieutenant-governor of upper Louisiana, anterior to the date of his regulations, ought not to be referred to as furnishing the construction which he, Morales, put on his own regulations.

"15. That the uniform practice of the subdelegates, or lieutenant-governor of upper Louisiana, from the first establishment of that province to the 10th March, 1804, is to be disregarded as proof of law, usage, or custom therein.

"16. That the historical fact that nineteen-twentieths of the titles to lands in upper Louisiana were not only incomplete but not conformable to the regulations of O'Reily, Gayoso, or Morales at the date of the cession to the United States, affords no inference in favor of the general legality of those titles.

"17. That the fact that incomplete concessions, whether floating or located, were, previous to the cession, treated and considered by the Government and population of Louisiana as property, salable, transferable, and the subject of inheritances and distribution ab intestato, furnishes no inference in favor of those titles, or to their claim to the protection of the treaty of cession, or of the law of nations.

"18. That the laws of Congress heretofore passed in favor of incomplete titles furnish no argument or protecting principle in favor of those titles of a precisely similar character, which remain unconfirmed.

"In addition to the above, a number of other errors, consequential on those indicated, might be stated. The judge's doctrine as to the forfeiture which he contends is inflicted by Morales's regulations, seems to me to be peculiarly pregnant with grievous consequences. I shall, however, not tire the reader with any further enumeration, and shall detain him only to observe, by way of conclusion, that the judge's recollection of the argument of the counsel for the petitioner, as delivered at the bar, differs materially from what I can remember, who also heard it. In justice to the counsel I beg to observe that all that I have now submitted to the public has been suggested by that argument as spoken, and by the printed report of it, which is even now before me.

"A CITIZEN."

And the said James H. Peck, judge as aforesaid, unmindful of the solemn duties of his station, and that he held the same, by the Constitution of the United States, during good behavior only, with intention wrongfully and unjustly to oppress, imprison, and otherwise injure the said Luke Edward Lawless, under color of law, did, thereafter, at a term of the said district court of the United States for the district of Missouri, begun and held at the city of St. Louis, in the State of Missouri, on the 3d Monday in April, 1826, arbitrarily, oppressively, and unjustly, and under the further color and pretense that the said Luke Edward Lawless was answerable to the said court for the said publication signed "A Citizen," as for a contempt thereof, institute, in the said court, before him, the said James H. Peck, judge as aforesaid, certain proceedings against the said Luke Edward Lawless, in a summary way, by attachment issued for that purpose by the order of the said James H. Peck, as such judge, against the person of the said Luke Edward Lawless, touching the said pretended contempt, under and by virtue of which said attachment the said Luke Edward Lawless was, on the 21st day of April, 1826, arrested, imprisoned, and brought into the said court, before the said judge, in the custody of the marshal of the said State; and the said James H. Peck, judge as aforesaid, did, afterwards, on the same day, under the color and pretenses aforesaid, and with the intent aforesaid, in the said court, then and there, unjustly, oppressively, and arbitrarily, order and adjudge that the said Luke Edward Lawless, for the cause aforesaid, should be committed to prison for the period of twenty-four hours, and that he should be suspended from practicing as an attorney or counsellor at law in the said district court for the period of eighteen calendar months from that day, and did then and there further cause the said unjust and oppressive sentence to be carried into execution; and the said Luke Edward Lawless was, under color of the said sentence, and by the order of the said James H. Peck, judge as aforesaid, thereupon suspended from practicing as such attorney or counsellor in the said court for the period aforesaid, and immediately committed to the common prison in the said city of St. Louis, to the great disparagement of public justice, the abuse of judicial authority, and to the subversion of the liberties of the people of the United States.

And the House of Representatives by protestation, saving to themselves the liberty of exhibiting, at any time hereafter, any further articles, or other accusations of impeachment, against the said James H. Peck, and also of replying to his answers which he shall make unto the article herein preferred against him, and of offering proof to the same, and every part thereof, and to all and every other articles, accusation, or impeachment, which shall be exhibited by them as the case shall require, do demand that the said James H. Peck may be

put to answer the misdemeanor herein charged against him, and that such proceedings, examinations, trials, and judgments, may be thereupon had and given, and may be agreeable to law and justice.

A. STEVENSON,
Speaker of the House of Representatives, United States.

Attest:
M. ST. CLAIR CLARKE,
Clerk, House of Representatives, United States.

IMPEACHMENT OF JUDGE WEST H. HUMPHREYS

This message was duly delivered in the House, and presently four of the managers appointed by the House of Representatives, namely, Mr. Bingham, Mr. Pendleton, Mr. Train, and Mr. Dunlap (Mr. Hickman not being present), appeared below the bar.

Mr. Bingham advanced and said:

Mr. President, myself and associates are managers appointed by the House of Representatives, and instructed in their name to appear at the bar of the Senate, and present articles of impeachment against West H. Humphreys, judge of the district court of the United States for the several districts of Tennessee, for high crimes and misdemeanors.

The VICE-PRESIDENT. The managers on the part of the House of Representatives will please be seated, at seats prepared for them within the bar of the Senate.

The managers were conducted to the seats prepared for them in the area between the Secretary's desk and the seats of the Senators.

The VICE-PRESIDENT. The Sergeant-at-Arms of the Senate will now make the usual proclamation.

The Sergeant-at-Arms, GEORGE T. BROWN, Esq. Oyez! oyez! oyez! All persons are commanded to keep silence on pain of imprisonment, while the grand inquest of the nation is exhibiting to the Senate of the United States articles of impeachment against West H. Humphreys, judge of the district court of the United States for the districts of Tennessee.

Mr. Bingham (all the managers standing) read the articles of impeachment, as follows:

Articles exhibited by the House of Representatives of the United States in the name of themselves and of all the people of the United States against West H. Humphreys, judge of the district court of the United States for the several districts of the State of Tennessee, in maintenance and support of their impeachment against him for high crimes and misdemeanors.

ARTICLE 1. That, regardless of his duties as a citizen of the United States, and unmindful of the duties of his said office, and in violation of the sacred obligation of his official oath "to administer justice without respect to persons," "and faithfully and impartially discharge all of the duties incumbent upon him as judge of the district court of the United States for the several districts of the State of Tennessee agreeable to the Constitution and laws of the United States," the said West H. Humphreys, on the 29th day of December, A.D. 1860, in the city of Nashville, in said State, the said West H. Humphreys then being a citizen of the United States, and owing allegiance thereto, and then and there being judge of the district court of the United States for the several districts of said State, at a public meeting, on the day and year aforesaid, held in said city of Nashville, and in the hearing of divers persons then there present, did endeavor by public speech to incite revolt and rebellion within said State against the Constitution and Government of the United States, and did then and there publicly declare that it was the right of the people of said State, by an ordinance of secession, to absolve themselves from all allegiance to the Government of the United States, the Constitution and laws thereof.

ART. 2. That, in further disregard of his duties as a citizen of the United States, and unmindful of the solemn obligations of his office as judge of the district court of the United States for the several districts of the State of Tennessee, and that he held his said office, by the Constitution of the United States, during good behavior only, with intent to abuse the high trust reposed in him

as such judge, and to subvert the lawful authority and Government of the United States within said State, the said West H. Humphreys, then being judge of the district court of the United States, as aforesaid, to wit, in the year of our Lord 1861, in said State of Tennessee, did, together with other evil-minded persons within said State, openly and unlawfully support, advocate, and agree to an act commonly called an ordinance of secession, declaring the State of Tennessee independent of the Government of the United States, and no longer within the jurisdiction thereof.

ART. 3. That in the years of our Lord 1861 and 1862, within the United States, and in said State of Tennessee, the said West H. Humphreys, then owing allegiance to the United States of America, and then being district judge of the United States, as aforesaid, did then and there, to wit: within said State, unlawfully, and in conjunction with other persons, organize armed rebellion against the United States and levy war against them.

ART. 4. That on the 1st day of August, A.D. 1861, and on divers other days since that time, within said State of Tennessee, the said West H. Humphreys, then being judge on the district court of the United States, as aforesaid, and J. C. Ramsay, and Jefferson Davis, and others, did unlawfully conspire together "to oppose by force the authority of the Government of the United States," contrary to his duty as such judge and to the laws of the United States.

ART. 5. That said West H. Humphreys, with intent to prevent the due administration of the laws of the United States within said State of Tennessee, and to aid and abet the overthrow of "the authority of the Government of the United States" within said State, has, in gross disregard of his duty as judge of the district court of the United States, as aforesaid, and in violation of the laws of the United States, neglected and refused to hold the district court of the United Sates, as by law he was required to do, within the several districts of the State of Tennessee, ever since the 1st day of July, A.D. 1861.

ART. 6. That the said West H. Humphreys, in the year of our Lord 1861, within the State of Tennessee, and with intent to subvert the authority of the Government of the United States, to hinder and delay the due execution of the laws of the United States, and to oppress and injure citizens of the United States, did unlawfully act as judge of an illegally constituted tribunal within said State, called the district court of the Confederate States of America, and as judge of said tribunal last named said West H. Humphreys, with the intent aforesaid, then and there assumed and exercised powers unlawful and unjust, to wit, in causing one Perez Dickinson, a citizen of said State, to be unlawfully arrested and brought before him, as judge of said alleged court of said Confederate States of America, and required him to swear allegiance to the pretended government of said Confederate States of America; and upon the refusal of said Dickinson so to do, the said Humphreys, as judge of said illegal tribunal, did unlawfully, and with the intent to oppress said Dickinson, require and receive of him a bond, conditioned that while he should remain within said State he would keep the peace, and as such judge of said illegal tribunal, and without authority of law, said Humphreys there and then decreed that said Dickinson should leave said State.

2. In decreeing within said State, and as judge of said illegal tribunal, the confiscation to the use of said Confederate States of America of property of citizens of the United States, and especially of property of one Andrew Johnson and one John Catron.

3. In causing, as judge of said illegal tribunal, to be unlawfully arrested and imprisoned within said State citizens of the United States because of their fidelity to their obligations as citizens of the United States, and because of their rejection of, and their resistance to, the unjust and assumed authority of said Confederate States of America.

ART. 7. That said West H. Humphreys, judge of the district court of the United States as aforesaid, assuming to act as judge of said tribunal known as the district court of the Confederate States of America, did, in the year of our Lord 1861, without lawful authority, and with intent to injure one William G. Brownlow, a citizen of the United States, cause said Brownlow to be unlawfully arrested and imprisoned within said State in violation of the rights of said Brownlow as a citizen of the United States, and of the duties of said Humphreys as a district judge of the United States.

And the House of Representatives, by protestation, saving to themselves the liberty of exhibiting at any time hereafter any further articles, or other accusation or impeachment against the said West H. Humphreys, and also of replying

to his answers which he shall make unto the articles herein preferred against him, and of offering proof to the same and every part thereof, and to all and every other article, accusation, or impeachment which shall be exhibited by them as the case shall require, do demand that the said West H. Humphreys may be put to answer the high crimes and misdemeanors herein charged against him, and that such proceedings, examinations, trials, and judgments may be thereupon had and given as may be agreeable to law and justice.

GALUSHA A. GROW,
Speaker House of Representatives.

Attest:
EMERSON ETHERIDGE
Clerk House of Representatives.

Impeachment of Secretary William W. Belknap

On April 4,[1] in the House, the Secretary of the Senate delivered this message:

I am directed to inform the House that the Senate is ready to receive the managers appointed by the House of Representatives to carry to the Senate articles of impeachment against William W. Belknap, Secretary of War.

Soon after the receipt of this message Mr. Manager Lord, rising to a question of privilege,[2] asked if it was the wish of the House to accompany the managers in the presentation of the articles of impeachment. It was recalled that in the cases of Judge Humphreys and President Johnson the House had accompanied the managers; but, on the other hand, it was pointed out that the message of the Senate referred only to the managers. No proposition that the House attend was made and the matter dropped.

Soon after, in the Senate,[3] the managers of the impeachment on the part of the House of Representatives appeared at the bar (at 1 o'clock and 25 minutes p. m.) and their presence was announced by the Sergeant-at-Arms.

The President pro tempore. The managers on the part of the House of Representatives are admitted and the Sergeant-at-Arms will conduct them to seats provided for them within the bar of the Senate.

The managers were thereupon escorted by the Sergeant-at-Arms of the Senate to the seats assigned to them in the area in front of the Chair.

Mr. Manager Lord. Mr. President, the managers on the part of the House of Representatives are ready to exhibit on the part of the House articles of impeachment against William W. Belknap, late Secretary of War.

The President pro tempore. The Sergeant-at-Arms will make proclamation.

The Sergeant-at-Arms. Hear ye, hear ye, hear ye. All persons are commanded to keep silence, on pain of imprisonment, while the House of Representatives is exhibiting to the Senate of the United States articles of impeachment against William W. Belknap, late Secretary of War.

Mr. Manager Lord rose and read the articles of impeachment,[4] as follows:

Articles exhibited by the House of Representatives of the United States of America in the names of themselves and of all the people of the United States of America, against William W. Belknap, late Secretary of War, in maintenance and support of their impeachment against him for high crimes and misdemeanors while in said office.

Article I.

That William W. Belknap, while he was in office as Secretary of War of the United States of America, to wit, on the 8th day of October, 1870, had the power and authority, under the laws of the United States, as Secretary of War, as afore-

[1] House Journal, p. 743; Record, p. 2182.
[2] Record, p. 2184.
[3] Senate Journal, pp. 383–390; Record, pp. 2178–2180.
[4] These articles appear in full in the Senate Journal.

said, to appoint a person to maintain a trading establishment at Fort Sill, a military post of the United States; that said Belknap, as Secretary of War, as aforesaid, on the day and year aforesaid, promised to appoint one Caleb P. Marsh to maintain said trading establishment at said military post; that thereafter, to wit, on the day and year aforesaid, the said Caleb P. Marsh and one John S. Evans entered into an agreement in writing substantially as follows, to wit:

Articles of agreement made and entered into this 8th day of October, A. D. 1870, by and between John S. Evans, of Fort Sill, Indian Territory, United States of America, of the first part, and Caleb P. Marsh, of No. 51 West Thirty-fifth street, of the city, county, and State of New York, of the second part, witnesseth, namely:

"Whereas the said Caleb P. Marsh has received from Gen. William W. Belknap, Secretary of War of the United States, the appointment of posttrader at Fort Sill, aforesaid; and whereas the name of said John S. Evans is to be filled into the commission of appointment of said posttrader at Fort Sill, aforesaid, by permission and at the instance and request of said Caleb P. Marsh and for the purpose of carrying out the terms of this agreement; and whereas said John S. Evans is to hold said position of posttrader, as aforesaid, solely as the appointee of said Caleb P. Marsh and for the purposes hereinafter stated:

"Now, therefore, said John S. Evans, in consideration of said appointment and the sum of $1 to him in hand paid by said Caleb P. Marsh, the receipt of which is hereby acknowledged, hereby covenants and agrees to pay to said Caleb P. Marsh the sum of $12,000 annually, payable quarterly in advance, in the city of New York, aforesaid; said sum to be so payable during the first year of this agreement absolutely and under all circumstances, anything hereinafter contained to the contrary notwithstanding; and thereafter said sum shall be so payable, unless increased or reduced in amount, in accordance with the subsequent provisions of this agreement.

"In consideration of the premises, it is mutually agreed between the parties aforesaid as follows, namely:

"First. This agreement is made on the basis of seven cavalry companies of the United States Army, which are now stationed at Fort Sill aforesaid.

"Second. If at the end of the first year of this agreement the forces of the United States Army stationed at Fort Sill, aforesaid, shall be increased or diminished not to exceed one hundred men, then this agreement shall remain in full force and unchanged for the next year. If, however, the said forces shall be increased or diminished beyond the number of one hundred men, then the amount to be paid under this agreement by said John S. Evans to said Caleb P. Marsh shall be increased or reduced in accordance therewith and in proper proportion thereto. The above rule laid down for the continuation of this agreement at the close of the first year thereof shall be applied at the close of each succeeding year so long as this agreement shall remain in force and effect.

"Third. This agreement shall remain in force and effect so long as said Caleb P. Marsh shall hold or control, directly or indirectly, the appointment and position of posttrader at Fort Sill, aforesaid.

"Fourth. This agreement shall take effect from the date and day the Secretary of war, aforesaid, shall sign the commission of posttrader at Fort Sill, aforesaid, said commission to be issued to said John S. Evans at the instance and request of said Caleb P. Marsh and solely for the purpose of carrying out the provisions of this agreement.

"Fifth. Exception is hereby made in regard to the first quarterly payment under this agreement, it being agreed and understood that the same may be paid at any time within the next thirty days after the said Secretary of War shall sign the aforesaid commission of posttrader at Fort Sill.

"Sixth. Said Caleb P. Marsh is at all times, at the request of said John E. Evans, to use any proper influence he may have with said Secretary of War for the protection of said John S. Evans while in the discharge of his legitimate duties in the conduct of the business as posttrader at Fort Sill, aforesaid.

"Seventh. Said John S. Evans is to conduct the said business of posttrader at Fort Sill, aforesaid, solely on his own responsibility and in his own name, it being expressly agreed and understood that said Caleb P. Marsh shall assume no liability in the premises whatever.

"Eighth. And it is expressly understood and agreed that the stipulations and convenants aforesaid are to apply to and bind the heirs, executors, and administrators of the respective parties.

In witness whereof the parties to these presents have hereunto set their hands and seals the day and year first above written.

"JOHN S. EVANS, [SEAL.]
"C. P. MARSH, [SEAL.]

"Signed, sealed, and delivered in presence of—
"E. T. BARTLETT."

That thereafter, to wit, on the 10th day of October, 1870, said Belknap, as Secretary of War, aforesaid, did, at the instance and request of said Marsh, at the city of Washington, in the District of Columbia, appoint said John S. Evans to maintain said trading establishment at Fort Sill, the military post aforesaid, and in consideration of said appointment of said Evans, so made by him as Secretary of War, as aforesaid, the said Belknap did, on or about the 2d day of November, 1870, unlawfully and corruptly receive from said Caleb P. Marsh the sum of $1,500, and that at divers times thereafter, to wit, on or about the 17th of January, 1871, and at or about the end of each three months during the term of one whole year, the said William W. Belknap, while still in office as Secretary of War, as aforesaid, did unlawfully receive from said Caleb P. Marsh like sums of $1,500, in consideration of the appointment of the said John S. Evans by him, the said Belknap, as Secretary of War, as aforesaid, and in consideration of his permitting said Evans to continue to maintain the said trading establishment at said military post during that time; whereby the said William W. Belknap, who was then Secretary of War, as aforesaid, was guilty of high crimes and misdemeanors in office.

ARTICLE II.

That said William W. Belknap, while he was in office as Secretary of War of the United States of America, did, at the city of Washington, in the District of Columbia, on the 4th day of November, 1873, willfully, corruptly, and unlawfully take and receive from one Caleb P. Marsh the sum of $1,500, in consideration that he would continue to permit one John S. Evans to maintain a trading establishment at Fort Sill, a military post of the United States, which said establishment said Belknap, as Secretary of War, as aforesaid, was authorized by law to permit to be maintained at said military post, and which the said Evans had been before that time appointed by said Belknap to maintain; and that said Belknap, as Secretary of War, as aforesaid, for said consideration, did corruptly permit the said Evans to continue to maintain the said trading establishment at said military post. And so the said Belknap was thereby guilty, while he was Secretary of War, of a high misdemeanor in his said office.

ARTICLE III.

That said William W. Belknap was Secretary of War of the United States of America before and during the month of October, 1870, and continued in office as such Secretary of War until the 2d day of March, 1876; that as Secretary of War as aforesaid said Belknap had authority, under the laws of the United States, to appoint a person to maintain a trading establishment at Fort Sill, a military post of the United States, not in the vicinity of any city or town; that on the 10th day of October, 1870, said Belknap, as Secretary of War as aforesaid, did, at the city of Washington, in the District of Columbia, appoint one John S. Evans to maintain said trading establishment at said military post; and that said John S. Evans, by virtue of said appointment, has since, till the 2d day of March, 1876, maintained a trading establishment at said military post, and that said Evans, on the 8th day of October, 1870, before he was so appointed to maintain said trading establishment as aforesaid, and in order to procure said appointment and to be continued therein, agreed with one Caleb P. Marsh that, in consideration that said Belknap would appoint him, the said Evans, to maintain said trading establishment at said military post, at the instance and request of said Marsh, he, the said Evans, would pay to him a large sum of money, quarterly, in advance, from the date of his said appointment by said Belknap, to wit, $12,000 during the year immediately following the 10th day of October, 1870, and other large sums of money, quarterly, during each year that he, the said Evans, should be permitted by said Belknap to maintain said trading establishment at said post; that said Evans did pay to said Marsh said sum of money quarterly during each year after his said appointment, until the month of December, 1875, when the last of said payments was made; that said Marsh, upon the receipt of each of said payments, paid one-half thereof to him, the said

Belknap. Yet the said Belknap, well knowing these facts, and having the power to remove said Evans from said position at any time, and to appoint some other person to maintain said trading establishment, but criminally disregarding his duty as Secretary of War, and basely prostituting his high office to his lust for private gain, did unlawfully and corruptly continue said Evans in said position and permit him to maintain said establishment at said military post during all of said time, to the great injury and damage of the officers and soldiers of the Army of the United States stationed at said post, as well as of emigrants, freighters, and other citizens of the United States, against public policy, and to the great disgrace and detriment of the public service.

Whereby the said William W. Belknap was, as Secretary of War as aforesaid, guilty of high crimes and misdemeanors in office.

ARTICLE IV.

That said William W. Belknap, while he was in office and acting as Secretary of War of the United States of America, did, on the 10th day of October, 1870, in the exercise of the power and authority vested in him as Secretary of War as aforesaid by law, appoint one John S. Evans to maintain a trading establishment at Fort Sill, a military post of the United States, and he, the said Belknap, did receive, from one Caleb P. Marsh, large sums of money for and in consideration of his having so appointed said John S. Evans to maintain said trading establishment at said military post, and for continuing him therein, whereby he has been guilty of high crimes and misdemeanors in his said office.

Specification 1.—On or about the 2d day of November, 1870, said William W. Belknap, while Secretary of War as aforesaid, did receive from Caleb P. Marsh $1,500, in consideration of his having appointed said John S. Evans to maintain a trading establishment at Fort Sill aforesaid, and for continuing him therein.

Specification 2.—On or about the 17th day of January, 1871, the said William W. Belknap, while Secretary of War as aforesaid, did receive from said Caleb P. Marsh $1,500, in consideration of his having appointed said John S. Evans to maintain a trading establishment at Fort Sill aforesaid, and for continuing him therein.

Specification 3.—On or about the 18th day of April, 1871, the said William W. Belknap, while Secretary of War as aforesaid, did receive from said Caleb P. Marsh $1,500, in consideration of his having appointed said John S. Evans to maintain a trading establishment at Fort Sill aforesaid, and continuing him therein.

Specification 4.—On or about the 25th day of July, 1871, the said William W. Belknap, while Secretary of War as aforesaid, did receive from said Caleb P. Marsh $1,500, in consideration of his having appointed said John S. Evans to maintain a trading establishment at Fort Sill aforesaid, and continuing him therein.

Specification 5.—On or about the 10th day of November, 1871, the said William W. Belknap, while Secretary of War as aforesaid, did receive from said Caleb P. Marsh $1,500, in consideration of his having appointed said John S. Evans to maintain a trading establishment at Fort Sill aforesaid, and continuing him therein.

Specification 6.—On or about the 15th day of January, 1872 the said William W. Belknap, while Secretary of War as aforesaid, did receive from said Caleb P. Marsh $1,500, in consideration of his having appointed said John S. Evans to maintain a trading establishment at Fort Sill aforesaid, and continuing him therein.

Specification 7.—On or about the 13th day of June, 1872, the said William W. Belknap, while Secretary of War as aforesaid, did receive from said Caleb P. Marsh $1,500, in consideration of his having appointed said John S. Evans to maintain a trading establishment at Fort Sill aforesaid, and continuing him therein.

Specification 8.—On or about the 22d day of November, 1872, the said William W. Belknap, while Secretary of War as aforesaid, did receive from said Caleb P. Marsh $1,500, in consideration of his having appointed said John S. Evans to maintain a trading establishment at Fort Sill aforesaid, and continuing him therein.

Specification 9.—On or about the 28th day of April, 1873, the said William W. Belknap, while Secretary of War as aforesaid, did receive from said Caleb P. Marsh, $1,000, in consideration of his having appointed said John S. Evans to

maintain a trading establishment at Fort Sill aforesaid, and continuing him therein.

Specification 10.—On or about the 16th day of June, 1873, the said William W. Belknap, while Secretary of War as aforesaid, did receive from said Caleb P. Marsh $1,700, in consideration of his having appointed said John S. Evans to maintain a trading establishment at Fort Sill aforesaid, and continuing him therein.

Specification 11.—On or about the 4th day of November, 1873, the said William W. Belknap, while Secretary of War as aforesaid, did receive from said Caleb P. Marsh $1,500, in consideration of his having appointed said John S. Evans to maintain a trading establishment at Fort Sill aforesaid, and continuing him therein.

Specification 12.—On or about the 22d day of January, 1874, the said William W. Belknap, while Secretary of War as aforesaid, did receive from said Caleb P. Marsh $1,500, in consideration of his having appointed said John S. Evans to maintain a trading establishment at Fort Sill aforesaid, and continuing him therein.

Specification 13.—On or about the 10th day of April, 1874, the said William W. Belknap, while Secretary of War as aforesaid, did receive from said Caleb P. Marsh $1,500, in consideration of his having appointed said John S. Evans to maintain a trading establishment at Fort Sill aforesaid, and continuing him therein.

Specification 14.—On or about the 9th day of October, 1874, the said William W. Belknap, while Secretary of War as aforesaid, did receive from said Caleb P. Marsh $1,500, in consideration of his having appointed said John S. Evans to maintain a trading establishment at Fort Sill aforesaid, and continuing him therein.

Specification 15.—On or about the 24th day of May, 1875, the said William W. Belknap, while Secretary of War as aforesaid, did receive from said Caleb P. Marsh $1,500, in consideration of his having appointed said John S. Evans to maintain a trading establishment at Fort Sill aforesaid, and continuing him therein.

Specification 16.—On or about the 17th day of November, 1875, the said William W. Belknap, while Secretary of War as aforesaid, did receive from said Caleb P. Marsh $1,500, in consideration of his having appointed said John S. Evans to maintain a trading establishment at Fort Sill aforesaid, and continuing him therein.

Specification 17.—On or about the 15th day of January, 1876, the said William W. Belknap, while Secretary of War as aforesaid, did receive from said Caleb P. Marsh $750, in consideration of his having appointed said John S. Evans to maintain a trading establishment at Fort Sill aforesaid, and continuing him therein.

ARTICLE V.

That one John S. Evans was, on the 10th day of October, in the year of 1870, appointed by the said Belknap to maintain a trading establishment at Fort Sill, a military post on the frontier, not in the vicinity of any city or town, and said Belknap did from that day continuously to the 2d day of March, 1876, permit said Evans to maintain the same; and said Belknap was induced to make said appointment by the influence and request of one Caleb P. Marsh; and said Evans paid to said Marsh, in consideration of such influence and request and in consideration that he should thereby induce said Belknap to make said appointment, divers large sums of money at various times, amounting to about $12,000 a year from the date of said appointment to the 25th day of March, 1872, and to about $6,000 a year thereafter until the 2d day of March, 1876, all which said Belknap well knew; yet said Belknap did, in consideration that he would permit said Evans to continue to maintain said trading establishment and in order that said payments might continue and be made by said Evans to said Marsh as aforesaid, corruptly receive from said Marsh, either to his, the said Belknap's, own use or to be paid over to the wife of said Belknap, divers large sums of money at various times, namely: The sum of $1,500 on or about the 2d day of November, 1870; the sum of $1,500 on or about the 17th day of January, 1871; the sum of $1,500 on or about the 18th day of April, 1871,; the sum of $1,500 on or about the 25th day of July, 1871; the sum of $1,500 on or about the 10th day of November, 1871; the sum of $1,500 on or about the 15th day of January, 1872; the sum of $1,500 on or about the 13th day of June, 1872; the sum of $1,500 on or about

the 22d day of November, 1872; the sum of $1,000 on or about the 28th day of April, 1873; the sum of $1,700 on or about the 16th day of June, 1873; the sum of $1,500 on or about the 4th day of November, 1873; the sum of $1,500 on or about the 22d day of January, 1873; the sum of $1,500 on or about the 10th day of April, 1874; the sum of $1,500 on or about the 9th day of October, 1874; the sum of $1,500 on or about the 24th day of May, 1875; the sum of $1,500 on or about the 17th day of November, 1875; the sum of $750 on or about the 15th day of January, 1876; all of which acts and doings were while the said Belknap was Secretary of War of the United States as aforesaid, and were a high misdemeanor in said office.

And the House of Representatives by protestation, saying to themselves the liberty of exhibiting at any time hereafter any further articles of accusation or impeachment against the said William W. Belknap, late Secretary of War of the United States, and also of replying to his answers which he shall make unto the articles herein preferred against him, and of offering proof to the same and every part thereof, and to all and every other article, accusation, or impeachment which shall be exhibited by them, as the case shall require, do demand that the said William W. Belknap may be put to answer the high crimes and misdemeanors in office herein charged against him, and that such proceedings, examinations, trials, and judgments may be thereupon had and given as may be agreeable to law and justice.

MICHAEL C. KERR,
Speaker of the House of Representatives.

Attest:

GEO. M. ADAMS,
Clerk of the House of Representatives.

IMPEACHMENT OF JUDGE CHARLES SWAYNE

The PRESIDENT pro tempore. The Sergeant-at-Arms will make proclamation.

The Sergeant-at-Arms (D. M. Ransdell) made proclamation as follows:

Hear ye, hear ye, hear ye. All persons will keep silence, on pain of imprisonment, while the House of Representatives is exhibiting to the Senate of the United States articles of impeachment against Charles Swayne, judge of the district court of the United States for the northern district of Florida.

Mr. Manager PALMER. Mr. President.

The PRESIDENT pro tempore. Mr. Manager.

Mr. Manager PALMER. The managers on the part of the House of Representatives are ready to exhibit articles of impeachment against Charles Swayne, district judge of the United States in and for the northern district of Florida, as directed by the House, in the words and figures following:[1]

Articles exhibited by the House of Representatives of the United States of America, in the name of themselves and of all the people of the United States of America, against Charles Swayne, a judge of the United States, in and for the northern district of Florida, in maintenance and support of their impeachment against him for high crimes and misdemeanor in office.

ARTICLE I. That the said Charles Swayne, at Waco, in the State of Texas, on the 20th day of April, 1897, being then and there a United States district judge in and for the northern district of Florida, did then and there, as said judge, make and present to R. M. Love, then and there being the United States marshal in and for the northern district of Texas, a false claim against the Government of the United States in the sum of $230, then and there knowing said claim to be false, and for the purpose of obtaining payment of said false claim, did then and there as said judge, make and use a certain false certificate then and there knowing said certificate to be false, said certificate being in the words and figures following:

"UNITED STATES OF AMERICA, *Northern District of Texas, ss:*

"I, Charles Swayne, district judge of the United States for the northern district of Florida, do hereby certify that I was directed to and held court at the city of Waco, in the northern district of Texas, twenty-three days, commencing on the 20th day of April, 1897; also, that the time engaged in holding said court, and in going to and returning from the same, was twenty-three days, and that my reasonable expenses for travel and attendance amounted to the sum of two hundred and thirty dollars and ——— cents, which sum is justly due me for such attendance and travel.

"CHAS. SWAYNE, *Judge.*

"WACO, *May 15, 1897.*

"Received of R. M. Love, United States marshal for the northern district of Texas, the sum of 230 dollars and no cents in full payment of the above account.

"230.

"CHAS. SWAYNE,"

when in truth and in fact, as the said Charles Swayne then and there well knew, there was then and there justly due the said Swayne from the Government of the United States and from said United States marshal a far less sum,

[1] The articles were enrolled on parchment, following the practice of the early trials. In the later trials of Johnson and Belknap the articles had been engrossed on ordinary white paper.

whereby he has been guilty of a high crime and misdemeanor in his said office.

ART. 2. That the said Charles Swayne, having been duly appointed, confirmed, and commissioned as judge of the United States in and for the northern district of Florida, entered upon the duties of his office, and while in the exercise of his office as judge, as aforesaid, the said Charles Swayne was entitled by law to be paid his reasonable expenses for travel and attendance when lawfully directed to hold court outside of the northern district of Florida, not to exceed $10 per diem, to be paid upon his certificate by the United States marshal for the district in which the court was held, and was forbidden by law to receive compensation for such services. That the said Charles Swayne, well knowing these provisions, falsely certified that his reasonable expenses for travel and attendance were $10 per diem while holding court at Tyler, Tex., twenty-four days commencing December 3, 1900, and seven days going to and returning from said Tyler, Tex., and received therefor from the Treasury of the United States, by the hand of John Grant, the United States marshal for the eastern district of Texas, the sum of $310, when the reasonable expenses incurred and paid by the said Charles Swayne for travel and attendance did not amount to the sum of $10 per diem.

Wherefore the said Charles Swayne, judge as aforesaid, misbehaved himself and was and is guilty of a high crime, to wit, the crime of obtaining money from the United States by a false pretense, and of a high misdemeanor in office.

ART. 3. That the said Charles Swayne having been duly appointed, confirmed, and commissioned as judge of the United States in and for the northern district of Florida, entered upon the duties of his office, and while in the exercise of his office of judge as aforesaid was entitled by law to be paid his reasonable expenses for travel and attendance when lawfully directed to hold court outside of the northern district of Florida, not to exceed $10 per diem, to be paid upon his certificate by the United States marshal of the district in which the court was held, and was forbidden by law to receive any compensation for such services. Yet the said Charles Swayne, well knowing these provisions, falsely certified that his reasonable expenses for travel in going to and coming from and attendance were $10 per diem while holding court at Tyler, Tex., thirty-five days from January 12, 1903, and six days going to and returning from said Tyler, Tex., and received therefor from the Treasury of the United States, by the hand of A. J. Houston, the United States marshal for the eastern district of Texas, the sum of $410, when the reasonable expenses of the said Charles Swayne incurred and paid by him during said period were much less than said sum.

Wherefore the said Charles Swayne, judge as aforesaid, misbehaved himself and was and is guilty of a high crime, to wit, obtaining money from the United States by a false pretense, and of a high misdemeanor in office.

ART. 4. That the said Charles Swayne having been duly appointed, confirmed, and commissioned as judge of the United States in and for the northern district of Florida, entered upon the duties of his office, and while in the exercise of his office as judge as aforesaid heretofore, to wit, A.D. 1898, did unlawfully appropriate to his own use, without making compensation to the owner, a certain railroad car, belonging to the Jacksonville, Tampa and Key West Railroad Company, for the purpose of transporting himself, his family, and friends from Guyencourt, in the State of Delaware, to Jacksonville, Fla., the said railroad company being at the time in the possession of a receiver appointed by said Charles Swayne, judge as aforesaid, on the petition of creditors.

The said car was supplied with provisions by the said receiver, which were consumed by said Swayne and his friends, and was provided with a conductor or porter at the cost and expense of said railroad company, and with transportation over connecting lines. The expenses of the trip were paid by the said receiver out of the funds of the said Jacksonville, Tampa and Key West Railroad Company, and the said Charles Swayne, acting as judge, allowed the credit claimed by the said receiver for and on account of the said expenditure as a part of the necessary expenses of operating said road. The said Charles Swayne, judge as aforesaid, used the said property without making compensation to the owner, and under a claim of right, for the reason that the same was in the hands of a receiver appointed by him.

Wherefore the said Charles Swayne, judge as aforesaid, was and is guilty of an abuse of judicial power and of a high misdemeanor in office.

ART. 5. That the said Charles Swayne was duly appointed, commissioned, and confirmed as judge of the United States in and for the northern district of Florida,

and entered upon the duties of said office, and while in the exercise of his office as aforesaid heretofore, to wit, A.D. 1893, did unlawfully appropriate to his own use, without making compensation to the owner, a certain railroad car belonging to the Jacksonville, Tampa and Key West Railroad Company for the purpose of transporting himself, his family, and friends from Jacksonville, Fla., to California, said railroad company being at the time in the possession of a receiver appointed by the said Charles Swayne, judge as aforesaid, on the petition of creditors.

The car was supplied with some provisions by the said receiver, which were consumed by the said Swayne and his friends, and it was provided with a porter at the cost and expense of the railroad company and also with transportation over connecting lines. The wages of said porter and the cost of said provisions were paid by the said receiver out of the funds of the Jacksonville, Tampa and Key West Railroad Company, and the said Charles Swayne, acting as judge as aforesaid, allowed the credits claimed by the said receiver for and on account of the said expenditures as a part of the necessary expenses of operating the said railroad. The said Charles Swayne, judge as aforesaid, used the said property without making compensation to the owner under a claim of right, alleging that the same was in the hands of a receiver appointed by him and he therefore had a right to use the same.

Wherefore the said Charles Swayne, judge as aforesaid, was and is guilty of an abuse of judicial power and of high misdemeanor in office.

ART. 6. That the said Charles Swayne, having been duly appointed and confirmed, was commissioned district judge of the United States in and for the northern district of Florida on the 1st day of April, A. D. 1890, to serve during good behavior, and thereafter, to wit, on the 22d day of April, A. D. 1890, took the oath of office and assumed the duties of his appointment, and established his residence at the city of St. Augustine, in the State of Florida, which was at that time within the said northern district. That subsequently, by an act of Congress approved the 23d of July, A. D. 1894, the boundaries of the said northern district of Florida were changed, and the city of St. Augustine and contiguous territory were transferred to the southern district of Florida; whereupon it became and was the duty of the said Charles Swayne to change his residence and reside in the northern district of Florida and to comply with the five hundred and fifty-first section of the Revised Statutes of the United States, which provides that—

"A district judge shall be appointed for each district, except in cases hereinafter provided. Every judge shall reside in the district for which he is appointed, and for offending against this provision shall be deemed guilty of a high misdemeanor."

Nevertheless the said Charles Swayne, judge as aforesaid, did not acquire a residence, and did not, within the intent and meaning of said act, reside in his said district, to wit, the northern district of Florida, from the 23d day of July, A. D. 1894, to the 1st day of October, A. D. 1900, a period of about six years.

Wherefore, the said Charles Swayne, judge as aforesaid, willfully and knowingly violated the aforesaid law and was and is guilty of a high misdemeanor in office.

ART. 7. That the said Charles Swayne, having been duly appointed and confirmed, was commissioned district judge of the United States in and for the northern district of Florida on the 1st day of April, A.D. 1890, to serve during good behavior, and thereafter, to wit, on the 22d day of April, A.D. 1890, took the oath of office and assumed the duties of his appointment, and established his residence at the city of St. Augustine, in the State of Florida, which was at that time within the said northern district. That subsequently, by an act of Congress of the United States approved the 23d day of July, A.D. 1894, the boundaries of the said northern district of Florida were changed, and the city of St. Augustine, with the contiguous territory, was transferred to the southern district of Florida, whereupon it became and was the duty of the said Charles Swayne to change his residence and reside in the northern district of Florida, as defined by said act of Congress, and to comply with section 551 of the Revised Statutes of the United States, which provides that—

"A district judge shall be appointed for each district, except in cases hereinafter provided. Every judge shall reside in the district for which he is appointed, and for offending against this provision shall be deemed guilty of a high misdemeanor."

Nevertheless, the said Charles Swayne, judge as aforesaid, totally disregarding his duty as aforesaid, did not acquire a residence, and within the intent and

meaning of said act did not reside in his said district, to wit, the northern district of Florida, from the 23d day of July, A.D. 1894, to the 1st day of January, A.D. 1903, a period of about nine years.

Wherefore the said Charles Swayne, judge as aforesaid, willfully and knowingly violated the aforesaid law, and was and is guilty of a high misdemeanor in office.

ART. 8. That the said Charles Swayne, having been appointed, confirmed, and duly commissioned as judge of the district court of the United States in and for the northern district of Florida, entered upon the duties of said office, and while in the exercise of his office as judge, as aforesaid, to wit, while performing the duties of a judge of a circuit court of the United States, heretofore, to wit, on the 12th day of November, A.D. 1901, at the city of Pensacola, in the county of Escambia, in the State of Florida, did maliciously and unlawfully adjudge guilty of a contempt of court and impose a fine of $100 upon and commit to prison for a period of ten days E. T. Davis, an attorney and counselor at law, for an alleged contempt of the circuit court of the United States.

Wherefore the said Charles Swayne, judge as aforesaid, misbehaved himself in his office of judge, and was and is guilty of an abuse of judicial power and of a high misdemeanor in office.

ART. 9. That the said Charles Swayne, having been appointed, confirmed, and duly commissioned as judge of the district court of the United States in and for the northern district of Florida, entered upon the duties of said office, and while in the exercise of his office as judge as aforesaid, to wit, while performing the duties of a judge of a circuit court of the United States heretofore, to wit, on the 12th day of November, A.D. 1901, at the city of Pensacola, in the county of Escambia, in the State of Florida, did knowingly and unlawfully adjudge guilty of a contempt of court and impose a fine of $100 upon and commit to prison for a period of ten days E. T. Davis, an attorney and counselor at law, for an alleged contempt of the circuit court of the United States.

Wherefore the said Charles Swayne, judge as aforesaid, misbehaved himself in his office of judge and was and is guilty of an abuse of judicial power and of a high misdemeanor in office.

ART. 10. That the said Charles Swayne, having been appointed, confirmed, and duly commissioned as judge of the district court of the United States in and for the northern district of Florida, entered upon the duties of said office, and while in the exercise of his office as judge as aforesaid, to wit, while performing the duties of a judge of a circuit court of the United States heretofore, to wit, on the 12th day of November, A.D. 1901, at the city of Pensacola, in the county of Escambia, in the State of Florida, did maliciously and unlawfully adjudge guilty of a contempt of court and impose a fine of $100 upon and commit to prison for a period of ten days Simeon Belden, an attorney and counselor at law, for an alleged contempt of the circuit court of the United States.

Wherefore the said Charles Swayne, judge as aforesaid, misbehaved himself in his office of judge and was and is guilty of an abuse of judicial power and of a high misdemeanor in office.

ART. 11. That the said Charles Swayne, having been appointed, confirmed, and duly commissioned as judge of the district court of the United States in and for the northern district of Florida, entered upon the duties of said office, and while in the exercise of his office as judge as aforesaid, to wit, while performing the duties of a circuit judge of the United States heretofore, to wit, on the 12th day of November, A. D. 1901, at the city of Pensacola, in the county of Escambia, in the State of Florida, did knowingly and unlawfully adjudge guilty of contempt of court and impose a fine of $100 upon and commit to prison for a period of ten days Simeon Belden, an attorney and counselor at law, for an alleged contempt of the circuit court of the United States.

Wherefore the said Charles Swayne, judge as aforesaid, misbehaved himself in his office as judge and was and is guilty of an abuse of judicial power and of a high misdemeanor in office.

ART. 12. That the said Charles Swayne, having been duly appointed, confirmed, and commissioned as judge of the United States in and for the northern district of Florida, entered upon the duties of his office, and while in the exercise of his office of judge heretofore, to wit, on the 9th day of December, A. D. 1902, at Pensacola, in the county of Escambia, in the State of Florida, did unlawfully and knowingly adjudge guilty of contempt and did commit to prison for the period of sixty days one W. C. O'Neal, for an alleged contempt of the district court of the United States for the northern district of Florida.

Wherefore the said Charles Swayne, judge aforesaid, misbehaved himself in his office of judge, as aforesaid, and was and is guilty of an abuse of judicial power and of a high misdemeanor in office.

And the House of Representatives by protestation, saying to themselves the liberty of exhibiting at any time hereafter any further articles of accusation or impeachment against the said Charles Swayne, judge of the United States court for the northern district of Florida, and also of replying to his answers which he shall make unto the articles herein preferred against him, and of offering proof to the same and every part thereof, and to all and every other article or accusation or impeachment which shall be exhibited by them as the case shall require, do demand that the said Charles Swayne may be put to answer the high crimes and misdemeanors in office herein charged against him, and that such proceedings, examinations, trials, and judgments may be thereupon had and given as may be agreeable to law and justice.

J. G. CANNON,
Speaker of the House of Representatives.

Attest:
A. MCDOWELL, *Clerk.*

IMPEACHMENT OF PRESIDENT ANDREW JOHNSON

The Sergeant-at-Arms proclaimed:

Hear ye, hear ye, hear ye. All persons are commanded to keep silence, on pain of imprisonment, while the House of Representatives is exhibiting to the Senate of the United States articles of impeachment against Andrew Johnson, President of the United States.

The managers then rose and remained standing, with the exception of Mr. Stevens, who was physically unable to do so, while Mr. Manager Bingham read the articles of impeachment, as follows:

Articles exhibited by the House of Representatives of the United States, in the name of themselves and all the people of the United States, against Andrew Johnson, President of the United States, in maintenance and support of their impeachment against him for high crimes and misdemeanors in office.

ARTICLE I.

That said Andrew Johnson, President of the United States, on the 21st day of February, in the year of our Lord 1868, at Washington, in the District of Columbia, unmindful of the high duties of his office, of his oath of office, and of the requirement of the Constitution that he should take care that the laws be faithfully executed, did unlawfully, and in violation of the Constitution and laws of the United States, issue an order in writing for the removal of Edwin M. Stanton from the office of Secretary for the Department of War, said Edwin M. Stanton having been theretofore duly appointed and commissioned, by and with the advice and consent of the Senate of the United States, as such Secretary, and said Andrew Johnson, President of the United States, on the 12th day of August, in the year of our Lord 1867, and during the recess of said Senate, having suspended by his order Edwin M. Stanton from said office, and within twenty days after the first day of the next meeting of said Senate—that is to say, on the 12th day of December, in the year last aforesaid—having reported to said Senate such suspension, with the evidence and reasons for his action in the case and the name of the person designated to perform the duties of such office temporarily until the next meeting of the Senate, and said Senate thereafterwards, on the 13th day of January, in the year of our Lord 1868, having duly considered the evidence and reasons reported by said Andrew Johnson for said suspension, and having refused to concur in said suspension, whereby and by force of the provisions of an act entitled "An act regulating the tenure of certain civil offices," passed March 2, 1867, said Edwin M. Stanton did forthwith resume the functions of his office, whereof the said Andrew Johnson had then and there due notice, and said Edwin M. Stanton, by reason of the premises, on said 21st day of February, being lawfully entitled to hold said office of Secretary for the Department of War, which said order for the removal of said Edwin M. Stanton is, in substance, as follows, that is to say:

"EXECUTIVE MANSION,
"*Washington, D.C., February 21, 1868.*

"SIR: By virtue of the power and authority vested in me as President by the Constitution and laws of the United States you are hereby removed from office as Secretary for the Department of War, and your functions as such will terminate upon receipt of this communication.

"You will transfer to Brevet Maj. Gen. Lorenzo Thomas, Adjutant-General of the Army, who has this day been authorized and empowered to act as Secretary of War ad interim, all records, books, papers, and other public property now in your custody and charge.

"Respectfully, yours,

ANDREW JOHNSON.

"Hon. EDWIN M. STANTON, *Washington, D.C.*"

Which order was unlawfully issued with intent then and there to violate the act entitled "An act regulating the tenure of certain civil offices," passed March 2, 1867; and with the further intent, contrary to the provisions of said act, in violation thereof, and contrary to the provisions of the Constitution of the United States, and without the advice and consent of the Senate of the United States, the said Senate then and there being in session, to remove said Edwin M. Stanton from the office of Secretary for the Department of War, the said Edwin M. Stanton being then and there Secretary of War, and being then and there in the due and lawful execution and discharge of the duties of said office, whereby said Andrew Johnson, President of the United States, did then and there commit, and was guilty of a high misdemeanor in office.

ARTICLE II.

That on said 21st day of February, in the year of our Lord 1868, at Washington, in the District of Columbia, said Andrew Johnson, President of the United States, unmindful of the high duties of his office, of his oath of office, and in violation of the Constitution of the United States, and contrary to the provisions of an act entitled "An act regulating the tenure of certain civil offices," passed March 2, 1867, without the advice and consent of the Senate of the United States, said Senate then and there being in session, and without authority of law, did, with intent to violate the Constitution of the United States and the act aforesaid, issue and deliver to one Lorenzo Thomas a letter of authority, in substance as follows, that is to say:

"EXECUTIVE MANSION,
"*Washington, D.C., February 21, 1868.*

"SIR: Hon. Edwin M. Stanton having been this day removed from office as Secretary for the Department of War, you are hereby authorized and empowered to act as Secretary of War ad interim, and will immediately enter upon the discharge of the duties pertaining to that office.

"Mr. Stanton has been instructed to transfer to you all the records, books, papers, and other public property now in his custody and charge.

"Respectfully, yours,

ANDREW JOHNSON.

"To Brevet Maj. Gen. LORENZO THOMAS,
"*Adjutant-General United States Army, Washington, D.C.*"

Then and there being no vacancy in said office of Secretary for the Department of War, whereby said Andrew Johnson, President of the United States, did then and there commit, and was guilty of a high misdemeanor in office.

ARTICLE III.

That said Andrew Johnson, President of the United States, on the 21st day of February, in the year of our Lord 1868, at Washington, in the District of Columbia, did commit and was guilty of a high misdemeanor in office in this, that, without authority of law, while the Senate of the United States was then and there in session, he did appoint one Lorenzo Thomas to be Secretary for the Department of War ad interim, without the advice and consent of the Senate and with intent to violate the Constitution of the United States, no vacancy having happened in said office of Secretary for the Department of War during the recess of the Senate, and no vacancy existing in said office at the time, and which said appointment, so made by said Andrew Johnson, of said Lorenzo Thomas, is in substance as follows, that is to say:

"EXECUTIVE MANSION,
"*Washington, D.C., February 21, 1868.*

"SIR: Hon. Edwin M. Stanton having been this day removed from office as Secretary for the Department of War, you are hereby authorized and empowered to act as Secretary of War ad interim, and will immediately enter upon the discharge of the duties pertaining to that office.

"Mr. Stanton has been instructed to transfer to you all the records, books, papers, and other public property now in his custody and charge.

"Respectfully, yours,

ANDREW JOHNSON.

"To Brevet Maj. Gen. LORENZO THOMAS,
"*Adjutant-General United States Army, Washington, D.C.*"

ARTICLE IV.

That said Andrew Johnson, President of the United States, unmindful of the high duties of his office and of his oath of office, in violation of the Constitution and laws of the United States, on the 21st day of February, in the year of our Lord 1868, at Washington, in the District of Columbia, did unlawfully conspire with one Lorenzo Thomas, and with other persons to the House of Representatives unknown, with intent, by intimidation and threats, unlawfully to hinder and prevent Edwin M. Stanton, then and there the Secretary for the Department of War, duly appointed under the laws of the United States, from holding said office of Secretary for the Department of War, contrary to and in violation of the Constitution of the United States and of the provisions of an act entitled "An act to define and punish certain conspiracies," approved July 31, 1861, whereby said Andrew Johnson, President of the United States, did then and there commit, and was guilty of a high crime in office.

ARTICLE V.

That said Andrew Johnson, President of the United States, unmindful of the high duties of his office and of his oath of office, on the 21st day of February, in the year of our Lord 1868, and on divers other days and times in said year, before the 2d day of March, A. D. 1868, at Washington, in the District of Columbia, did unlawfully conspire with one Lorenzo Thomas, and with other persons to the House of Representatives unknown, to prevent and hinder the execution of an act entitled "An act regulating the tenure of certain civil offices," passed March 2, 1867, and in pursuance of said conspiracy did unlawfully attempt to prevent Edwin M. Stanton, then and there being Secretary for the Department of War, duly appointed and commissioned under the laws of the United States, from holding said office, whereby the said Andrew Johnson, President of the United States, did then and there commit and was guilty of a high misdemeanor in office.

ARTICLE VI.

That said Andrew Johnson, President of the United States, unmindful of the high duties of his office and of his oath of office, on the 21st day of February, in the year of our Lord 1868, at Washington, in the District of Columbia, did unlawfully conspire with one Lorenzo Thomas, by force to seize, take, and possess the property of the United States in the Department of War, and then and there in the custody and charge of Edwin M. Stanton, Secretary for said Department, contrary to the provisions of an act entitled "An act to define and punish certain conspiracies," approved July 31, 1861, and with intent to violate and disregard an act entitled "An act regulating the tenure of certain civil offices," passed March 2, 1867, whereby said Andrew Johnson, President of the United States, did then and there commit a high crime in office.

ARTICLE VII.

That said Andrew Johnson, President of the United States, unmindful of the high duties of his office and of his oath of office, on the 21st day of February, in the year of our Lord 1868, at Washington, in the District of Columbia, did unlawfully conspire with one Lorenzo Thomas with intent unlawfully to seize, take, and possess the property of the United States in the Department of War, in the custody and charge of Edwin M. Stanton, Secretary for said Department, with intent to violate and disregard the act entitled "An act regulating the tenure of certain civil offices," passed March 2, 1867, whereby said Andrew Johnson, President of the United States, did then and there commit a high misdemeanor in office.

ARTICLE VIII.

That said Andrew Johnson, President of the United States, unmindful of the high duties of his office and of his oath of office, with intent unlawfully to control the disbursements of the moneys appropriated for the military service and for the Department of War, on the 21st day of February, in the year of our Lord 1868, at Washington, in the District of Columbia, did unlawfully and contrary to the provisions of an act entitled "An act regulating the tenure of certain civil offices," passed March 2, 1867, and in violation of the Constitution of the United States, and without the advice and consent of the Senate of the United States, and while the Senate was then and there in session, there being no vacancy in

the office of Secretary for the Department of War, with intent to violate and disregard the act aforesaid, then and there issue and deliver to one Lorenzo Thomas a letter of authority in writing, in substance as follows, that is to say:

"EXECUTIVE MANSION,
"*Washington, D. C., February 21, 1868.*

"SIR: Hon. Edwin M. Stanton having been this day removed from office as Secretary for the Department of War, you are hereby authorized and empowered to act as Secretary of War ad interim, and will immediately enter upon the discharge of the duties pertaining to that office.

"Mr. Stanton has been instructed to transfer to you all the records, books, papers, and other public property now in his custody and charge.

"Respectfully yours,

ANDREW JOHNSON.

"Brevet Maj. Gen. LORENZO THOMAS,
"*Adjutant-General United States Army, Washington, D. C.*

whereby said Andrew Johnson, President of the United States, did then and there commit and was guilty of a high misdemeanor in office.

ARTICLE IX.

That said Andrew Johnson, President of the United States, on the 22d day of February, in the year of our Lord 1868, at Washington, in the District of Columbia, in disregard of the Constitution and the laws of the United States, duly enacted, as Commander in Chief of the Army of the United States, did bring before him then and there William H. Emory, a major-general by brevet in the Army of the United States, actually in command of the Department of Washington and the military forces thereof, and did then and there, as such Commander in Chief, declare to and instruct said Emory that part of a law of the United States, passed March 2, 1867, entitled "An act making appropriations for the support of the Army for the year ending June 30, 1868, and for other purposes," especially the second section thereof, which provides, among other things, that "all orders and instructions relating to military operations issued by the President or Secretary of War shall be issued through the General of the Army, and, in case of his inability, through the next in rank," was unconstitutional and in contravention of the commission of said Emory, and which said provision of law had been theretofore duly and legally promulgated by general order for the government and direction of the Army of the United States, as the said Andrew Johnson then and there well knew, with intent thereby to induce said Emory, in his official capacity as commander of the Department of Washington, to violate the provisions of said act, and to take and receive, act upon, and obey such orders as he, the said Andrew Johnson, might make and give, and which should not be issued through the General of the Army of the United States, according to the provisions of said act, and with the further intent thereby to enable him, the said Andrew Johnson, to prevent the execution of an act entitled "An act regulating the tenure of certain civil offices," passed March 2, 1867, and to unlawfully prevent Edwin M. Stanton, then being Secretary for the Department of War, from holding said office and discharging the duties thereof, whereby said Andrew Johnson, President of the United States, did then and there commit and was guilty of a high misdemeanor in office.

ARTICLE X.

That said Andrew Johnson, President of the United States, unmindful of the high duties of his office and the dignity and proprieties thereof, and of the harmony and courtesies which ought to exist and be maintained between the executive and legislative branches of the Government of the United States, designing and intending to set aside the rightful authority and powers of Congress, did attempt to bring into disgrace, ridicule, hatred, contempt, and reproach the Congress of the United States and the several branches thereof, to impair and destroy the regard and respect of all the good people of the United States for the Congress and legislative power thereof (which all officers of the Government ought inviolably to preserve and maintain), and to excite the odium and resentment of all the good people of the United States against Congress and the laws by it duly and constitutionally enacted; and in pursuance of his said design and intent, openly and publicly, and before divers assemblages of the citizens of the United

States convened in divers parts thereof to meet and receive said Andrew Johnson as the Chief Magistrate of the United States, did, on the 18th day of August, in the year of our Lord 1866, and on divers other days and times, as well before as afterwards, make and deliver with a loud voice certain intemperate, inflammatory, and scandalous harangues, and did therein utter loud threats and bitter menaces as well against Congress as the laws of the United States duly enacted thereby, amid the cries, jeers, and laughter of the multitudes then assembled and within hearing, which are set forth in the several specifications hereinafter written, in substances and effect, that is to say:

Specification first.—In this, that at Washington, in the District of Columbia, in the Executive Mansion, to a committee of citizens who called upon the President of the United States, speaking of and concerning the Congress of the United States, said Andrew Johnson, President of the United States, heretofore, to wit, on the 18th day of August, in the year of our Lord 1866, did in a loud voice, declare in substance and effect, among other things, that is to say:

"So far as the executive department of the Government is concerned, the effort has been made to restore the Union, to heal the breach, to pour oil into the wounds which were consequent upon the struggle, and (to speak in common phrase) to prepare, as the learned and wise physician would, a plaster healing in character and coextensive with the wound. We thought, and we think, that we had partially succeeded; but as the work progresses, as reconstruction seemed to be taking place and the country was becoming reunited, we found a disturbing and marring element opposing us. In alluding to that element, I shall go no further than your convention and the distinguished gentleman who has delivered to me the report of its proceedings. I shall make no reference to it that I do not believe the time and the occasion justify.

"We have witnessed in one department of the Government every endeavor to prevent the restoration of peace, harmony, and union. We have seen hanging upon the verge of the Government, as it were, a body called, or which assumes to be, the Congress of the United States, while in fact it is a Congress of only a part of the States. We have seen this Congress pretend to be for the Union when its every step and act tended to perpetuate disunion and make a disruption of the States inevitable. * * * We have seen Congress gradually encroach step by step upon constitutional rights and violate, day after day and month after month, fundamental principles of the Government. We have seen a Congress that seemed to forget that there was a limit to the sphere and scope of legislation. We have seen a Congress in a minority assume to exercise power which, allowed to be consummated, would result in despotism or monarchy itself."

Specification second.—In this, that at Cleveland, in the State of Ohio, heretofore, to wit, on the 3d day of September, in the year of our Lord 1866, before a public assemblage of citizens and others, said Andrew Johnson, President of the United States, speaking of and concerning the Congress of the United States did, in a loud voice, declare in substance and effect among other things, that is to say:

"I will tell you what I did do. I called upon your Congress that is trying to break up the Government.

* * * * * * *

"In conclusion, beside that, Congress had taken much pains to poison their constituents against him. But what had Congress done? Have they done anything to restore the union of these States? No; on the contrary, they had done everything to prevent it; and because he stood now where he did when the rebellion commenced he had been denounced as a traitor. Who had run greater risks or made greater sacrifices than himself? But Congress, factious and domineering, had undertaken to poison the minds of the American people."

Specification third.—In this, that at St. Louis, in the State of Missouri, heretofore, to wit, on the 8th day of September, in the year of our Lord 1866, before a public assemblage of citizens and others, said Andrew Johnson, President of the United States, speaking of and concerning the Congress of the United States, did, in a loud voice, declare, in substance and effect, among other things, that is to say:

"Go on. Perhaps if you had a word or two on the subject of New Orleans you might understand more about it than you do. And if you will go back—if you will go back and ascertain the cause of the riot at New Orleans, perhaps you will not be so prompt in calling out 'New Orleans.' If you will take up the riot at New Orleans and trace it back to its source or its immediate cause, you will find out who was responsible for the blood that was shed there. If you will take up the riot at New Orleans and trace it back to the Radical Congress, you will find

that the riot at New Orleans was substantially planned. If you will take up the proceedings in their caucuses, you will understand that they there knew that a convention was to be called which was extinct by its power having expired; that it was said that the intention was that a new government was to be organized, and on the organization of that government the intention was to enfranchise one portion of the population, called the colored population, who had just been emancipated, and at the same time disfranchise white men. When you design to talk about New Orleans you ought to understand what you are talking about. When you read the speeches that were made, and take up the facts on the Friday and Saturday before that convention sat, you will there find that speeches were made incendiary in their character, exciting that portion of the population, the black population, to arm themselves and prepare for the shedding of blood. You will also find that that convention did assemble in violation of law, and the intention of that convention was to supersede the reorganized authorities in the State government of Louisiana, which had been recognized by the Government of the United States; and every man engaged in that rebellion in that convention, with the intention of superseding and upturning the civil government which had been recognized by the Government of the United States. I say that he was a traitor to the Constitution of the United States, and hence you find that another rebellion was commenced having its origin in the Radical Congress. * * *

"So much for the New Orleans riot. And there was the cause and the origin of the blood that was shed; and every drop of blood that was shed is upon their skirts, and they are responsible for it. I could test this thing a little closer, but will not do it here to-night. But when you talk about the causes and consequences that resulted from proceedings of that kind, perhaps as I have been introduced here and you have provoked questions of this kind, though it does not provoke me, I will tell you a few wholesome things that have been done by this Radical Congress in connection with New Orleans and the extension of the elective franchise.

"I know that I have been traduced and abused. I know it has come in advance of me here, as elsewhere, that I have attempted to exercise an arbitrary power in resisting laws that were intended to be forced upon the Government; that I had exercised that power; that I had abandoned the party that elected me, and that I was a traitor because I exercised the veto power in attempting and did arrest for a time a bill that was called a 'Freedman's Bureau' bill; yes, that I was a traitor. And I have been traduced. I have been slandered. I have been maligned. I have been called Judas Iscariot, and all that. Now, my countrymen here to-night, it is very easy to indulge in epithets; it is easy to call a man a Judas and cry out traitor; but when he is called upon to give arguments and facts he is very often found wanting. Judas Iscariot—Judas. There was a Judas, and he was one of the twelve apostles. Oh, yes; the twelve apostles had a Christ. The twelve apostles had a Christ, and he never could have had a Judas unless he had had twelve apostles. If I have played the Judas, who has been my Christ that I have played the Judas with? Was it Thad. Stevens? Was it Wendell Phillips? Was it Charles Sumner? These are the men that stop and compare themselves with the Saviour; and everybody that differs with them in opinion, and to try and stay and arrest the diabolical and nefarious policy, is to be denounced as a Judas.

* * * * * * *

"Well, let me say to you, if you will stand by me in this action; if you will stand by me in trying to give the people a fair chance, soldiers and citizens, to participate in these offices, God being willing, I will kick them out. I will kick them out just as fast as I can.

"Let me say to you, in concluding, that what I have said I intended to say. I was not provoked into this, and I care not for their menaces, the taunts, and the jeers. I care not for threats. I do not intend to be bullied by my enemies nor overawed by my friends. But, God willing, with your help I will veto their measures whenever any of them come to me."

Which said utterances, declarations, threats, and harangues, highly censurable in any, are peculiarly indecent and unbecoming in the Chief Magistrate of the United States, by means whereof said Andrew Johnson has brought the high office of the President of the United States into contempt, ridicule, and disgrace, to the great scandal of all good citizens, whereby said Andrew Johnson, President of the United States, did commit, and was then and there guilty of, a high misdemeanor in office.

ARTICLE XI

That said Andrew Johnson, President of the United States, unmindful of the high duties of the office and of his oath of office, and in disregard of the Constitution and laws of the United States, did heretofore, to wit, on the 18th day of August, 1866, at the city of Washington, and the District of Columbia, by public speech, declare and affirm, in substance, that the Thirty-ninth Congress of the United States was not a Congress of the United States authorized by the Constitution to exercise legislative power under the same; but, on the contrary, was a Congress of only part of the States, thereby denying and intending to deny that the legislation of said Congress was valid or obligatory upon him, the said Andrew Johnson, except in so far as he saw fit to approve the same, and also thereby denying and intending to deny the power of the said Thirty-ninth Congress to propose amendments to the Constitution of the United States; and, in pursuance of said declaration, the said Andrew Johnson, President of the United States, afterwards, to wit, on the 21st day of February, 1868, at the city of Washington, in the District of Columbia, did unlawfully and in disregard of the requirements of the Constitution, that he should take care that the laws be faithfully executed, attempt to prevent the execution of an act entitled "An act regulating the tenure of certain civil offices," passed March 2, 1867, by unlawfully devising and contriving, and attempting to devise and contrive, means by which he should prevent Edwin M. Stanton from forthwith resuming the functions of the office of Secretary for the Department of War, notwithstanding the refusal of the Senate to concur in the suspension theretofore made by said Andrew Johnson, of said Edwin M. Stanton from said office of Secretary for the Department of War, and also by further unlawfully devising and contriving, and attempting to devise and contrive, means then and there to prevent the execution of an act entitled "An act making appropriations for the support of the Army for the fiscal year ending June 30, 1868, and for other purposes," approved March 2, 1867, and also to prevent the execution of an act entitled "An act to provide for the more efficient government of the rebel States," passed March 2, 1867; whereby the said Andrew Johnson, President of the United States, did then, to wit, on the 21st day of February, 1868, at the city of Washington, commit and was guilty of a high misdemeanor in office.

And the House of Representatives, by protestation, saving to themselves the liberty of exhibiting at any time hereafter any further articles or other accusation or impeachment against the said Andrew Johnson, President of the United States, and also of replying to his answers which he shall make unto the article herein preferred against him, and of offering proof to the same and every part thereof, and to all and every other article, accusation, or impeachment which shall be exhibited by them, as the case shall require, do demand that the said Andrew Johnson may be put to answer the high crimes and misdemeanors in office herein charged against him, and that such proceedings, examinations, trials, and judgments may be thereupon had and given as may be agreeable to law and justice.

SCHUYLER COLFAX,
Speaker of the House of Representatives.

Attest:
EDWARD MCPHERSON,
Clerk of the House of Representatives.

Mr. Bingham having concluded the reading of the articles of impeachment, the President pro tempore informed the managers that the Senate would take proper order on the subject of the impeachment, of which due notice would be given to the House of Representatives.

The managers, by their chairman, Mr. Bingham, then delivered the articles of impeachment at the table of the Secretary, and withdrew, accompanied by the Members of the House of Representatives.

The Committee of the Whole, having returned to the Hall of the House, rose and the Speaker resumed the chair, whereupon Mr. Henry L. Dawes, of Massachusetts, the chairman, reported:

Mr. Speaker: The House in the Committee of the Whole, by order of the House, have accompanied their managers to the Senate while they presented, in

the name of the House of Representatives and of all the people of the United States, articles of impeachment agreed upon by the House against Andrew Johnson, President of the United States. The President of the Senate announced that the Senate would take order in the premises, of which due notice would be given to the House of Representatives.

Resolution providing for introduction of the Chief Justice and the organization of the Senate for the trial of President Johnson.

The Senate ordered a copy of its rules for the trial of President Johnson to be sent to the House.

The notice to the Chief Justice to meet the Senate for the trial of President Johnson was delivered by a committee of three Senators, who were his escort also.

In the Senate, on the same day, Mr. Howard moved the adoption of the following:

Resolved, That at 1 o'clock to-morrow afternoon the Senate will proceed to consider the impeachment of Andrew Johnson, President of the United States, at which time the oath or affirmation required by the rules of the Senate sitting for the trial of an impeachment shall be administered by the Chief.

Impeachment of Judge George W. English*

On the 2d day of November, 1921, the said George W. English, as judge in the said eastern district of Illinois, designated the Union Trust Co., of East St. Louis, a Government depository of bankruptcy funds; afterwards, about the 1st of April, 1924, said George W. English, as judge, with the knowledge and consent of Charles B. Thomas, as referee in bankruptcy, entered into an agreement with the Union Trust Co. in consideration that said Union Trust Co. would employ Farris English (the son of Judge English) in the bank at a salary of $200 per month, he, the said George W. English, would become, with Charles B. Thomas, depositors in said bank, and that George W. English and Charles B. Thomas would cause to be removed from the Drovers National Bank of East St. Louis the bankruptcy funds deposited there and deposit the same in the said Union Trust Co, and that the Union Trust Co. would pay said Farris English a salary of $200 per month and a sum equal to 3 per cent on monthly balances on bankruptcy funds in addition to his salary and as a part of this agreement said funds should not be withdrawn and deposited in another Government depository while said English was employed.

Farris English was employed by the Union Trust Co. and remained in its employ for 14 months, during which time he received his salary of $200 per month and $2,700 as interest on bankruptcy funds, and the funds in the Drovers National Bank were withdrawn from it and deposited in the Union Trust Co.

On the 4th day of April, 1924, the said George W. English, acting as judge as aforesaid, designated the Merchants State Bank of Centralia, Ill., to be a Government depository of bankruptcy funds, the said George W. English and Charles B. Thomas being then and there depositors and stockholders in said bank. While the said George W. English was a director and said Charles B. Thomas a depositor, and while both were stockholders in the said bank of Centralia, and while said bank was a depository of Government funds deposited by said George W. English, he, George W. English, borrowed from the said bank, without security and at a rate of interest below the customary rate, the sum of $17,200; and the said Charles B. Thomas borrowed from said bank, without security and at a rate of interest below the customary rate, the sum of $20,000; said sums were excessive loans and were obtained by reason of the control of said George W. English and Charles B. Thomas over court funds in designating what disposition should be made of them and into what depository they should be placed.

On or about the 4th day of April, 1925, in concert with the officers and directors of said bank, said Charles B. Thomas and said George W. English, with said directors of said bank, obtained loans which in the aggregate exceeded the total capital stock and surplus of said bank, without security and at a low rate of interest, which facts were concealed from the public and from the public authorities.

*From the Congressional Record (House), Mar. 25, 1926 (6283–87).

THE LAW

CONSTITUTIONAL PROVISIONS RELATING TO JUDICIAL IMPEACHMENTS

The provisions of the Constitution of the United States bearing upon the impeachment of judges are as follows:

"The House of Representatives shall choose their Speaker and other officers and shall have the sole power of impeachment. (Art. I, sec. 2.)

"Judgement in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust, or profit under the United States; but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment, and punishment according to law. (Art. I, sec. 3.)

"The President * * * shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment. (Art. II, sec. 2.)

"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. (Art. II, sec. 4.)

"The judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior and shall, at stated times, receive for their services a compensation which shall not be diminished during their continuance in office." (Art. III, sec. 1.)

The case of Robert W. Archbald, who was convicted by the Senate and removed from office in 1912 (S. Doc. 1140, 62d Cong. 2d sess.), furnishes the latest case and precedent so far as any case may be a precedent upon the subject of impeachment of judges. Each case of impeachment must necessarily stand upon its own facts. It can not, therefore, become a precedent or be on all fours with every other case.

In the present case we are relieved from the consideration of the debated legal proposition whether or not a man may be impeached after the term of his office has expired or he has resigned. Other cases indicate that a judge may be impeached if he is still continuing in the same office although under a different commission and election. In the Archbald case it was held that he could not be impeached upon the ground of things done while he was a district judge, his term having ended in that court. In the case of George W. English, however, all of the acts complained of having been performed by him in his judicial capacity and in the exercise of his official functions and within his term of service.

Although frequently debated and the negative advocated by some high authorities, it is now, we believe, considered that impeachment is not confined alone to acts which are forbidden by the Constitution or Federal statutes. The better sustained and modern view is that the provision for impeachment in the Constitution applies not only to high crimes and misdemeanors as those words were understood at common law but also acts which are not defined as criminal and made subject to indictment, but also to those which affect the public welfare. Thus an official may be impeached for offenses of a political character and for gross betrayal of public interests. Also for abuses or betrayal of trusts, for inexcusable negligence of duty, for the tyrannical abuse of power, or as one writer puts it, for a "breach of official duty by malfeasance or misfeasance, including conduct such as drunkeness, when habitual, or in the performance of official duties, gross indecency, profanity, obscenity, or other language used in the discharge of an official function, which tends to bring the office into disrepute, or for an abuse or reckless exercise of discretionary power as well as the breach of an official duty imposed by statute or common law." No judge may be impeached for a wrong decision.

A Federal judge is entitled to hold office under the Constitution during good behavior, and this provision should be considered along with article 4, section 2, providing that all civil officers of the United States shall be removed from office upon impeachment for and conviction of treason, bribery, or other high crimes and misdemeanors. Good behavior is the essential condition on which the tenure to judicial office rests, and any act committed or omitted by the incumbent in violation of this condition necessarily works a forfeiture of the office.

A civil officer may have behaved in public so as to bring disgrace upon himself and shame upon the country and he would continue to do this until his name became a public stench and yet might not be subject to indictment under any law of the United States, but he certainly could be impeached. Otherwise the public would in this and kindred cases be beyond the protection intended by the Constitution. When the Constitution says a judge shall hold office during good behavior it means that he shall not hold it when his behavior ceases to be good behavior.

The conduct of Judge George W. English has been of such a character that one must regard it as reprehensible and tending to bring shame and reproach upon the administration of justice and destroy the confidence of the public in our courts if it be allowed to go unrebuked.

The Federal judiciary has been marked by the services of men of high character and integrity, men of independence and incorruptibility, men who have not used their office for the promotion of their private interests or those of their friends. No one reading the record in this case can conclude that this man has lived up to the standards of our judiciary, nor is he the personification of integrity, high honor, and uprightness, as the evidence presents the picture of the manner in which he discharged the high duties and exercised the powers of his great office.

RECOMMENDATION

Your committee reports herewith the accompanying resolution and articles of impeachment against Judge George W. English, and recommends that they be adopted by the House and that they be presented to the Senate with a demand for the conviction and removal from office of said George W. English, United States district judge for the eastern district of Illinois.

RESOLUTION

Resolved, That George W. English, United States district judge for the eastern district of Illinois, be impeached of misdemeanors in office; and that the evidence heretofore taken by the special committee of the House of Representatives under House Joint Resolution 347, sustains five articles of impeachment, which are hereinafter set out; and that said articles be, and they are hereby, adopted by the House of Representatives, and that the same shall be exhibited to the Senate in the following words and figures, to wit:

Articles of impeachment of the House of Representatives of the United States of America in the name of themselves and of all of the people of the United States of America against George W. English, who was appointed, duly qualified, and commissioned to serve during good behavior in office, as United States District Judge for the Eastern District of Illinois, on May 3, 1918.

ARTICLE I

That the said George W. English, having been nominated by the President of the United States, confirmed by the Senate of the United States, duly qualified and commissioned, and while acting as the district judge for the eastern district of Illinois, did on divers and various occasions so abuse the powers of his high office that he is hereby charged with tyranny and oppression, whereby he has brought the administration of justice in said district in the court of which he is judge into disrepute, and by his tyrannous and oppressive course of conduct is guilty of misbehavior falling under the constitutional provision as ground for impeachment and removal from office.

In that the said George W. English, on the 20th day of May, 1922, at a session of court held before him as judge aforesaid, did willfully, tyrannically, oppressively, and unlawfully suspend and disbar one Thomas M. Webb, of East St. Louis, a member of the bar of the United States District Court for the Eastern District of Illinois, without charges having been preferred against him, without any prior notice to him, and without permitting him, the said Thomas M. Webb, to be heard in his own defense, and without due process of law; and also,

In that the said George W. English, judge as aforesaid, on the 15th day of August, 1922, in a court then and there holden by him, the said George W. English, judge as aforesaid, did willfully, tyranically, oppressively, and unlawfully suspend and disbar one Charles A. Karch, of East St. Louis, a member of the bar of the United States District Court for the Eastern District of Illinois with-

out charges having been preferred against him, without any prior notice to him, and without permitting him, the said Charles A. Karch, to be heard in his own defense, and without due process of law; and also in that the said George W. English, judge as aforesaid, restored the said Karch to membership of the bar in said district, but willfully, tyranically, oppressively, and unlawfully deprived the said Charles A. Karch of the right to practice in said court or try any case before him, the said George W. English, while sitting or holding court in said eastern district of Illinois; and also,

In that the said George W. English, judge as aforesaid, on the 1st day of August, 1922, unlawfully and deceitfully issued a summons from the said district court of the United States, and had the same served by the marshal of said district, summoning the State sheriffs and State attorneys then and there in the said eastern district of Illinois, being duly elected and qualified officials of the sovereign State of Illinois, and the mayor of the city of Wamac, also a duly elected and qualified municipal officer of said State of Illinois, residing in said district, to appear before him in an imaginary case of "the United States against one Gourley and one Daggett," when in truth and fact no such case was then and there pending in said court, and in placing the said State officials and mayor of Wamac in the jury box, and when they came into court, in answer to said summons, then and there in a loud, angry voice, using improper, profane, and indecent language, denounced said officials without any lawful or just cause or reason, and without naming any act of misconduct or offense committed by the said officials and without permitting said officials or any of them to be heard, and without having any lawful authority or control over said officials, and then and there did unlawfully, improperly, oppressively, and tyrannically threaten to remove said State officials from their said offices, and when addressing them used obscene and profane language, and thereupon then and there dismissed said officials from his said court and denied them any explanation or hearing; and also,

In that the said George W. English, judge aforesaid, on the 8th day of May, 1922, in the trial of the case of the United States against Hall, then and there pending before said George W. English, as judge, the said George W. English, judge as aforesaid, from the bench and in open court, did willfully, unlawfully, tyrannically, and oppressively, and intending thereby to coerce the minds of the jurymen in the said court in the performance of their duty as jurors, stated in open court and in the presence of said jurors, parties and counsel in said case, that if he told them (thereby then and there meaning said jurymen) that a man was guilty and they did not find him guilty that he would send them to jail; and also,

In that the said George W. English, judge aforesaid, on the 15th day of August, 1922, willfully, unlawfully, tyranically, and oppressively did summon Michael L. Munie, of East St. Louis, a member of the editorial staff of the East St. Louis Journal, a newspaper published in said East St. Louis, and Samuel A. O'Neal, a reporter of the St. Louis Post-Dispatch, a newspaper published at St. Louis, in the State of Missouri, and when said Munie and the said O'Neal appeared before him did willfully, unlawfully, tyrannically, and oppressively, and with angry and abusive language attempt to coerce and did threaten them as members of the press from truthfully publishing the facts in relation to the disbarment of Charles A. Karch by said George W. English, judge as aforesaid, and then and there used the power of his office tyrannically, in violation of the freedom of the press guaranteed by the Constitution, to suppress the publication of the facts about the official conduct of said George W. English, judge aforesaid, and did then and there forbid the said Munie and the said O'Neal to publish any facts whatsoever in relation to said disbarment under threats of imprisonment; and also,

In that the said George W. English, judge aforesaid, on the 15th day of August, 1922, at East St. Louis, in the State of Illinois, did unlawfully summon before him one Joseph Maguire, being then and there the editor and publisher of the Carbondale Free Press, a newspaper published in Carbondale, in said eastern district of Illinois, and then and there, on the appearance before him of said Joseph Maguire in open court, did violently threaten said Joseph Maguire with imprisonment for having printed in his said paper a lawful editorial from the columns of the St. Louis Post-Dispatch, a newspaper published at St. Louis, in the State of Missouri, and in a very angry and improper manner did threaten said Maguire with imprisonment for having also printed some lawful handbills—said handbills having no allusion to said judge or to his conduct of the said court—and then and there did threaten this member of the press with imprisonment.

Wherefore the said George W. English was and is guilty of a course of conduct tyrannous and oppressive and is guilty of misbehavior in office as such judge, and was and is guilty of a misdemeanor in office.

ARTICLE II

That George W. English, judge as aforesaid, was guilty of a course of improper and unlawful conduct as said judge, filled with partiality and favoritism, resulting in the creation of a combination to control and manage in collusion with Charles B. Thomas, referee in bankruptcy, in and for the eastern district of Illinois for their own interests and profit and that of the relatives and friends of said George W. English, judge as aforesaid, and of Charles B. Thomas, referee, the bankruptcy affairs of the eastern district of Illinois.

In that said George W. English, judge as aforesaid, corruptly did appoint and continue to appoint said Charles B. Thomas, of East St. Louis, in said State of Illinois, a member of the bar of the district court of the United States in and for said district, as sole referee in bankruptcy in said district with all of the advantages and preferments of said appointment, notwithstanding he then and there well knew that said eastern district was a great commercial district of 45 counties nearly 300 miles long, with a large volume of business in bankruptcy, and that the said volume of business would necessarily take all the time and attention of any appointee as referee in bankruptcy to perform properly the work and duties of said office, and well knew at the time of said appointments that said Charles B. Thomas was practicing in all the courts, both civil and criminal, in said eastern district of Illinois, he, the said Charles B. Thomas, through said appointment as sole referee in bankruptcy and the favors in connection therewith extended to him by said George W. English, judge aforesaid, built up a large and lucrative practice; and that notwithstanding the size of the eastern district of Illinois, the volume of bankruptcy business therein, and the large practice of said Thomas, referee aforesaid, did then and there give said referee in bankruptcy enlarged duties and authority by unlawfully changing and amending the rules of bankruptcy for said eastern district for the sole benefit of said George W. English, judge aforesaid, and the said Charles B. Thomas, sole referee aforesaid, as follows:

"It is hereby further ordered that the following rule be, and the same is hereby, made and adopted as a rule of this court in bankruptcy, to be effective in all cases from and after this date, namely:

"All matters of application for the appointment of a receiver, or the marshal to take charge of the property of the bankrupt or alleged bankrupt, made after the filing of the petition, and prior to its being dismissed or to the trustee being qualified, shall be and are hereby referred to the referee in bankruptcy for his consideration and action; and the clerk will enter such order of reference as of course in each case; and the referees of this court heretofore or hereafter appointed are hereby authorized and empowered to appoint receivers, or the marshal upon application of parties in interest, in case the referee shall find same is absolutely necessary for the preservation of the estate, to take charge of the property of the bankrupt; and to exercise all jurisdiction over and in respect to the actions and proceedings of the receiver or marshal which the court by law may exercise. After adjudication, where the referee deems it necessary for the production of the state, he may make such appointment on his own motion.

"And it is hereby further ordered that all special rules and general orders heretofore entered or adopted be, and they are hereby, set aside and annulled in so far as they in any way conflict with the provisions of the above rule and general order.

"For the purpose of transacting the business of the court of bankruptcy, it is ordered that the referee [meaning then and there said Charles B. Thomas] be and he is hereby, authorized and directed to procure and maintain suitable offices for the transaction of said business, and to suitably furnish and equip same for said purpose; that the referee be, and he is hereby, further authorized and directed to employ such clerks, stenographers, and court reporters or any other assistance which he finds and deems necessary for the proper management of said court and offices and the administration of bankrupt estates; to install telephones; to procure and keep on hand needed stationery; and generally to provide all such other and further office equipment proper to transact business of the referee; and

"it is further ordered that in the event that the charges for referee's expenses authorized by any and all of the rules of this court to be charged against the estates administered before the referee do not amount to a total to pay the expenses which the referee has incurred or for which he may have paid or obligated himself to pay the referee he, and he is hereby, authorized and directed to make a charge against the bankrupt estates administered before him, in as equitable pro rata share as the nature and circumstances will permit, sufficient in amount to meet the deficit existing by reason of the referee's receipts from expenses or charges authorized by this and other rules being less than the total expenses incurred by the referee."

Said amendments of the rules of court were then and there made with the intent to favor and prefer said Charles B. Thomas and did thereby give said Charles B. Thomas the power and opportunity to appoint his friends and members of his family and the family of said George W. English, judge aforesaid, to receiverships and to use said office of referee as aforesaid for the improper personal and financial benefit of said George W. English, judge aforesaid, and said Charles B. Thomas, referee aforesaid, and the friends and families of both.

The said Thomas, in pursuance of said unlawful combination and by authority of said rule and order aforesaid, and with the full knowledge and approval of said George W. English, judge aforesaid, did rent and furnish a large and expensive suite of rooms and offices in said East St. Louis near the said judge's chamber, in the Federal building in said East St. Louis, occupied by said George W. English, judge aforesaid, at the expense and cost of the United States and of estates in bankruptcy by virtue of said rule and order;

And the said Charles B. Thomas then and there, with the full knowledge and consent of said George W. English, judge aforesaid, did wrongfully and unlawfully create and organize a large and expensive office force supported by and paid for out of the funds and assets of estates in bankruptcy as aforesaid, and then and there did hire and provide a large number of clerks, stenographers, and secretaries, at the cost and expense of the United States and the funds and assets of the estates in bankruptcy, as aforesaid;

And the said Charles B. Thomas did then and there hire and place in said offices, with the knowledge and approval of the said George W. English, judge aforesaid, one George W. English, jr., the son of the aforesaid Judge English, at a large compensation, salary, and fees, paid out of the funds and assets of the estates in bankruptcy, in and under the charge and control of said Thomas, referee aforesaid;

And the said Charles B. Thomas, referee aforesaid, did further confer upon said George W. English, jr., appointments as trustee and receiver and appointments as attorney for trustees and receivers in estates in bankruptcy;

And said Referee Charles B. Thomas then and there, with the knowledge, consent, and assistance of the said George W. English, judge aforesaid, did hire and place in the said office and make a part of said organization one M. H. Thomas, son of said Charles B. Thomas; and one D. S. Leadbetter, son-in-law of said Charles B. Thomas; and one C. P. Wideman, son-in-law of said Charles B. Thomas;

And the said Charles B. Thomas, referee aforesaid, did then and there wrongfully and unlawfully pay to all of the persons last aforesaid large salaries, fees, and commissions, and did likewise confer upon said persons appointments as trustees, receivers, and masters in estates in bankruptcy with the full knowledge, consent, and approval of said George W. English, judge aforesaid;

And said George W. English, judge aforesaid, in order further to carry out and make effective said improper and unlawful organization, did appoint one Herman P. Frizzell, United States commissioner in and for said eastern district of Illinois, and said commissioner did occupy free of charge the said offices of Charles B. Thomas, referee aforesaid, and did receive from said Charles B. Thomas, as said referee, large and valuable fees, commissions, salaries, appointments as trustee, receiver, and master in estates in bankruptcy with the knowledge and consent of the said George W. English, judge aforesaid;

And the said George W. English, judge aforesaid, did further allow and permit the said Charles B. Thomas, referee aforesaid, to appear as attorney and counsel before said Commissioner Frizzell in divers and sundry criminal cases; and then and there, further to carry out and make effective the said unlawful and improper combination, the said George W. English, judge aforesaid, with full knowledge of the premises, did improperly and unlawfully consent and approve the appointment by the said referee, Charles B. Thomas, of one Oscar Hooker, of said

East St. Louis, as chief clerk in said offices of said referee, and thereby the said Hooker did receive from said Charles B. Thomas, referee aforesaid, large and valuable fees, salaries, appointments as trustee, receiver, and master, and as attorney for trustees and receivers in bankruptcy estates;

And further the said George W. English, judge aforesaid, did improperly allow and permit said Hooker, as the agent of a bonding company, to furnish surety bonds for said George W. English, jr., the son of George W. English, judge aforesaid, and also surety bonds for said Herman P. Frizzell, said United States commissioner, and surety bonds for said M. H. Thomas, son of said Charles B. Thomas, as aforesaid, and surety bonds for D. L. Leadbetter and said C. P. Wideman, sons-in-law of said Charles B. Thomas, in all matters of trusteeships and receiverships to which they were appointed by said Charles B. Thomas, referee aforesaid—the said Oscar Hooker, George W. English, jr., D. S. Leadbetter, C. P. Wideman, and Herman P. Frizzell being then and there without property or credit;

And, then and there, further to carry out and make effective said unlawful and improper combination, the said George W. English, judge as aforesaid, with full knowledge of the premises, did improperly and unlawfully allow said Charles B. Thomas, referee as aforesaid, to organize and incorporate from his office force and employees a corporation known as the Government Sales Corporation, organized and incorporated November 27, 1922, for the object and purpose of furnishing appraisers in bankruptcy estates and auctioneers in the sale and disposal of assets of estates in bankruptcy, the said Government Sales Corporation being then and there made up and composed, organized, and formed of incorporators and directors from the families and friends of said George W. English, judge aforesaid, and said Charles B. Thomas, referee aforesaid, and from said office force of said Thomas, referee aforesaid;

The said George W. English, judge aforesaid, well knowing the facts and premises, then and there did willfully, improperly, and unlawfully take advantage of his said official position as judge aforesaid, and did aid and assist said Charles B. Thomas, referee, aforesaid, in the establishment, maintenance, and operation of said unlawful and improper organization as above set forth, for the purpose of obtaining improper and unlawful personal gains and profits for the said George W. English, judge aforesaid, and his family and friends;

Wherefore, the said George W. English was and is guilty of a course of conduct as aforesaid constituting misbehavior as such judge and was and is guilty of a misdemeanor in office.

ARTICLE III

That George W. English, judge aforesaid, was guilty of misbehavior in office is that he corruptly extended partiality and favoritism in diverse other matters hereinafter set forth to Charles B. Thomas, said sole referee in bankruptcy in the said eastern district of Illinois, and by his conduct and partiality as judge brought the administration of justice into discredit and disrepute, degraded the dignity of the court, and destroyed the confidence of the public in its integrity;

In that in the matter of the case of East St. Louis & Suburban Co. et al. v. Alton, Granite & St. Louis Traction Co., pending before George W. English, judge as aforesaid, upon the petition for appointment of receivers for said Alton, Granite & St. Louis Traction Co., the said George W. English, judge as aforesaid, did improperly and unlawfully refuse to appoint the temporary receivers suggested by counsel for the parties in interest in said case unless said Charles B. Thomas was appointed attorney for the receivers; that by reason of the condition imposed by George W. English, judge aforesaid, the counsel for the parties in interest in said case did agree to the appointment of said Charles B. Thomas as counsel for said temporary receivers at a salary stipulated by said Charles B. Thomas of $200 a month; and thereupon the said George W. English, as judge, improperly, corruptly, and unlawfully appointed said Charles B. Thomas as attorney for the temporary receivers and approved of the payment of said salary by an order entered in said case as of August 11, 1920; and that subsequently, to wit, on January 20, 1921, George W. English, judge aforesaid, did issue an order making the temporary receivers permanent and that the said Charles B. Thomas, as attorney and counsel for the receivers, be paid the sum of $350 per month and that the further sum of $500 per month additional be paid to said Charles B. Thomas, for his services and responsibilities in assisting the receivers in the control and management of said receivership properties, making a total salary of $850 per month, and that said salary should be retroactive from October 1, 1920;

that the services of said Charles B. Thomas, both as attorney for the receivers and for assisting in the management of the receivership properties, were not required or necessary, and thereby an additional burden upon the receivership properties was imposed which said George W. English, judge aforesaid, well knew; that this salary of $850 per month was continued to be paid to said Charles B. Thomas for a long period of time, to wit, from October 1, 1920, to January 1, 1925, making the total amount received under said order by said Charles B. Thomas $43,350; that the said appointment of said Charles B. Thomas was made by George W. English, judge aforesaid, with the intent wrongfully and unlawfully to prefer and show partiality and favoritism to said Charles B. Thomas, to whom George W. English, judge aforesaid, was under obligations, financial and otherwise; and also

In that in the case of Handelsman against Chicago Fuel Co. pending before him, George W. English, judge as aforesaid, did improperly and unlawfully appoint said Charles B. Thomas as one of the receivers in said case and then and there did improperly order, direct, and fix the compensation and salary of said Charles B. Thomas as said receiver at the rate of $1,000 per month; and did then and there improperly and unlawfully appoint said Herman P. Frizzell, United States commissioner for said eastern district of Illinois and chief clerk in the office of said Thomas as referee in bankruptcy, to be attorney for the said receiver, Charles B. Thomas, and then and there did improperly fix the salary and fees of said Frizzell as said attorney at the rate of $200 per month; that all said acts of said English as judge aforesaid were done with the unlawful and improper intent unlawfully to favor and prefer said Thomas and benefit the said organization.

In that on the 15th day of August, 1924, at a session of court then holden by George W. English, judge as aforesaid, in the matter of Gideon N. Heuffman et al. against Hawkins Mortgage Co. in bankruptcy, did improperly and unlawfully allow and permit said Charles B. Thomas, referee as aforesaid, to appear and conduct said case as attorney and counselor at law in behalf of Morton S. Hawkins, one of the bankrupts in said case, in violation of the statute of the United States that forbids a referee to practice as an attorney or counselor at law in any bankruptcy proceedings, and afterwards, to wit, on the 27th day of August, 1924, George W. English, judge as aforesaid, did again improperly and unlawfully allow and permit said Charles B. Thomas, referee as aforesaid, to appear before him and practice as an attorney in behalf of said bankrupt, Morton S. Hawkins; that said unlawful acts were willfully permitted in order to favor said Charles B. Thomas in obtaining from said Morton S. Hawkins a fee for his services of $2,500, which was then and there paid to said Charles B. Thomas by said Morton S. Hawkins, all with the full knowledge and consent of George W. English, judge as aforesaid; and, also,

In that on the 18th day of May, 1922, after conviction by a jury of one F. J. Skye, in a case before George W. English, judge as aforesaid, involving the crime of selling and possessing intoxicating liquors, the said George W. English, as judge, did impose a sentence upon said F. J. Skye of imprisonment in jail for four months and the payment of a fine of $500; that on the trial the said F. J. Skye was represented by one Charles A. Karch; that after such conviction and sentence said Charles A. Karch took an appeal to the United States Circuit Court of Appeals for the Seventh Circuit in behalf of his client and filed an appeal bond in due course; that subsequently to the appeal said F. J. Skye discharged said Charles A. Karch as attorney and retained Charles B. Thomas, referee aforesaid; that on July 5, 1922, said F. J. Skye, by his attorney, said Charles B. Thomas, abandoned his appeal to the circuit court of appeals and filed a motion for a stay of the sentence of imprisonment, which motion, after hearing, George W. English, judge as aforesaid, did allow and did stay the sentence of imprisonment until December 31, 1922; and on June 7, 1923, George W. English, judge as aforesaid, did order said jail sentence vacated and said stay of execution and commitment to jail of said F. J. Skye made permanent, relieving said F. J. Skye from imprisonment and only obligating him to pay a fine of $500; that said F. J. Skye paid to said Charles B. Thomas $2,500 as a fee in said case; that said vacation of the jail sentence and the permanent stay of execution and commitment was granted by George W. English, judge as aforesaid, without the presence of said Charles B. Thomas in court and without any investigation of the affidavits filed in support thereof, and was done willfully, improperly, unlawfully, and with intent to prefer and show favoritism to said Thomas, to whom said George W. English, judge as aforesaid, was under obligations, financial and otherwise; and, also,

In that in the case of Hamilton v. Egyptian Coal Mining Co., George W. English, judge as aforesaid, did arbitrarily and unlawfully and without notice remove from office the duly appointed receiver in said case, and with intent improperly to prefer and favor Charles B. Thomas, aforesaid, did then and there appoint the said Charles B. Thomas in place of the removed receiver; that this removal of the receiver was made on July 11, 1924, with the intent to prefer unlawfully the said Charles B. Thomas, to whom the said George W. English, judge aforesaid, was under great obligations, financial and otherwise; and, also,

In that on or about March, 1924, at a hearing before George W. English, judge aforesaid, in the case of Wallace v. Shedd Coal Co., George W. English, judge aforesaid, did appoint Charles B. Thomas as an attorney for the receiver (one F. D. Barnard), when in truth and in fact no attorney for said receiver was needed, and afterwards, to wit, on or about August, 1924, said George W. English, judge as aforesaid, did arbitrarily and improperly remove from office said F. B. Barnard as such receiver and then and there did improperly appoint as receiver in place of said Barnard said Charles B. Thomas; that the removal of said receiver and the appointment of said Charles B. Thomas was made with the intent to corruptly prefer said Charles B. Thomas, to whom said George W. English was under great obligations, financial and otherwise; and, also,

In that on or about the 27th day of June, 1924, at a hearing held by him, George W. English, judge as aforesaid, in the case of Ritchey et al. v. Southern Gem Coal Corporations, George W. English, judge as aforesaid, did then and there improperly appoint Charles B. Thomas, aforesaid, one of the receivers in said case and then and there unlawfully did order and decree that said Charles B. Thomas, as said receiver, should have as his salary the excessive and exorbitant sum of $1,000 per month; that said act of George W. English, judge aforesaid, in the appointment of said Charles B. Thomas as receiver aforesaid and in the fixing of said exorbitant salary was all done by George W. English, judge as aforesaid, with intent to prefer unlawfully said Charles B. Thomas, to whom said George W. English was under great obligations, financial and otherwise; and, also,

In that on or about the 24th day of October, 1921, at East St. Louis, in the State of Illinois, George W. English, judge as aforesaid, wrongfully, improperly, and unlawfully did accept and receive from said Charles B. Thomas, sole receiver in bankruptcy aforesaid, the sum of $1,425 which was applied toward the purchase price of an automobile that had been purchased by George W. English, judge as aforesaid; that said sum of money was improperly and unlawfully accepted and received by the said George W. English from the said Charles B. Thomas as a return or in recognition of the favoritism and partiality extended by George P. English, judge as aforesaid, to Charles B. Thomas, aforesaid; and, also,

In that George W. English, judge as aforesaid, at a term of court held by said judge for the eastern district of Illinois in the case of the Southern Gem Coal Corporation in receivership, did receive and approve the report of Charles B. Thomas, as one of the receivers in said case, for the first six months of said receivership; that in said report to George W. English, judge as aforesaid, said Charles B. Thomas stated that he had during those six months spent all of his time in Chicago looking after the interest of said Southern Gem Coal Corporation in receivership; and then and there George W. English, judge as aforesaid, did receive and approve said report; that with full knowledge that said referee, Charles B. Thomas, was neglecting his duties as referee in bankruptcy in his office at East St. Louis in spending six months of his time 290 miles away from his office at East St. Louis, George W. English, judge as aforesaid, did then and there, despite this knowledge and these facts, approve said negligence on the part of said Charles B. Thomas and said neglect of duty without criticism or rebuke by then and there reappointing him for another term.

Wherefore the said George W. English was and is guilty of misbehavior as such judge and was and is guilty of a misdemeanor in office.

ARTICLE IV

That George W. English, while serving as judge as aforesaid, in the District Court of the United States for the Eastern District of Illinois, did in conjunction with Charles B. Thomas, sole referee in bankruptcy aforesaid, corruptly and improperly handle and control the deposit of bankruptcy and other funds under his control in said court, by depositing, transferring, and using said funds for

the pecuniary benefit of himself and said Charles B. Thomas, sole referee in bankruptcy, thus prostituting his official power and influence for the purpose of securing benefits to himself and to his family and to the said Charles B. Thomas and his family;

In that George W. English, judge as aforesaid, on or about December, 1918, did designate the First State Bank of Coulterville, in the State of Illinois, to be the sole United States depository of bankruptcy funds within said district; that said bank was situated a great distance from East St. Louis, the office and place of business of Charles B. Thomas, said referee in bankruptcy; and that then and there one J. E. Carlton, a brother-in-law of George W. English, judge aforesaid, was a large stockholder and director and cashier of said bank; and that George W. English, judge as aforesaid, was a depositor, stockholder, and director in said bank; that said improper act of George W. English, judge as aforesaid, in designating said bank, tended to scandalize the court in the administration of its bankruptcy business; and also,

In that on or about July, 1919, George W. English, judge as aforesaid, at a hearing then had before him, in the case of Sanders *v.* Southern Traction Co., in which certain assets had been sold for the sum of $100,000, did willfully and unlawfully order and decree that of said sum of $100,000 the sum of, to wit, $100,000 should be deposited in the Merchants State Bank of Centralia, Ill., a United States depository of bankruptcy funds, said deposit to draw no interest; that said deposit was made in said bank as ordered, and that George W. English, judge as aforesaid, was then and there a depositor, stockholder, and director in said bank; that said order and deposit of funds was made for the benefit of himself, George W. English, judge as aforesaid, and for his personal gain and profit and for the benefit of his family and friends, to the great scandal of the said office of judge aforesaid, and all tending to bring the administration of justice in said court into distrust and contempt; and, also,

In that George W. English, judge aforesaid, on or about October 1, 1922, and Charles B. Thomas, sole referee in bankruptcy aforesaid, did make and enter into the following improper and unlawful agreement with the officers of the Drovers National Bank of East St. Louis, to wit, that in consideration that said bank would employ one Farris English, son of said George W. English, as cashier in said bank at a salary of $1,500 per year, that George W. English, judge as aforesaid, and Charles B. Thomas, referee aforesaid, would make and designate said bank as a Government depository of bankruptcy funds without interest thereon, and that funds from estates in bankruptcy and receiverships should thereafter largely be sent to and deposited in said bank, and that George W. English, judge as aforesaid, and Charles B. Thomas, sole referee as aforesaid, and said Farris English would become depositors in said bank and then and there would purchase shares of stock therein, as follows:

George W. English, judge as aforesaid, 10 shares; said Farris English, 10 shares; and said Charles B. Thomas, 50 shares, at $50 per share; that in pursuance of said agreement said Farris English was hired as cashier at said salary of $1,500 per year and entered upon this employment; that George W. English, judge as aforesaid, in pursuance of said agreement, did designate said bank to be a Government depository of bankruptcy funds, and said George W. English and said Farris English and said Charles B. Thomas, in pursuance of said agreement, did become depositors in said bank, and the said George W. English, judge as aforesaid, the said Charles B. Thomas, referee as aforesaid, did make 17 transfers of bankruptcy funds from the Union Trust Co. of East St. Louis and cause the same to be deposited in said Drovers National Bank, without interest, to the aggregate amount of $100,000, and then and there George W. English, judge as aforesaid, did receive and pay for his said 10 shares of stock and also for the stock of his son, said Farris English; that the said improper acts were done and performed by George W. English, judge as aforesaid, with the wrongful and unlawful intent to use the influence of his said office as judge for the personal gain and profit of himself, said George W. English, and for the unlawful and improper and personal gain of the family and friends of the said George W. English; and, also,

In that George W. English, judge as aforesaid, on or about the 1st day of April, 1924, with the knowledge and consent of Charles B. Thomas, referee in bankruptcy aforesaid, did make and enter into the following improper and unlawful agreement with said Union Trust Co., a Government depository of bankruptcy funds, to wit, that if said Union Trust Co. would then and there employ one Farris English, the son of George W. English, judge aforesaid, at a salary of $200

per month, he, said George W. English, judge aforesaid, with said Charles B. Thomas, would become depositors in said Union Trust Co., and that he, the said George W. English, and said Charles B. Thomas would cause to be removed from the Drovers National Bank of East St. Louis the bankruptcy funds deposited there and would deposit the same in said Union Trust Co. and that said Union Trust Co. should pay to said Farris English, in addition to his said salary of $200 per month, interest on said bankruptcy funds from time to time on deposit in said Union Trust Co. at the rate of 3 per cent on monthly balances, and for this consideration George W. English, judge as aforesaid, further did agree with said Union Trust Co. that while said agreement continued said funds should not be withdrawn and deposited in any other Government depository, and thereupon said Farris English was employed by said Union Trust Co. under said agreement and remained in the services of said company for 14 months and drew out of said company during this said period, in addition to his salary of $200 per month, the sum of $2,700 as interest on bankruptcy funds; that the bankruptcy funds were withdrawn from said Drovers National Bank and deposited in the said Union Trust Co. under said agreement; that George W. English, judge as aforesaid, and Charles B. Thomas, referee in bankruptcy aforesaid, did then and there become depositors in said Union Trust Co., the said George W. English did then and there use his influence as judge for the unlawful and improper personal gain and profit to himself, family, and friends; and, also,

In that George W. English, judge as aforesaid, did improperly designate the Merchants State Bank, of Centralia, Ill., to be a Government depository of bankruptcy funds, in which bank he, the said George W. English, and he, the said Charles B. Thomas, were then and there depositors and stockholders and George W. English was then and there a director; and, also,

In that George W. English, judge as aforesaid, on divers days and times prior to the 7th day of April, 1925, and while George W. English, judge as aforesaid, and Charles B. Thomas, referee in bankruptcy aforesaid, were each depositors and stockholders and George W. English, a director of said Merchants State Bank of Centralia, Ill., and while said bank was a Government depository of bankruptcy funds, did borrow from said bank without security, at a rate of interest below the customary rate, sums of money from time to time amounting in the aggregate to $17,200, and that during said time prior to the 7th day of April, 1925, Charles B. Thomas, said referee in bankruptcy did borrow from said bank without security and at a rate of interest below the customary rate, sums of money to the total of $20,000; that said sums were loaned and said loans were renewed from time to time, and carried by said bank to the said George W. English and said Charles B. Thomas, by reason of the use of the official influence of George W. English, judge as aforesaid, and Charles B. Thomas, sole referee in bankruptcy aforesaid, and by reason of said bank having been made and continued as a United States depository for bankruptcy and other funds without interest; that said George W. English, judge as aforesaid, and Charles B. Thomas, sole referee in bankruptcy aforesaid, acting in concert with officers and directors of said Merchants State Bank of Centralia, Ill., did borrow with said directors sums of money in the total equal to all of the surplus, assets, and capital of said bank and at a low rate of interest and without security.

Wherefore the said George W. English was and is guilty of a course of conduct constituting misbehavior as such judge and that said George W. English was and is guilty of a misdemeanor in office.

ARTICLE V

That George W. English, on the 3d day of May, 1918, was duly appointed United States district judge for the eastern district of Illinois, and has held such office to the present day.

That during the time in which said George W. English has acted as such United States district judge, he, the said George W. English, at divers times and places, has repeatedly, in his judicial capacity, treated members of the bar, in a manner coarse, indecent, arbitrary, and tyrannical, and has so conducted himself in court and from the bench as to oppress and hinder members of the bar in the faithful discharge of their sworn duties to their clients, and to deprive such clients of their right to appear and be protected in their liberty and property by counsel, and in the above and other ways has conducted himself in a manner unbecoming the high position which he holds and thereby did bring the administration of justice in his said court into contempt and disgrace, to the great scandal and reproach of the said court.

That said George W. English, as judge aforesaid, during his said term of office, at divers times and places, while acting as such judge, did disregard the authority of the laws, and, wickedly meaning and intending so to do, did refuse to allow parties lawfully in said court the benefit of trial by jury, contrary to his said trust and duty as judge of said district court, against the laws of the United States, and in violation of the solemn oath which he had taken to administer equal and impartial justice.

That the said George W. English, as judge aforesaid, during his said term of office, at divers times and places, when acting as such judge, did so conduct himself in his said court, in making decisions and orders in actions pending in his said court and before him as said judge, as to excite fear and distrust and to inspire a widespread belief, in and beyond said eastern district of Illinois that causes were not decided in said court according to their merits but were decided with partiality and with prejudice and favoritism to certain individuals, particularly to one Charles B. Thomas, referee in bankruptcy for said eastern district.

That the said George W. English, as judge aforesaid, during his said term of office, at divers times and places, while acting as said judge, did improperly and unlawfully intent to favor and prefer Charles B. Thomas, his referee in bankruptcy for said eastern district, and to make for said Thomas large and improper gains and profits, continually and habitually prefer said Thomas in his appointments, rulings, and decrees.

That said George W. English, as judge aforesaid, during his said term of office, at divers times and places while acting as said judge, from the bench and in open court, did interfere with and usurp the authority and power and privileges of the sovereign State of Illinois, and usurp the rights and powers of said State over its State officials, and set at naught the constitutional rights of said sovereign State of Illinois, to the great prejudice and scandal of the cause of justice and of his said court and the rights of the people to have and receive due process of law.

That said George W. English, as judge aforesaid, during his said term of office, at divers times and places, did, while acting as said judge, unlawfully and improperly attempt to secure the approval, cooperation, and assistance of his associate upon the bench in said eastern district of Illinois, Judge Walter C. Lindley, by suggesting to said Walter C. Lindley, judge as aforesaid, that he appoint George W. English, jr., son of said George W. English, judge as aforesaid, to receiverships and other appointments in the said district court for said eastern district of Illinois, in consideration that said George W. English, judge as aforesaid, would appoint to like positions in his said court a cousin of said Judge Walter C. Lindley, and thereby unlawfully and improperly avoid the law in such case made and provided; all to the disgrace and prejudice of the administration of justice in the court of George W. English, judge as aforesaid.

That said George W. English, as judge aforesaid, during his said term of office, at divers times and places, did, while serving as said judge, seek from a large railroad corporation, to wit, the Missouri Pacific Railroad Co., which had large trackage, in said eastern district of Illinois, the appointment of his son, George W. English, jr., as attorney for said railroad.

All to the scandal and disrepute of said court and the administration of justice therein.

Wherefore, the said George W. English was and is guilty of misbehavior as such judge and of a misdemeanor in office.

IMPEACHMENT OF JUDGE ROBERT W. ARCHBALD*

In 1862 West H. Humphreys, United States district judge for the district of Tennessee, was impeached on several specifications, one of which was based on his action in making a speech at a public meeting, while off the bench, inciting revolt and rebellion against the Constitution and Government of the United States. The evidence clearly showed that he was in no wise acting in a judicial capacity, yet he was convicted on this charge.

A number of the impeachments of judges of the several States of the Union have been predicated on various acts of debauchery entirely separate from the performance of their official duties.

Any conduct on the part of a judge which reflects on his integrity as a man or his fitness to perform the judicial functions should be sufficient to sustain his impeachment. It would be both absurd and monstrous to hold that an impeachable offense must needs be committed in an official capacity. If such an atrocious doctrine should receive the sanction of the congressional authority, there is no limit to the variety and the viciousness of the offenses which a Federal judge might commit with perfect immunity from effective impeachment.

IMPEACHMENT FOR OFFENSES COMMITTED IN ANOTHER JUDICIAL OFFICE

Certain of the proposed articles of impeachment against Judge Archbald are based on offenses committed while he held the office of United States district judge for the middle district of Pennsylvania, whereas he now holds the office of circuit judge of the United States for the third judicial circuit, and is assigned to serve for a period of four years in the Commerce Court. In this respect the case here presented seems to be unique in the annals of impeachment proceedings under our Constitution.

By virtue of the provisions of section 609 of the Revised Statutes, which were then in force, Judge Archbald, while holding the office of United States district judge, was duly clothed with authority to sit or preside in the United States circuit court, and he was actually presiding over such circuit court at Scranton, Pa., during the time that some or all of the offenses charged in these articles were committed.

Since his elevation to a circuit judgeship the United States circuit courts have been abolished by the act of March 3, 19711 (36 Stat., 1087), entitled "An act to codify, revise, and amend the laws relating to the judiciary," but the provisions relative to the interchangeability of district and circut judges remain substantially the same. Section 18 of this act provides that—

> Whenever, in the judgment of the senior circuit judge of the circuit in which the district lies, or of the circuit justice assigned to such circuit, or of the Chief Justice, the public interest shall require, the said judge or associate justice or

* From Congressional Record (House) July 8, 1912 (8705-08)

Chief Justice shall designate and appoint any circuit judge of the circuit to hold said district court.

Thus it appears that Judge Archbald now holds a civil office, within the meaning of the Constitution, of the same judicial nature as the office held by him at the time of the commission of the offenses charged in the said articles, and that, under the existing law, he may be called upon at any time to perform precisely the same functions that he performed as United States district judge.

In State *v.* Hill (37 Nebr., 80) the Legislature of Nebraska had impeached certain ex-officers of the State for offenses alleged to have been committed during their respective terms of office. The Supreme Court of Nebraska held that inasmuch as they had ceased to be civil officers of the State they were not subject to impeachment. In the course of the decision the court said (pp. 88–89) :

> Judge Barnard was impeached in the State of New York during his second term for acts committed in his previous term of office. His plea that he was not liable to impeachment for offenses occurring in the first term was overruled. Precisely the same question was raised in the impeachment proceedings against Judge Hubbel, of Wisconsin, and on the trial of Gov. Butler, of this State, and in each of which the ruling was the same as in the Barnard case. There was good reason for overruling the plea to the jurisdiction in the three cases just mentioned. Each respondent was a civil officer at the time he was impeached and had been such uninterruptedly since the alleged misdemeanors in office were committed. The fact that the offense occurred in the previous term was immaterial. The object of impeachment is to remove a corrupt or unworthy officer. If his term has expired and he is no longer in office, that object is attained and the reason for his impeachment no longer exists. But if the offender is still an officer, he is amenable to impeachment, although the acts charged were committed in his previous term of the same office.

In the cases discussed there was a constructive breach in the tenure of the offices held by the defendants between the time of the commission of the offenses charged and the adoption of the articles of impeachment. Even though the offices held by the defendants at the time of their impeachment had not been the same offices which they held at the time of the commission of the alleged offenses, it might well have been decided, on principle, that impeachment would lie if in fact the prescribed functions of such offices were of the same general nature and susceptible to the same malversations and abuse.

It is indeed anomalous if this Congress is powerless to remove a corrupt or unfit Federal judge from office because his corruption or misdemeanor, however vicious or reprehensible, may have occurred during his tenure in some other judicial office under the Government of the United States prior to his appointment to the particular office from which he is sought to be ousted by impeachment, although he may have held a Federal judgeship continuously from the time of the commission of his offenses. Surely the House of Representatives will not recognize nor the Senate apply such a narrow and technical construction of the constitutional provisions relating to impeachments.

Conclusion.

Judges "shall hold their offices during good behavior." Thus says the Constitution. The framers of that instrument were desirous of having an independent and incorruptible judiciary, but they never intended to provide that any judge should hold his office upon non-

forfeitable life tenure. Those who formulated the organic law sought to protect the people against the malfeasance and misfeasance of unjust and corrupt judges. Therefore they wisely limited the tenure of office to "during good behavior" and provided the remedy for misbehavior to be forfeiture of office and the removal therefrom by impeachment.

The conduct of this judge has been exceedingly reprehensible and in marked contrast with the high sense of judicial ethics and probity that generally characterizes the Federal judiciary. Be it said to the credit of the wisdom of our fathers and in behalf of our American institutions that the judges have, as a rule, deported themselves in such manner as to merit and keep the confidence of the people. The public respect for the judicial branch of our Government has almost amounted to reverence. This confidence has been deserved, and let us hope that it will continue to be deserved, to the end that an upright and independent judiciary may be maintained for the perpetuation of our government of law.

A judge should be the personification of integrity, of honor, and of uprightness in his daily work and conversation. He should hold his exalted office and the administration of justice above the sordid desire to accumulate wealth by trading or trafficking with actual or probable litigants in his court. He should be free and unaffected by any bias born of avarice and unhampered by pecuniary or other improper obligations.

Your committee is of opinion that Judge Archbald's sense of moral responsibility has become deadened. He has prostituted his high office for personal profit. He has attempted by various transactions to commercialize his potentiality as judge. He has shown an overweening desire to make gainful bargains with parties having cases before him or likely to have cases before him. To accomplish this purpose he has not hesitated to use his official power and influence. He has degraded his high office and has destroyed the confidence of the public in his judicial integrity. He has forfeited the condition upon which he holds his commission and should be removed from office by impeachment.

Recommendation.

Your committee reports herewith the accompanying resolution and articles of impeachment against Judge Robert W. Archbald, and recommends that they be adopted by the House and that they be presented to the Senate with a demand for the conviction and removal from office of said Robert W. Archbald, United States circuit judge designated as a member of the Commerce Court:

House Resolution 622.

Resolved, That Robert W. Archbald, additional circuit judge of the United States from the third judicial, appointed pursuant to the act of June 18, 1910 (U.S. Stat. L., vol. 36, 539), and having duly qualified and having been duly commissioned and designated on the 31st day of January, 1911, to serve for four years in the Commerce Court, be impeached for misbehavior and for high crimes and misdemeanors; and that the evidence heretofore taken by the Committee on the Judiciary under House resolution 521 sustains 13 articles of impeachment which are hereinafter set out; and that said articles be, and they are hereby, adopted by the House of Representatives, and that the same shall be exhibited to the Senate in the following words and figures, to wit:

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Articles of impeachment of the House of Representatives of the United States of America in the name of themselves and of all of the people of the United States of America against Robert W. Archbald, additional circuit judge of the United States from the third judicial circuit, appointed pursuant to the act of June 18, 1910 (U.S. Stat. L., vol. 36, 540), and having duly qualified and having been duly commissioned and designated on the 31st day of January, 1911, to serve for four years in the Commerce Court:

ARTICLE 1.

That the said Robert W. Archbald, at Scranton, in the State of Pennsylvania, being a United States circuit judge, and having been duly designated as one of the judges of the United States Commerce Court, and being then and there a judge of the said court, on March 31, 1911, entered into an agreement with one Edward J. Williams whereby the said Robert W. Archbald and the said Edward J. Williams agreed to become partners in the purchase of a certain culm dump, commonly known as the Katydid culm dump, near Moosic, Pa., owned by the Hillside Coal & Iron Co., a corporation, and one John M. Robertson, for the purpose of disposing of said property at a profit. That pursuant to said agreement, and in furtherance thereof, the said Robert W. Archbald, on the 31st day of March, 1911, and at divers other times and at different places, did undertake, by correspondence, by personal conferences, and otherwise, to induce and influence, and did induce and influence, the officers of the said Hillside Coal & Iron Co. and of the Erie Railroad Co., a corporation, which owned all of the stock of said coal company, to enter into an agreement with the said Robert W. Archbald and the said Edward J. Williams to sell the interest of the said Hillside Coal & Iron Co. in the Katydid culm dump for a consideration of $4,500. That during the period covering the several negotiations and transactions leading up to the aforesaid agreement the said Robert W. Archbald was a judge of the United States Commerce Court, duly designated and acting as such judge; and at the time aforesaid and during the time the aforesaid negotiations were in progress the said Erie Railroad Co. was a common carrier engaged in interstate commerce and was a party litigant in certain suits, to wit, the Baltimore & Ohio Railroad Co., et al., v. The Interstate Commerce Commission, No. 38, and the Baltimore & Ohio Railroad Co. et al. v. The Interstate Commerce Commission, No. 39, then pending in the United States Commerce Court; and the said Robert W. Archbald, judge as aforesaid, well knowing these facts, willfully, unlawfully, and corruptly took advantage of his official position as such judge to induce and influence the officials of the said Erie Railroad Co. and the said Hillside Coal & Iron Co., a subsidiary corporation thereof, to enter into a contract with him and the said Edward J. Williams, as aforesaid, for profit to themselves, and that the said Robert W. Archbald, then and there, through the influence exerted by reason of his position as such judge, willfully, unlawfully, and corruptly did induce the officers of said Erie Railroad Co. and of the said Hillside Coal & Iron Co. to enter into said contract for the consideration aforesaid.

Wherefore the said Robert W. Archbald was and is guilty of misbehavior as such judge and of a high crime and misdemeanor in office.

ARTICLE 2.

That the said Robert W. Archbald, on the 1st day of August, 1911, was a United States circuit judge, and, having been duly designated as one of the judges of the United States Commerce Court, was then and there a judge of said court.

That at the time aforesaid the Marian Coal Co., a corporation, was the owner of a certain culm bank at Taylor, Pa., and was then and there engaged in the business of washing and shipping coal; that prior to that time the said Marian Coal Co. had filed before the Interstate Commerce Commission a complaint against the Delaware, Lackawanna & Western Railroad Co. and five other railroad companies as defendants, charging said defendants with discrimination in rates and with excessive charges for the transportation of coal shipped by the said Marian Coal Co. over their respective lines of road; that all of the said defendant companies were common carriers engaged in interstate commerce. That the decision of the said case by the Interstate Commerce Commission at the instance of either party thereto was subject to review, under the law, by the United States Commerce Court; that one Christopher G. Boland and one William P. Boland were then the principal stockholders of the said Marian Coal Co. and

controlled the operation of the same, and they, the said Christopher G. Boland and the said William P. Boland, employed one George M. Watson as an attorney to settle the case then pending as aforesaid in the Interstate Commerce Commission and to sell to the Delaware, Lackawanna & Western Railroad Co. two-thirds of the stock of the said Marian Coal Co.; and at the time aforesaid there was pending in the United States Commerce Court a certain suit entitled the Baltimore & Ohio Railroad Co. et al. *v.* The Interstate Commerce Commission, No. 38, to which suit the said Delaware, Lackawanna & Western Railroad Co. was a party litigant.

That the said Robert W. Archbald, being judge as aforesaid and well knowing these facts, did, then and there, engage, for a consideration, to assist the said George M. Watson to settle the aforesaid case then pending before the Interstate Commerce Commission and to sell to the said Delaware, Lackawanna & Western Railroad Co. the said two-thirds of the stock of the said Marian Coal Co., and in pursuance of said engagement the said Robert W. Archbald, on or about the 10th day of August, 1911, and at divers other times and at different places, did undertake, by correspondence, by personal conferences, and otherwise, to induce and influence the officers of the Delaware, Lackawanna & Western Railroad Co. to enter into an agreement with the said George M. Watson for the settlement of the aforesaid case and the sale of said stock of the Marian Coal Co.; and the said Robert W. Archbald thereby willfully, unlawfully, and corruptly did use his influence as such judge in the attempt to settle said case and to sell said stock of the said Marian Coal Co. to the Delaware, Lackawanna & Western Railroad Co.

Wherefore the said Robert W. Archbald was and is guilty of misbehavior as such judge and of a high crime and misdemeanor in office.

ARTICLE 3.

That the said Robert Archbald, being a United States circuit judge and a judge of the United States Commerce Court, on or about October 1, 1911, did secure from the Lehigh Valley Coal Co., a corporation, which coal company was then and there owned by the Lehigh Valley Railroad Co., a common carrier engaged in interstate commerce, and which railroad company was at that time a party litigant in certain suits then pending in the United States Commerce Court, to wit, The Baltimore & Ohio Railroad Co. et al. *v.* Interstate Commerce Commission et al., No. 38, and The Lehigh Valley Railroad Co. *v.* Interstate Commerce Commission et al., No. 49, all of which was well known to said Robert W. Archbald, an agreement which permitted said Robert W. Archbald and his associates to lease a culm dump, known as Packer No. 3, near Shenandoah, in the State of Pennsylvania, which said culm dump contained a large amount of coal, to wit, 472,670 tons, and which said culm dump the said Robert W. Archbald and his associates agreed to operate and to ship the product of the same exclusively over the lines of the Lehigh Valley Railroad Co.; and that the said Robert W. Archbald unlawfully and corruptly did use his official position and influence as such judge to secure from the said coal company the said agreement.

Wherefore the said Robert W. Archbald was and is guilty of misbehavior as such judge and of a misdemeanor in such office.

ARTICLE 4.

That the said Robert W. Archbald, while holding the office of United States circuit judge and being a member of the United States Commerce Court, was and is guilty of gross and improper conduct, and was and is guilty of a misdemeanor as said circuit judge and as a member of said Commerce Court in manner and form as follows, to wit: Prior to and on the 4th day of April, 1911, there was pending in said United States Commerce Court the suit of Louisville and Nashville Railroad Co. *v.* The Interstate Commerce Commission. Said suit was argued and submitted to said United States Commerce Court on the 4th day of April, 1911; that afterwards, to wit, on the 22d day of August, 1911, while said suit was still pending in said court, and before the same had been decided, the said Robert W. Archbald, as a member of said United States Commerce Court, secretly, wrongfully, and unlawfully did write a letter to the attorney for the said Louisville & Nashville Railroad Co. requesting said attorney to see one of the witnesses who had testified in said suit on behalf of said company and to get his explanation and interpretation of certain testimony that the said witness had given in said suit, and communicate the same to the said Robert W. Archbald, which request

was complied with by said attorney; that afterwards, to wit, on the 10th day of January, 1912, while said suit was still pending, and before the same had been decided by said court, the said Robert W. Archbald, as judge of said court, secretly, wrongfully, and unlawfully again did write to the said attorney that other members of said United States Commerce Court has discovered evidence on file in said suit detrimental to the said railroad company and contrary to the statements and contentions made by the said attorney, and the said Robert W. Archbald, judge of said United States Commerce Court as aforesaid, in said letter requested the said attorney to make to him, the said Robert W. Archbald, an explanation and an answer thereto; and he, the said Robert W. Archbald, as a member of said United States Commerce Court aforesaid, did then and there request and solicit the said attorney for the said railroad company to make and deliver to the said Robert W. Archbald a further argument in support of the contentions of the said attorney so representing the said railroad company, which request was complied with by said attorney, all of which on the part of said Robert W. Archbald was done secretly, wrongfully, and unlawfully, and which was without the knowledge or consent of the said Interstate Commerce Commission or its attorneys.

Wherefore the said Robert W. Archbald was and is guilty of misbehavior in office, and was and is guilty of a misdemeanor.

ARTICLE 5.

That in the year 1901 one Frederick Warnke, of Scranton, Pa., purchased a two-thirds interest in a lease on certain coal lands owned by the Philadelphia & Reading Coal & Iron Co., located near Lorberry Junction, in said State, and put up a number of improvements thereon and operated a culm dump located on said property for several years thereafter; that operations were carried on at a loss; that said Frederick Warnke thereupon applied to the Philadelphia & Reading Coal & Iron Co. for the mining maps of the said land covered by the said lease, and was informed that the lease under which he claimed had been forfeited two years before it was assigned to him, and his application for said maps was therefore denied; that said Frederick Warnke then made a proposition to George F. Baer, president of the Philadelphia & Reading Railroad Co. and president of the Philadelphia & Reading Coal & Iron Co., to relinquish any claim that he might have in this property under the said lease, provided that the Philadelphia & Reading Coal & Iron Co. would give him an operating lease on what was known as the Lincoln culm bank located near Lorberry; that said George F. Baer referred said proposition to one W. J. Richards, vice president and general manager of the Philadelphia & Reading Coal & Iron Co., for consideration and action; that the general policy of the said coal company being adverse to the lease of any of its culm banks, the said George F. Baer and the said W. J. Richards declined to make the lease, and the said Frederick Warnke was so advised; that the said Frederick Warnke then made several attempts, through his attorneys and friends, to have the said George F. Baer and the said W. J. Richards reconsider their decision in the premises, but without avail; that on or about November 1, 1911, the said Frederick Warnke called upon Robert A. Archbald, who was then and now is a United States circuit judge, having been duly designated as one of the judges of the United States Commerce Court, and asked him, the said Robert W. Archbald, to intercede in his behalf with the said W. J. Richards; that on November 24, 1911, the said Robert W. Archbald, judge as aforesaid, pursuant to said request, did write a letter to the said W. J. Richards requesting an appointment with the said W. J. Richards; that several days thereafter the said Robert W. Archbald called at the office of the said W. J. Richards to intercede for the said Frederick Warnke; that the said W. J. Richards then and there informed the said Robert W. Archbald that the decision which he had given to the said Warnke must be considered as final, and the said Archbald so informed the said Warnke; that the entire capital stock of the Philadelphia & Reading Coal & Iron Co. is owned by the Reading Co., which also owns the entire capital stock of the Philadelphia & Reading Railroad Co., which last-named company is a common carrier engaged in interstate commerce.

That the said Robert W. Archbald, judge as aforesaid, well knowing all of the aforesaid facts, did wrongfully attempt to use his influence as such judge to aid and assist the said Frederick Warnke to secure an operating lease of the said Lincoln culm dump owned by the Philadelphia & Reading Coal & Iron Co., as aforesaid, which lease the officials of the said Philadelphia & Reading Coal &

Iron Co. had theretofore refused to grant, which said fact was also well known to the said Robert W. Archbald.

That the said Robert W. Archbald, judge as aforesaid, shortly after the conclusion of his attempted negotiations with the officers of the Philadelphia & Reading Railroad Co. and of the Philadelphia & Reading Coal & Iron Co. aforesaid in behalf of the said Frederick Warnke, and on or about the 31st day of March, 1912, willfully, unlawfully, and corruptly did accept as a gift, reward, or present from the said Frederick Warnke, tendered in consideration of favors shown him by said judge in his efforts to secure a settlement and agreement with the said railroad company and the said coal company, and for other favors shown by said judge to the said Frederick Warnke, a certain promissory note for $500 executed by the firm of Warnke & Co., of which the said Frederick Warnke was a member.

Wherefore the said Robert W. Archbald was and is guilty of misbehavior as a judge and high crimes and misdemeanor in office.

ARTICLE 6.

That the said Robert W. Archbald, being a United States circuit judge and a judge of the United States Commerce Court, on or about the 1st day of December, 1911, did unlawfully, improperly, and corruptly attempt to use his influence as such judge with the Lehigh Valley Coal Co. and the Lehigh Valley Railway Co. to induce the officers of said companies to purchase a certain interest in a tract of coal land containing 800 acres, which interest at said time belonged to certain persons known as the Everhardt heirs.

Wherefore the said Robert W. Archbald was and is guilty of misbehavior in office, and was and is guilty of a misdemeanor.

ARTICLE 7.

That during the months of October and November, A.D. 1908, there was pending in the United States district court, in the city of Scranton, State of Pennsylvania, over which court Robert W. Archbald was then presiding as the duly appointed judge thereof, a suit or action at law wherein the Old Plymouth Coal Co. was plaintiff and the Equitable Fire & Marine Insurance Co. was defendant. That the said coal company was principally owned and entirely controlled by one W. W. Rissinger, which fact was well known to said Robert W. Archbald; that on or about November 1, 1908, and while said suit was pending, the said Robert W. Archbald and the said W. W. Rissinger wrongfully and corruptly agreed together to purchase stock in a gold-mining scheme in Honduras, Central America, for the purpose of speculation and profit; that in order to secure the money with which to purchase said stock the said Rissinger executed his promissory note in the sum of $2,500, payable to Robert W. Archbald and Sophia J. Hutchison, which said note was indorsed then and there by the said Robert W. Archbald for the purpose of having same discounted for cash; that one of the attorneys for said Rissinger in the trial of said suit was one John T. Lenahan; that on the 23d day of November, 1908, said suit came on for trial before said Robert W. Archbald, judge presiding, and a jury, and after the plaintiff's evidence was presented the defendant insurance company demurred to the sufficiency of such evidence and moved for a nonsuit, and after extended argument by attorneys for both plaintiff and defendant the said Robert W. Archbald ruled against the defendant and in favor of the plaintiff, and thereupon the defendant proceeded to introduce evidence, before the conclusion of which the jury was dismissed and a consent judgment rendered in favor of the plaintiff for $2,500, to be discharged upon the payment of $2,129.63 if paid within 15 days from November 23, 1908, and on the same day judgments were entered in a number of other like suits against different insurance companies, which resulted in the recovery of about $28,000 by the Old Plymouth Coal Co.; that before the expiration of said 15 days the said Rissinger, with the knowledge and consent of said Robert W. Archbald, presented said note to the said John T. Lenahan for discount, which was refused and which was later discounted by a bank and has never been paid.

All of which acts on the part of the said Robert W. Archbald were improper, unbecoming, and constituted misbehavior in his said office as judge and render him guilty of a misdemeanor.

ARTICLE 8.

That during the summer and fall of the year 1909 there was pending in the United States district court for the middle district of Pennsylvania, in the

city of Scranton, over which court the said Robert W. Archbald was then and there presiding as the duly appointed judge thereof, a civil action wherein the Marian Coal Co. was defendant, which action involved a large sum of money, and which defendant coal company was principally owned and controlled by one Christopher G. Boland and one William P. Boland, all of which was well known to said Robert W. Archbald; and while said suit was so pending the said Robert W. Archbald drew a note for $500, payable to himself, and which note was signed by one John Henry Jones and indorsed by the said Robert W. Archbald, and then and there during the pendency of said suit as aforesaid the said Robert W. Archbald wrongfully agreed and consented that the said note should be presented to the said Christopher G. Boland and the said William P. Boland, or one of them, for the purpose of having the said note discounted, corruptly intending that his name on said note would coerce and induce the said Christopher G. Boland and the said William P. Boland, or one of them to discount the same because of the said Robert W. Archbald's position as judge, and because the said Bolands were at that time litigants in his said court.

Wherefore the said Robert W. Archbald was and is guilty of gross misconduct in his office as judge, and was and is guilty of a misdemeanor in his said office as judge.

ARTICLE 9.

That the said Robert W. Archbald, of the city of Scranton and State of Pennsylvania, on or about November 1, 1909, being then and there a United States district judge in and for the middle district of Pennsylvania, in the city of Scranton and State aforesaid, did draw a note in his own proper handwriting, payable to himself, in the sum of $500, which said note was signed by one John Henry Jones, which said note the said Robert W. Archbald indorsed for the purpose of securing the sum of $500, and the said Robert W. Archbald, well knowing that his indorsement would not secure money in the usual commercial channels, then and there wrongfully did permit the said John Henry Jones to present said note for discount, at his law office, to one C. H. Von Storch, attorney at law and practitioner in said district court, which said Von Storch, a short time prior thereto, was a party defendant in a suit in the said district court presided over by said Robert W. Archbald, which said suit was decided in favor of the said Von Storch upon a ruling by the said Robert W. Archbald; and when the said note was presented to the said Von Storch for discount, as aforesaid, the said Robert W. Archbald wrongfully and improperly used his influence as such judge to induce the said Von Storch to discount same; that the said note was then and there discounted by the said Von Storch, and the same has never been paid, but is still due and owing.

Wherefore the said Robert W. Archbald was and is guilty of gross misconduct in his said office, and was and is guilty of a misdemeanor in his said office as judge.

ARTICLE 10.

That the said Robert W. Archbald, while holding the office of United States district judge, in and for the middle district of the State of Pennsylvania, on or about the 1st day of May, 1910, wrongfully and unlawfully did accept and receive a large sum of money, the exact amount of which is unknown to the House of Representatives, from one Henry W. Cannon; that said money so given by the said Henry W. Cannon and so unlawfully and wrongfully received and accepted by the said Robert W. Archbald, judge as aforesaid, was for the purpose of defraying the expenses of a pleasure trip of the said Robert W. Archbald to Europe; that the said Henry W. Cannon, at the time of the giving of said money and the receipt thereof by the said Robert W. Archbald, was a stockholder and officer in various and divers interstate railway corporations, to wit: A director in the Great Northern Railway, a director in the Lake Erie & Western Railroad Co., and a director in the Fort Wayne, Cincinnati & Louisville Railroad Co.; that the said Henry W. Cannon was president and chairman of the board of directors of the Pacific Coast Co., a corporation which owned the entire capital stock of the Columbus & Puget Sound Railroad Co., the Pacific Coast Railway Co., the Pacific Coast Steamship Co., and various other corporations engaged in the mining of coal and in the development of agricultural and timber land in various parts of the United States; that the acceptance by the said Robert W. Archbald, while holding said office of United States district judge, of said favors from an officer

and official of the said corporations, any of which in the due course of business was liable to be interested in litigation pending in the said court over which he presided as such judge, was improper and had a tendency to and did bring his said office of district judge into disrepute.

Wherefore the said Robert W. Archbald was and is guilty of misbehavior in office, and was and is guilty of a misdemeanor.

ARTICLE 11.

That the said Robert W. Archbald, while holding the office of United States district judge in and for the middle district of the State of Pennsylvania, did, on or about the 1st day of May, 1910, wrongfully and unlawfully accept and receive a sum of money in excess of $500, which sum of money was contributed and given to the said Robert W. Archbald by various attorneys who were practitioners in the said court presided over by the said Robert W. Archbald; that said money was raised by subscription and solicitation from said attorneys by two of the officers of said court, to wit, Edward R. W. Searle, clerk of said court, and J. B. Woodward, jury commissioner of said court, both the said Edward R. W. Searle and the said J. B. Woodward having been appointed to the said positions by the said Robert W. Archbald, judge aforesaid.

Wherefore said Robert W. Archbald was and is guilty of misbehavior in office, and was and is guilty of a misdemeanor.

ARTICLE 12.

That on the 9th day of April, 1901, and for a long time prior thereto, one J. B. Woodward was a general attorney for the Lehigh Valley Railroad Co., a corporation and common carrier doing a general railroad business; that on said day the said Robert W. Archbald, being then and there a United States district judge in and for the middle district of Pennsylvania, and while acting as such judge, did appoint the said J. B. Woodward as a jury commissioner in and for said judicial district, and the said J. B. Woodward, by virtue of said appointment and with the continued consent and approval of the said Robert W. Archbald, held such office and performed all the duties pertaining thereto during all the time that the said Robert W. Archbald held said office of United States district judge, and that during all of said time the said J. B. Woodward continued to act as a general attorney for the said Lehigh Valley Railroad Co.; all of which was at all times well known to the said Robert W. Archbald.

Wherefore the said Robert W. Archbald was and is guilty of misbehavior in office, and was and is guilty of a misdemeanor.

ARTICLE 13.

That Robert W. Archbald, on the 29th day of March, 1901, was duly appointed United States district judge for the middle district of Pennsylvania and held such office until the 31st day of January, 1911, on which last-named date he was duly appointed a United States circuit judge and designated as a judge of the United States Commerce Court.

That during the time in which the said Robert W. Archbald has acted as such United States district judge and judge of the United States Commerce Court he, the said Robert W. Archbald, at divers times and places, has sought wrongfully to obtain credit from and through certain persons who were interested in the result of suits then pending and suits that had been pending in the court over which he presided as judge of the district court, and in suits pending in the United States Commerce Court, of which the said Robert W. Archbald is a member.

That the said Robert W. Archbald, being United States circuit judge and being then and there a judge of the United States Commerce Court, at Scranton, in the State of Pennsylvania, on the 31st day of March, 1911, and at divers other times and places, did undertake to carry on a general business for speculation and profit in the purchase and sale of culm dumps, coal lands, and other coal properties, and for a valuable consideration to compromise litigation pending before the Interstate Commerce Commission, and in the furtherance of his efforts to compromise such litigation and of his speculations in coal properties, willfully, unlawfully, and corruptly did use his influence as a judge of the said United States Commerce Court to induce the officers of the Erie Railroad Co., the Delaware, Lackawanna & Western Railroad Co., the Lackawanna & Wyoming Valley Railroad Co., and

other railroad companies engaged in interstate commerce, respectively, to enter into various and divers contracts and agreements in which he was then and there financially interested with divers persons, to wit, Edward J. Williams, John Henry Jones,, Thomas H. Jones, George M. Watson, and others, without disclosing his said interest therein on the face of the contract, but which interest was well known to the officers and agents of said railroad companies.

That the said Robert W. Archbald did not invest any money or other thing of value in consideration of any interest acquired or sought to be acquired by him in securing or in attempting to secure such contracts or agreements or properties as aforesaid, but used his influence as such judge with the contracting parties thereto, and received an interest in said contracts, agreements, and properties in consideration of such influence in aiding and assisting in securing same.

That the said several railroad companies were and are engaged in interstate commerce, and at the time of the execution of the several contracts and agreements aforesaid and of entering into negotiations looking to such agreements had divers suits pending in the United States Commerce Court, and that the conduct and efforts of the said Robert W. Archbald in endeavoring to secure and in securing such contracts and agreements from said railroad companies was continuous and persistent from the said 31st day of March, 1911, to about the 15th day or April, 1912.

Wherefore the said Robert W. Archbald was and is guilty of misbehavior as such judge and of misdemeanors in office.

Mr. CLAYTON. Mr. Speaker, I beg to say, for the benefit of the Members of the House, that a thousand copies of this report, with the accompanying resolution, have been printed by the committee, so that any Member of the House desiring to have a copy of this report, with the accompanying resolution, may have the same by applying to the Committee on the Judiciary at its rooms in the House Office Building.

Impeachment of Judge Harold Louderback

A decision holding that a motion relating to a question of the Senate sitting as a court of impeachment is not debatable.

The Senate having been informed, on February 28,[1] by message, of the action[2] of the House of Representatives, transmitted to the House on the same day[3] a message announcing its readiness to receive the managers appointed by the House for the purpose of exhibiting the articles of impeachment.

On March 3,[4] the managers on the part of the House appeared before the Senate and were received with the formalities customarily observed on such occasions.

Mr. Manager Sumners read the resolution[5] agreed to by the House appointing its managers, and yielded to Mr. Manager Browning, who read the articles of impeachment, as follows:

Articles of impeachment against Harold Louderback

Congress of the United States of America,
In the House of Representatives,
February 24, 1933.

Resolution

Resolved, That Harold Louderback, who is a United States district judge of the northern district of California, be impeached of misdemeanors in office; and that the evidence heretofore taken by the special committee of the House of Representatives under House Resolution 239, sustains five articles of impeachment, which are hereinafter set out; and that the said articles be, and they are hereby adopted by the House of Representatives, and that the same shall be exhibited to the Senate in the following words and figures, to wit:

Articles of impeachment of the House of Representatives of the United States of America in the name of themselves and of all of the people of the United States of America against Harold Louderback, who was appointed, duly qualified, and commissioned to serve during good behavior in office, as United States district judge for the northern district of California, on April 17, 1928.

Article I

That the said Harold Louderback, having been nominated by the President of the United States, confirmed by the Senate of the United States, duly qualified and commissioned and while acting as a district judge for the northern district of California did on diverse and various occasions so abuse the power of his high office, that he is hereby charged with tyranny and oppression, favoritism and conspiracy, whereby he has brought the administration of justice in said district in the court of which he is a judge into disrepute, and by his conduct

[1] H. Res. 403, Record, p. 5178.
[2] Record, p. 5193.
[3] Record, p. 5195.
[4] Record, p. 5473.
[5] H. Res. 402, Record, p. 5177.

is guilty of misbehavior, falling under the constitutional provision as ground for impeachment and removal from office.

In that the said Harold Louderback on or about the 13th day of March, 1930, at his chambers and in his capacity as judge aforesaid, did willfully, tyrannically, and oppressively discharge on Addison G. Strong, whom he had on the 11th day of March, 1930, appointed as equity receiver in the matter of Olmstead against Russell-Colvin Co. after having attempted to force and coerce the said Strong to appoint one Douglas Short as attorney for the receiver in said case.

In that the said Harold Louderback improperly did attempt to cause the said Addison G. Strong to appoint the said Douglas Short as attorney for the receiver by promises of allowance of large fees and by threats of reduced fees did he refuse to appoint said Douglas Short.

In that the said Harold Louderback improperly did use his office and power of district judge in his own personal interest by causing the appointment of the said Douglas Short as attorney for the receiver, at the instance, suggestion, or demand of one Sam Leake, to whom the said Harold Louderback was under personal obligation, the said Sam Leake having entered into a certain arrangement and conspiracy with the said Harold Louderback to provide him, the said Harold Louderback, with a room at the Fairmont Hotel in the city of San Francisco, Calif., and made arrangements for registering said room in his, Sam Leake's name and paying all bills therefor in cash under an arrangement with the said Harold Louderback, to be reimbursed in full or in part in order that the said Harold Louderback might continue to actually reside in the city and county of San Francisco after having improperly and unlawfully established a fictitious residence in Contra Costa County for the sole purpose of improperly removing for trial to said Contra Costa County a cause of action which the said Harold Louderback expected to be filed against him; and that the said Douglas Short did receive large and exorbitant fees for his services as attorney for the receiver in said action, and the said Sam Leake did receive certain fees, gratuities, and loans directly or indirectly from the said Douglas Short amounting approximately to $1,200.

In that the said Harold Louderback entered into a conspiracy with the said Sam Leake to violate the provisions of the California Political Code in establishing a residence in the county of Contra Costa when the said Harold Louderback in fact did not reside in said county and could not have established a residence without the concealment of his actual residence in the county of San Francisco, covered and concealed by means of the said conspiracy with the said Sam Leake, all in violation of the law of the State of California.

In that the said Harold Louderback, in order to give color to his fictitious residence in the county of Contra Costa, all for the purpose of preparing and falsely creating proof necessary to establish himself as a resident of Contra Costa County in anticipation of an action he expected to be brought against him, for the sole purpose of meeting the requirements of the Code of Civil Procedure of the State of California providing that all causes of action must be tried in the county in which the defendant resides at the commencing of the action, did in accordance with the conspiracy entered into with the said Sam Leake unlawfully register as a voter in said Contra Costa County, when in law and in fact he did not reside in said county and could not so register, and that the said acts of Harold Louderback constitute a felony defined by section 42 of the Penal Code of California.

Wherefore the said Harold Louderback was and is guilty of a course of conduct improper, oppressive, and unlawful and is guilty of misbehavior in office as such judge and was and is guilty of a misdemeanor in office.

ARTICLE II

That Harold Louderback, judge as aforesaid, was guilty of a course of improper and unlawful conduct as a judge, filled with partiality and favoritism in improperly granting excessive, exorbitant, and unreasonable allowances as disbursements to one Marshall Woodward and to one Samuel Shortridge, jr., as receiver and attorney, respectively, in the matter of the Lumbermen's Reciprocal Association.

And in that the said Harold Louderback, judge as aforesaid, having improperly acquired jurisdiction of the case of the Lumbermen's Reciprocal Association contrary to the law of the United States and the rules of the court did, on or about the 29th day of July, 1930, appoint one Marshall Woodward and one

Samuel Shortridge, jr., receiver and attorney, respectively, in said case, and after an appeal was taken from the order and other acts of the judge in said case to the United States Circuit Court of Appeals for the Ninth Circuit and the said order and acts of the said Harold Louderback having been reversed by said United States Circuit Court of Appeals and the mandate of said circuit court of appeals directed the court to cause the said receiver to turn over all of the assets of said association in his possession as receiver to the commissioner of insurance of the State of California, the said Harold Louderback unlawfully, improperly, and oppressively did sign and enter an order so directing the receiver to turn over said property to said State commissioner of insurance but improperly and unlawfully made such order conditional that the said State commissioner of insurance and any other party in interest would not take a Holding Co. case when as a matter of fact and law and under conditions then existing no receiver should have been appointed, but the said Harold Louderback did accept a petition verified on information and belief by an attorney in the case and without notice to the said Prudential Holding Co. did so appoint Guy H. Gilbert the receiver and the firm of Dinkelspiel and Dinkelspiel attorneys for the receiver; that the said Harold Louderback in an attempt to benefit and enrich the said Guy H. Gilbert and his attorneys, Dinkelspiel and Dinkelspiel, failed to give his fair, impartial, and judicial consideration to the application of the said Prudential Holding Co. for a dismissal of the petition and a discharge of the receiver, although the said Prudential Holding Co. was in law entitled to such dismissal of the petition and discharge of the receiver; that during the pendency of the application for the dismissal of the petition and for the discharge of the receiver a petition in bankruptcy was filed against the said Prudential Holding Co. based entirely and solely on an allegation that a receiver in equity had been appointed for the said Prudential Holding Co., and the said Harold Louderback then and there willfully, improperly, and unlawfully, sitting in a part of the court to which he had not been assigned at the time, took jurisdiction of the case in bankruptcy and though knowing the facts in the case and of the application then pending before him for the dismissal of the petition and the discharge of the equity receiver, granted the petition in bankruptcy and did on the 2d day of October, 1930, appoint the same Guy H. Gilbert receiver in bankruptcy and the said Dinkelspiel and Dinkelspiel attorneys for the receiver, knowing all of the time that the said Prudential Holding Co. was entitled as a matter of law to have the said petition in equity dismissed; in that through the oppressive, deliberate, and willful action of the said Harold Louderback acting in his capacity as a judge and misusing the powers of his judicial office for the sole purpose of benefiting and enriching said Guy H. Gilbert and Dinkelspiel and Dinkelspiel, did cause the said Prudential Holding Co. to be put to unnecessary delay, expense, and labor and did deprive them of a fair, impartial, and judicial consideration of their rights and the protection of their property, to which they were entitled.

Wherefore the said Harold Louderback was, and is, guilty of a course of conduct constituting misbehavior as said judge and that said Harold Louderback was, and is, guilty of a misdemeanor in office.

[Articles III and IV are not available.]

ARTICLE V

That Harold Louderback, on the 17th day of April, 1928, was duly appointed United States district judge for the northern district of California, and has held such office to the present day.

That the said Harold Louderback as judge aforesaid, during his said term of office, at diverse times and places when acting as such judge, did so conduct himself in his said court and in his capacity as judge in making decisions and orders in actions pending in his said court and before him as said judge, and in the method of appointing receivers and attorneys for receivers, in appointing incompetent receivers, and in displaying a high degree of indifference to the litigants in equity receiverships, as to excite fear and distrust and to inspire a widespread belief in and beyond said northern district of California that causes were not decided in said court according to their merits, but were decided with partiality and with prejudice and favoritism to certain individuals, particularly to receivers and attorneys for receivers by him so appointed, all of which is prejudicial to the dignity of the judiciary.

All to the scandal and disrepute of said court and the administration of justice therein.

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Wherefore the said Harold Louderback was, and is, guilty of misbehavior as such judge and of a misdemeanor in office.

[SEAL.] JNO. N. GARNER,
Speaker of the House of Representatives.

Attest: SOUTH TRIMBLE, *Clerk.*

Mr. Manager Sumners then entered a reservation of the right to exhibit at any time thereafter any further articles of accusation or impeachment, and made formal announcement that the managers on the part of the House of Representatives—

do now demand that the Senate take order for the appearance of said Harold Louderback to answer said impeachment, and do now demand his impeachment, conviction, and removal from office.

Impeachment of Judge Halsted L. Ritter

[H. Res. 422, 74th Cong. 2d sess.]

Congress of the United States of America.
In the House of Representatives,
March 2, 1936.

Resolved, That Halsted L. Ritter, who is a United States district judge for the southern district of Florida, be impeached for misbehavior, and for high crimes and misdemeanors; and that the evidence heretofore taken by the subcommittee of the Committee on the Judiciary of the House of Representatives under H. Res. 163 of the Seventy-third Congress sustains articles of impeachment, which are hereinafter set out; and that the said articles be, and they are hereby, adopted by the House of Representatives, and that the same shall be exhibited to the Senate in the following words and figures, to wit:

Articles of impeachment of the House of Representatives of the United States of America in the name of themselves and of all of the people of the United States of America against Halsted L. Ritter, who was appointed, duly qualified, and commissioned to serve, during good behavior in office, as United States district judge for the southern district of Florida, on February 15, 1929.

ARTICLE I

That the said Halsted L. Ritter, having been nominated by the President of the United States, confirmed by the Senate of the United States, duly qualified and commissioned, and while acting as a United States district judge for the southern district of Florida, was and is guilty of misbehavior and of a high crime and misdemeanor in office in manner and form as follows, to wit: On or about October 11, 1929, A. L. Rankin (who had been a law partner of said judge immediately before said judge's appointment as judge), as solicitor for the plaintiff, filed in the court of the said Judge Ritter a certain foreclosure suit and receivership proceeding, the same being styled "Bert E. Holland and others against Whitehall Building and Operating Company and others" (Number 678–M–Eq.). On or about May 15, 1930, the said Judge Ritter allowed the said Rankin an advance of $2,500 on his fee for his services in said case. On or about July 2, 1930, the said Judge Ritter by letter requested another judge of the United States district court for the southern district of Florida, to wit, Honorable Alexander Akerman, to fix and determine the total allowance for the said Rankin for his services in said case for the reason as stated by Judge Ritter in said letter, that the said Rankin had formerly been the law partner of the said Judge Ritter, and he did not feel that he should pass upon the total allowance made said Rankin in that case and that if Judge

Akerman would fix the allowance it would relieve the writer, Judge Ritter, from any embarrassment if thereafter any question should arise as to his, Judge Ritter's, favoring said Rankin with an exorbitant fee.

Thereafterward, notwithstanding the said Judge Akerman, in compliance with Judge Ritter's request, allowed the said Rankin a fee of $15,000 for his services in said case, from which sum the said $2,500 theretofore allowed the said Rankin by Judge Ritter as an advance on his fee was deducted, the said Judge Ritter, well knowing that at his request compensation had been fixed by Judge Akerman for the said Rankin's services in said case, and notwithstanding the restraint of propriety expressed in his said letter to Judge Akerman, and ignoring the danger of embarrassment mentioned in said letter, did fix an additional and exorbitant fee for the said Rankin in said case. On or about December 24, 1930, when the final decree in said case was signed, the said Judge Ritter allowed the said Rankin, additional to the total allowance of $15,000 theretofore allowed by Judge Akerman, a fee of $75,000 for his services in said case, out of which allowance the said Judge Ritter directly profited. On the same day, December 24, 1930, the receiver in said case paid the said Rankin, as part of his said additional fee, the sum of $25,000, and the said Rankin on the same day privately paid and delivered to the said Judge Ritter the sum of $2,500 in cash; $2,000 of said $2,500 was deposited in bank by Judge Ritter on, to wit, December 29, 1930, the remaining $500 being kept by Judge Ritter and not deposited in bank until, to wit, July 10, 1931. Between the time of such initial payment on said additional fee and April 6, 1931, the said receiver paid said Rankin thereon $5,000. On or about April 6, 1931, the said Rankin received the balance of the said additional fee allowed him by Judge Ritter, said balance amounting to $45,000. Shortly thereafter, on or about April 14, 1931, the said Rankin paid and delivered to the said Judge Ritter, privately, in cash, an additional sum of $2,000. The said Judge Halsted L. Ritter corruptly and unlawfully accepted and received for his own use and benefit from the said A. L. Rankin the aforesaid sums of money, amounting to $4,500.

Wherefore, the said Judge Halsted L. Ritter was and is guilty of misbehavior and was and is guilty of a high crime and misdemeanor.

ARTICLE II

That the said Halsted L. Ritter, while holding the office of United States district judge for the southern district of Florida, having been nominated by the President of the United States, confirmed by the Senate of the United States, duly qualified and commissioned, and while acting as a United States district judge for the southern district of Florida, was and is guilty of misbehavior and of high crimes and misdemeanors in office in manner and form as follows, to wit:

On the 15th day of February 1929 the said Halsted L. Ritter, having been appointed as United States district judge for the southern district of Florida, was duly qualified and commissioned to serve as such during good behavior in office. Immediately prior thereto and for several years the said Halsted L. Ritter had practiced law in said district in partnership with one A. L. Rankin, which partnership was

dissolved upon the appointment of said Ritter as said United States district judge.

On the 18th day of July 1928 one Walter S. Richardson was elected trustee in bankruptcy of the Whitehall Building and Operating Company, which company had been adjudicated in said district as a bankrupt, and as such trustee took charge of the assets of said Whitehall Building and Operating Company, which consisted of a hotel property located in Palm Beach in said district. That the said Richardson as such trustee operated said hotel property from the time of his said appointment until its sales on the 3d of January 1929, under the foreclosure of a third mortgage thereon. On the 1st of November and the 13th of December 1929, the said Judge Ritter made orders in said bankruptcy proceedings allowing the said Walter S. Richardson as trustee the sum of $16,500 as compensation for his services as trustee. That before the discharge of said Walter S. Richardson as such trustee, said Richardson, together with said A. L. Rankin, one Ernest Metcalf, one Martin Sweeney, and the said Halsted L. Ritter, entered into an arrangement to secure permission of the holder or holders of at least $50,000 of first-mortgage bonds on said hotel property for the purpose of filing a bill to foreclose the first mortgage on said premises in the court of said Halsted L. Ritter, by which means the said Richardson, Rankin, Metcalf, Sweeney, and Ritter were to continue said property in litigation before said Ritter. On the 30th day of August 1929, the said Walter S. Richardson, in furtherance of said arrangement and understanding, wrote a letter to the said Martin Sweeney, in New York, suggesting the desirability of contacting as many first-mortgage bondholders as possible in order that their cooperation might be secured, directing special attention to Mr. Bert E. Holland, an attorney, whose address was in the Tremont Building in Boston, and who, as cotrustee, was the holder of $50,000 of first-mortgage bonds, the amount of bonds required to institute the contemplated proceedings in Judge Ritter's court.

On October 3, 1929, the said Bert E. Holland, being solicited by the said Sweeney, requested the said Rankin and Metcalf to prepare a complaint to file in said Judge Ritter's court for foreclosure of said first mortgage and the appointment of a receiver. At this time Judge Ritter was holding court in Brooklyn, New York, and the said Rankin and Richardson went from West Palm Beach, Florida, to Brooklyn, New York, and called upon said Judge Ritter a short time previous to filing the bill for foreclosure and appointment of a receiver of said hotel property.

On October 10, 1929, and before the filing of said bill for foreclosure and receiver, the said Holland withdrew his authority to said Rankin and Metcalf to file said bill and notified the said Rankin not to file the said bill. Notwithstanding the said instructions to said Rankin not to file said bill, said Rankin, on the 11th day of October 1929, filed said bill with the clerk of the United States District Court for the Southern District of Florida but with the specific request to said clerk to lock up the said bill as soon as it was filed and hold until Judge Ritter's return so that there would be no newspaper publicity before the matter was heard by Judge Ritter for the appointment of

a receiver, which request on the part of the said Rankin was complied with by the said clerk.

On October 16, 1929, the said Holland telegraphed to the said Rankin, referring to his previous wire requesting him to refrain from filing the bill and insisting that the matter remain in its then status until further instruction was given; and on October 17, 1929, the said Rankin wired to Holland that he would not make an application on his behalf for the appointment of a receiver. On October 28, 1929, a hearing on the complaint and petition for receivership was heard before Judge Halsted L. Ritter at Miami, at which hearing the said Bert E. Holland appeared in person before said Judge Ritter and advised the judge that he wished to withdraw the suit and asked for dismissal of the bill of complaint on the ground that the bill was filed without his authority.

But the said Judge Ritter, fully advised of the facts and circumstances hereinbefore recited, wrongfully and oppressively exercised the powers of his office to carry into execution said plan and agreement theretofore arrived at, and refused to grant the request of the said Holland and made effective the champertous undertaking of the said Richardson and Rankin and appointed the said Richardson receiver of the said hotel property, notwithstanding that objection was made to Judge Ritter that said Richardson had been active in fomenting this litigation and was not a proper person to act as receiver.

On October 15, 1929, said Rankin made oath to each of the bills for intervenors which were filed the next day.

On October 16, 1929, bills for intervention in said foreclosure suit were filed by said Rankin and Metcalf in the names of holders of approximately $5,000 of said first-mortgage bonds, which intervenors did not possess the said requisite $50,000 in bonds required by said first mortgage to bring foreclosure proceedings on the part of the bondholders.

The said Rankin and Metcalf appeared as attorneys for complainants and intervenors, and in response to a suggestion of the said Judge Ritter, the said Metcalf withdrew as attorney for complainants and intervenors and said Judge Ritter thereupon appointed said Metcalf as attorney for the said Richardson, the receiver.

And in the further carrying out of said arrangement and understanding, the said Richardson employed the said Martin Sweeney and one Bemis, together with Ed Sweeney, as managers of said property, for which they were paid the sum of $60,000 for the management of said hotel for the two seasons the property remained in the custody of said Richardson as receiver.

On or about the 15th day of May 1930 the said Judge Ritter allowed the said Rankin an advance on his fee of $2,500 for his services in said case.

On or about July 2, 1930, the said Judge Ritter requested Judge Alexander Akerman, also a judge of the United States District Court for the Southern District of Florida, to fix the total allowance for the said Rankin for his services in said case, said request and the reasons therefor being set fort hin a letter by the said Judge Ritter, in words and figures as follows, to wit:

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July 2, 1930.

Hon. Alexander Akerman,
United States District Judge, Tampa, Fla.

My dear Judge:

In the case of Holland et al. v. Whitehall Building & Operating Co. (No. 678–M–Eq.), pending in my division, my former law partner, Judge A. L. Rankin, of West Palm Beach, has filed a petition for an order allowing compensation for his services on behalf of the plaintiff.

I do not feel that I should pass, under the circumstances, upon the total allowance to be made Judge Rankin in this matter. I did issue an order, which Judge Rankin will exhibit to you, approving an advance of $2,500 on his claim, which was approved by all attorneys.

You will appreciate my position in the matter, and I request you to pass upon the total allowance which should be made Judge Rankin in the premises as an accommodation to me. This will relieve me from any embarrassment hereafter if the question should arise as to my favoring Judge Rankin in this matter by an exorbitant allowance.

Appreciating very much your kindness in this matter, I am,

Yours sincerely,

Halsted L. Ritter.

In compliance with said request the said Judge Akerman allowed the said Rankin $12,500 in addition to the $2,500 theretofore allowed by Judge Ritter, making a total of $15,000 as the fee of the said Rankin in the said case.

But notwithstanding the said request on the part of said Ritter and the compliance by the said Judge Akerman and the reasons for the making of said request by said Judge Ritter of Judge Akerman, the said Judge Ritter, on the 24th day of December 1930, allowed the said Rankin an additional fee of $75,000.

And on the same date when the receiver in said case paid to the said Rankin as a part of said additional fee the sum of $25,000, said Rankin privately paid and delivered to said Judge Ritter out of the said $25,000 the sum of $2,500 in cash, $2,000 of which the said Judge Ritter deposited in a bank and $500 of which was put in a tin box and not deposited until the 10th day of July 1931, when it was deposited in a bank with an additional sum of $600.

On or about the 6th day of April 1931, the said Rankin received as a part of the $75,000 additional fee the sum of $45,000, and shortly thereafter, on or before the 14th day of April 1931, the said Rankin paid and delivered to said Judge Ritter, privately and in cash, out of said $45,000 the sum of $2,000.

The said Judge Halsted L. Ritter corruptly and unlawfully accepted and received for his own use and benefit from the said Rankin the aforesaid sums of $2,500 in cash and $2,000 in cash, amounting in all to $4,500.

Of the total allowance made to said A. L. Rankin in said foreclosure suit, amounting in all to $90,000, the following sums were paid out by said Rankin with the knowledge and consent of said Judge Ritter, to wit: to said Walter S. Richardson, the sum of $5,000; to said Metcalf, the sum of $10,000; to Shutts and Bowen, also attor-

neys for the receiver, the sum of $25,000; and to said Halsted L. Ritter, the sum of $1,500.

In addition to the said sum of $5,000 received by the said Richardson as aforesaid, said Ritter by order in said proceedings allowed said Richardson a fee of $30,000 for services as such receiver.

The said fees allowed by said Judge Ritter to A. L. Rankin (who had been a law partner of said judge immediately before said judge's appointment as judge) as solicitor for the plaintiff in said case were excessive and unwarranted, and said judge profited personally thereby in that out of the money so allowed said solicitor he received personally privately, and in cash $1,500 for his own use and benefit.

While the Whitehall Hotel was being operated in receivership under said proceeding pending in said court (and in which proceeding the receiver in charge of said hotel by appointment of said Judge was allowed large compensation by said judge) the said judge stayed at said hotel from time to time without cost to himself and received free rooms, free meals, and free valet service, and, with the knowledge and consent of said judge, members of his family, including his wife, his son, Thurston Ritter, his daughter, Mrs. M. R. Walker, his secretary, Mrs. Lloyd C. Hooks, and her husband, Lloyd C. Hooks, each likewise on various occasions stayed at said hotel without cost to themselves or to said judge, and received free rooms, and some or all of them received from said hotel free meals and free valet service; all of which expenses were borne by the said receivership to the loss and damage of the creditors whose interests were involved therein.

The said judge willfully failed and neglected to perform his duty to conserve the assets of the Whitehall Building and Operating Company in receivership in his court, but to the contrary, permitted waste and dissipation of its assets, to the loss and damage of the creditors of said corporation, and was a party to the waste and dissipation of such assets while under the control of his said court, and personally profited thereby, in the manner and form hereinabove specifically set out.

Wherefore, the said Judge Halsted L. Ritter was and is guilty of misbehavior, and was and is guilty of a high crime and misdemeanor in office.

ARTICLE III

That the said Halsted L. Ritter, having been nominated by the President of the United States, confirmed by the Senate of the United States, duly qualified and commissioned, and while acting as a United States district judge for the southern district of Florida, was and is guilty of a high crime and misdemeanor in office in manner and form as follows, to wit:

That the said Halsted L. Ritter, while such judge, was guilty of a violation of section 258 of the Judicial Code of the United States of America (U.S.C., Annotated, title 28, sec. 373) making it unlawful for any judge appointed under the authority of the United States to exercise the profession or employment of counsel or attorney, or to be engaged in the practice of the law, in that after the employment of the law firm of Ritter and Rankin (which, at the time of the appointment of Halsted L. Ritter to be judge of the United States

District Court for the Southern District of Florida, was composed of Halsted L. Ritter and A. L. Rankin) in the case of Trust Company of Georgia and Robert G. Stephens, trustees, against Brazilian Court Building Corporation, and others, numbered 5704, in the Circuit Court of the Fifteenth Judicial Circuit of Florida, and after the final decree had been entered in said cause, and after the fee of $4,000 which had been agreed upon at the outset of said employment had been fully paid to the firm of Ritter and Rankin, and after Halsted L. Ritter had on, to wit, February 15, 1929, become judge of the United States District Court for the Southern District of Florida, Judge Ritter on, to wit, March 11, 1929, wrote a letter to Charles A. Brodek, of counsel for Mulford Realty Corporation, (the client which his former law firm had been representing in said litigation), stating that there had been much extra and unanticipated work in the case, that he was then a Federal judge; that his partner, A. L. Rankin, would carry through further proceedings in the case, but that he, Judge Ritter, would be consulted about the matter until the case was all closed up; and that "this matter is one among very few which I am assuming to continue my interest in until finally closed up"; and stating specifically in said letter:

"I do not know whether any appeal will be taken in the case or not, but if so, we hope to get Mr. Howard Paschal or some other person as receiver who will be amenable to our directions, and the hotel can be operated at a profit, of course, pending the appeal. We shall demand a very heavy supersedeas bond, which I doubt whether D'Esterre can give."

At the time said letter was written by Judge Ritter and said $2,000 received by him, Mulford Realty Corporation held and owned large interests in Florida real estate and citrus groves, and a large amount of securities of the Olympia Improvement Corporation, which was a company orgainized to develop and promote Olympia, Florida, said holdings being within the territorial jurisdiction of the United States District Court, of which Judge Ritter was a judge from February 15, 1929.

Which acts of said judge were calculated to bring his office into disrepute, constitute a violation of section 258 of the Judicial Code, of the United States of America (U. S. C., Annotated, title 28, sec. 373), and constitute a high crime and misdemeanor within the meaning and intent of section 4 of article II of the Constitution of the United States.

Wherefore, the said Judge Halsted L. Ritter was and is guilty of a high misdemeanor in office.

ARTICLE IV

That the said Halsted L. Ritter, while holding the office of United States district judge for the southern district of Florida, having been nominated by the President of the United States, confirmed by the Senate of the United States, duly qualified and commissioned, and while acting as a United States district judge for the southern district of Florida, was and is guilty of misbehavior and of high crimes and misdemeanors in office in manner and form as follows, to wit:

The said Judge Ritter by his actions and conduct, as an individual and as such judge, has brought his court into scandal and disrepute,

to the prejudice of said court and public confidence in the administration of justice in his said court, and to the prejudice of public respect for and confidence in the Federal judiciary:

1. In fact in the Florida Power Company case (Florida Power and Light Company against City of Miami and others, numbered 1183–M–Eq.) which was a case wherein said judge had granted the complainant power company a temporary injunction restraining the enforcement of an ordinance of the city of Miami, which ordinance prescribed a reduction in the rates for electric current being charged in said city, said judge improperly appointed one Cary T. Hutchinson, who had long been associated with and employed by power and utility interests, special master in chancery in said suit, and refused to revoke his order so appointing said Hutchinson. Thereafter, when criticism of such action had become current in the city of Miami, and within two weeks after a resolution (H. Res. 163, Seventy-third Congress) had been agreed to in the House of Representatives of the Congress of the United States, authorizing and directing the Judiciary Committee thereof to investigate the official conduct of said judge and to make a report concerning said conduct to said House of Representatives, an arrangement was entered into with the city commissioners of the city of Miami or with the city attorney of said city by which the said city commissioners were to pass a resolution expressing faith and confidence in the integrity of said judge, and the said judge recuse himself as judge in said power suit. The said agreement was carried out by the parties thereto, and said judge, after the passage of such resolution, recused himself from sitting as judge in said power suit, thereby bartering his judicial authority in said case for a vote of confidence. Nevertheless, the succeeding judge allowed said Hutchinson as special master in chancery in said case a fee of $5,000, although he performed little, if any, service as such, and in the order making such allowance recitd: "And it appearing to the court that a minimum fee of $5,000 was approved by the court for the said Cary T. Hutchinson, special master in this cause."

2. In that in the Trust Company of Florida cases (Illick against Trust Company of Florida and others, numbered 1043–M–Eq., and Edmunds Committee and others against Marion Mortgage Company and others numbered 1124–M–Eq.) after the State banking department of Florida, through its comptroller, Honorable Ernest Amos, had closed the doors of the Trust Company of Florida and appointed J. H. Therrell liquidator for said Trust Company, and had intervened in the said Illick case, said Judge Ritter wrongfully and erroneously refused to recognize the right of said State authority to administer the affairs of the said trust company, and appointed Julian S. Eaton and Clark D. Stearns as receivers of the property of said trust company. On appeal, the United States Circuit Court of Appeals for the Fifth Circuit reversed the said order or decree of Judge Ritter, and ordered the said property surrendered to the State liquidator. Thereafter, on, to wit, September 12, 1932, there were filed in the United States District Court for the Southern District of Florida the Edmunds Committee case, supra. Marion Mortgage Company was a subsidiary of the Trust Company of Florida. Judge Ritter being absent from his district at the time of the filing of said case, an application for the appointment of receivers therein was presented to another

judge of said district, namely, Honorable Alexander Akerman. Judge Ritter, however, prior to the appointment of such receivers, telegraphed Judge Akerman, requesting him to appoint the aforesaid Eaton and Stearns as receivers in said case, which appointments were made by Judge Akerman. Thereafter, the United States Circuit Court of Appeals for the Fifth Circuit reversed the order of Judge Akerman, appointing said Eaton and Stearns as receivers in said case. In November 1932 J. H. Therrell, as liquidator, filed a bill of complaint in the Circuit Court of Dade County, Florida—a court of the State of Florida—alleging that the various trust properties of the Trust Company of Florida were burdensome to the liquidator to keep, and asking that the court appoint a succeeding trustee. Upon petition for removal of said cause from said State court into the United States District Court for the Southern District of Florida, Judge Ritter took jurisdiction, notwithstanding the previous rulings of the United States Circuit Court of Appeals above referred to, and again appointed the said Eaton and Stearns as the receivers of the said trust properties. In December 1932 the said Therrell surrendered all of the trust properties to said Eaton and Stearns as receivers, together with all records of the Trust Company of Florida pertaining thereto. During the time said Eaton and Stearns, as such receivers, were in control of said trust properties, Judge Ritter wrongfully and improperly approved their accounts without notice or opportunity for objection thereto to be heard. With the knowledge of Judge Ritter, said receivers appointed the sister-in-law of Judge Ritter, namely, Mrs. G. M. Wickard, who had had no previous hotel-management experience, to be manager of the Julia Tuttle Hotel and Apartment Building, one of said trust properties. On, to wit, January 1, 1933, Honorable J. M. Lee succeeded Honorable Ernest Amos as comptroller of the State of Florida and appointed M. A. Smith liquidator in said Trust Company of Florida cases to succeed J. H. Therrell. An appeal was again taken to the United States Circuit Court of Appeals for the Fifth Circuit from the then latest order or decree of Judge Ritter, and again the order or decree of Judge Ritter appealed from was reversed by the said circuit court of appeals, which held that Judge Ritter, or the court in which he presided, had been without jurisdiction in the matter of the appointment of said Eaton and Stearns as receivers. Thereafter, and with the knowledge of the decision of the said circuit court of appeals, Judge Ritter wrongfully and improperly allowed said Eaton and Stearns and their attorneys some $26,000 as fees out of said trust-estate properties, and endeavored to require, as a condition precedent to releasing said trust properties from the control of his court, a promise from counsel for the said State liquidator not to appeal from his order allowing the said fees to said Eaton and Stearns and their attorneys.

3. In that the said Halsted L. Ritter, while such Federal judge accepted, in addition to $4,500 from his former law partner as alleged in article I hereof, other large fees or gratuities, to wit, $7,500 from J. R. Francis, on or about April 19, 1929. J. R. Francis at this said time having large property interests within the territorial jurisdiction of the court of which Judge Ritter was a judge. On, to wit, the 4th day of April 1929 the said Judge Ritter accepted the sum of $2,000 from said Brodek, Raphael and Eisner, representing Mulford Realty Corporation, through his attorney, Charles A. Brodek, as a

fee or gratuity, at which time the said Mulford Realty Corporation held and owned large interests in Florida real estate and citrus groves, and a large amount of securities of the Olympia Improvement Corporation, which was a company organized to develop and promote Olympia, Florida, said holdings being within the territorial jurisdiction of the United States District Court of which Judge Ritter was a judge from February 15, 1929.

4. By his conduct as detailed in articles I and II hereof.

Wherefore, the said Judge Halsted L. Ritter was and is guilty of misbehavior, and was and is guilty of high crimes and misdemeanors in office.

JOSEPH W. BYRNS,
Speaker of House of Representatives.

Attest:

SOUTH TRIMBLE,
Clerk.

Mr. Manager SUMNERS. Mr. President, the House of Representatives by protestation, saving to themselves the liberty of exhibiting at any time hereafter any further articles of accusation or impeachment against the said Halsted L. Ritter, district judge of the United States for the southern district of Florida, and also of replying to his answers which he shall make unto the articles preferred against him, and of offering proof to the same and every part thereof, and to all and every other article of accusation or impeachment which shall be exhibited by them as the case shall require, do demand that the said Halsted L. Ritter may be put to answer the misdemeanors in office which have been charged against him in the articles which have been exhibited to the Senate, and that such proceedings, examinations, trials, and judgments may be thereupon had and given as may be agreeable to law and justice.

Mr. President, the managers on the part of the House of Representatives, in pursuance of the action of the House of Representatives, by the adoption of the articles of impeachment which have just been read to the Senate, do now demand that the Senate take order for the appearance of the said Halsted L. Ritter to answer said impeachment and do now demand his impeachment, conviction, and removal from office.

The VICE PRESIDENT. The Senate will take proper order, and notify the House of Representatives.

Mr. ASHURST. Mr. President, I move that the senior Senator from Idaho (Mr. BORAH), who is the senior Senator in point of service in the Senate, be now designated by the Senate to administer the oath to the presiding officer of the court of impeachment.

The motion was agreed to; and Mr. BORAH advanced to the Vice President's desk and administered the oath to Vice President GARNER as presiding officer, as follows:

You do solemnly swear that in all things appertaining to the trial of the impeachment of Halsted L. Ritter, United States district judge for the southern district of Florida, now pending, you will do impartial justice according to the Constitution and laws. So help you God.

The amendments to the articles of impeachment are, in full, as follows:

AMENDMENTS TO ARTICLES OF IMPEACHMENT AGAINST HALSTED L. RITTER

[H. Res. 471, 74th Cong., 2d sess.]

CONGRESS OF THE UNITED STATES OF AMERICA,
IN THE HOUSE OF REPRESENTATIVES,
March 30, 1936.

RESOLUTION

Resolved, That the articles of impeachment heretofore adopted by the House of Representatives in and by H. Res. 422, House Calendar number 279 be, and they are hereby, amended as follows:

Article III is amended so as to read as follows:

"ARTICLE III

"That the said Halsted L. Ritter, having been nominated by the President of the United States, confirmed by the Senate of the United States, duly qualified and commissioned, and, while acting as a United States District judge for the southern district of Florida, was and is guilty of a high crime and misdemeanor in office in manner and form as follows, to wit:

"That the said Halsted L. Ritter, while such judge, was guilty of a violation of section 258 of the Judicial Code of the United States of America (U. S. C., Annotated, title 28, sec. 373) making it unlawful for any judge appointed under the authority of the United States to exercise the profession or employment of counsel or attorney, or to be engaged in the practice of the law, in that after the employment of the law firm of Ritter and Rankin (which, at the time of the appointment of Halsted L. Ritter to be judge of the United States District Court for the Southern District of Florida, was composed of Halsted L. Ritter and A. L. Rankin) in the case of Trust Company of Georgia and Robert G. Stephens, trustee, against Brazilian Court Building Corporation, and others, numbered 5704, in the Circuit Court of the Fifteenth Judicial Circuit of Florida, and after the fee of $4,000 which had been agreed upon at the outset of said employment had been fully paid to the firm of Ritter and Rankin, and after Halsted L. Ritter had, on, to wit, February 15, 1929, become judge of the United States District Court for the Southern District of Florida, Judge Ritter on, to wit, March 11, 1929, wrote a letter to Charles A. Brodek, of counsel for Mulford Realty Corporation (the client which his former law firm had been representing in said litigation), stating that there had been much extra and unanticipated work in the case, that he was then a Federal Judge; that his partner, A. L. Rankin, would carry through further proceedings in the case, but that he, Judge Ritter, would be consulted about the matter until the case was all closed up; and that 'this matter is one among very few which I am assuming to continue my interest in until finally closed up'; and stating specifically in said letter:

"'I do not know whether any appeal will be taken in the case or not but, if so, we hope to get Mr. Howard Paschal or some other person as receiver who will be amenable to our directions, and the hotel can be operated at a profit, of course, pending the appeal. We shall demand a very heavy supersedeas bond, which I doubt whether D'Esterre can give', and further that he was 'of course primarily interested in getting some money in the case', and that he thought '$2,000 more by way of attorneys' fees should be allowed'; and asked that he be communicated with direct about the matter, giving his post-office-box number. On to wit, March 13, 1929, said Brodek replied favorably, and on March 30, 1929, a check of Brodek, Raphael, and Eisner, a law firm of New York City, representing Mulford Realty Corporation, in which Charles A. Brodek, senior member of the firm of Brodek, Raphael and Eisner, was one of the directors, was drawn, payable to the order of 'Honorable Halsted L. Ritter for $2,000 and which was duly endorsed 'Honorable Halsted L. Ritter, H. L. Ritter' and was paid on, to wit, April 4, 1929, and the proceeds thereof were received and appropriated by Judge Ritter to his own individual use and benefit, without advising his said former partner that said $2,000 had been received, without consulting with his former partner thereabout, and without the knowledge or consent of his said former partner, appropriated the entire amount thus solicited and received to the use and benefit of himself, the said Judge Ritter.

"At the time said letter was written by Judge Ritter and said $2,000 received by him, Mulford Realty Corporation held and owned large interests in Florida real

estate and citrus groves, and a large amount of securities of the Olympia Improvement Corporation, which was a company organized to develop and promote Olympia, Florida, said holdings being within the territorial jurisdiction of the United States District Court, of which Judge Ritter was a judge from, to wit, February 15, 1929.

"After writing said letter of March 11, 1929, Judge Ritter further exercised the profession or employment of counsel or attorney, or engaged in the practice of the law, with relation to said case.

"Which acts of said judge were calculated to bring his office into disrepute constitute a violation of section 258 of the Judicial Code of the United States of America (U. S. C., Annotated, title 28, sec. 373), and constitute a high crime and misdemeanor within the meaning and intent of section 4 of article II of the Constitution of the United States.

"Wherefore, the said Judge Halsted L. Ritter was and is guilty of a high misdemeanor in office."

By adding the following articles immediately after article III as amended:

"ARTICLE IV

"That the said Halsted L. Ritter, having been nominated by the President of the United States, confirmed by the Senate of the United States, duly qualified and commissioned, and, while acting as a United States district judge for the southern district of Florida, was and is guilty of a high crime and misdemeanor in office in manner and form as follows to wit:

"That the said Halsted L. Ritter, while such judge, was guilty of a violation of section 258 of the Judicial Code of the United States of America (U. S. C., Annotated, title 28, sec. 373), making it unlawful for any judge appointed under the authority of the United States to exercise the profession or employment of counsel or attorney, or to be engaged in the practice of the law, in that Judge Ritter did exercise the profession or employment of counsel or attorney, or engage in the practice of the law, representing J. R. Francis, with relation to the Boca Raton matter and the segregation and saving of the interest of J. R. Francis herein, or in obtaining a deed or deeds to J. R. Francis from the Spanish River Land Company to certain pieces of realty, and in the Edgewater Ocean Beach Development Company matter for which services the said Judge Ritter received from the said J. R. Francis the sum of $7,500.

"Which acts of said judge were calculated to bring his office into disrepute, constitute a violation of the law above recited, and constitute a high crime and misdemeanor within the meaning and intent of section 4 of article II of the Constitution of the United States.

"Wherefore, the said Judge Halsted L. Ritter was and is guilty of a high misdemeanor in office.

"ARTICLE V

"That the said Halsted L. Ritter, having been nominated by the President of the United States, confirmed by the Senate of the United States, duly qualified and commissioned, and, while acting as a United States district judge for the southern district of Florida, was and is guilty of a high crime and misdemeanor in office in manner and form as follows, to wit:

"That the said Halstead L. Ritter, while such judge, was guilty of violation of section 146 (h) of the Revenue Act of 1928, making it unlawful for any person willfully to attempt in any manner to evade or defend the payment of the income tax levied in and by said Revenue Act of 1928, in that during the year 1929 said Judge Ritter received gross taxable income—over and above his salary as judge—to the amount of some $12,000, yet paid no income tax thereon.

"Among the fees included in said gross taxable income for 1929 were the extra fee of $2,000 collected and received by Judge Ritter in the Brazilian Court case as described in article III, and the fee of $7,500 received by Judge Ritter from J. R. Francis.

"Wherefore the said Judge Halsted L. Ritter was and is guilty of a high misdemeanor in office.

"ARTICLE VI

"That the said Halsted L. Ritter, having been nominated by the President of the United States, confirmed by the Senate of the United States, duly qualified and commissioned, and, while acting as a United States district judge for the

southern district of Florida, was and is guilty of a high crime and misdemeanor in office in manner and form as follows, to wit:

"That the said Halsted L. Ritter, while such judge, was guilty of violation of section 146 (b) of the Revenue Act of 1928, making it unlawful for any person willfully to attempt in any manner to evade or defeat the payment of the income tax levied in and by said Revenue Act of 1928, in that during the year 1930 the said Judge Ritter received gross taxable income—over and above his salary as judge—to the amount of to wit, $5,300, yet failed to report any part thereof in his income-tax return for the year 1930, and paid no income tax thereon.

"Two thousand five hundred dollars of said gross taxable income for 1930 was that amount of cash paid Judge Ritter by A. L. Rankin on December 24, 1930, as described in article I.

"Wherefore the said Judge Halsted L. Ritter was and is guilty of a high misdemeanor in office."

Original article IV is amended so as to read as follows:

"ARTICLE VII

"That the said Halsted L. Ritter, while holding the office of United States district judge for the southern district of Florida, having been nominated by the President of the United States, confirmed by the Senate of the United States, duly qualified and commissioned, and, while acting as a United States district judge for the southern district of Florida, was and is guilty of misbehavior and of high crimes and misdemeanors in office in manner and form as follows, to wit:

"The reasonable and probable consequence of the actions or conduct of Halsted L. Ritter, hereunder specified or indicated in this article, since he became judge of said court, as an individual or as such judge, is to bring his court into scandal and disrepute, to the prejudice of said court and public confidence in the administration of justice therein, and to the prejudice of public respect for and confidence in the Federal judiciary, and to render him unfit to continue to serve as such judge:

"1. In that in the Florida Power Company case (Florida Power and Light Company against City of Miami and others, numbered 1138-M-Eq.) which was a case wherein said judge had granted the complainant power company a temporary injunction restraining the enforcement of an ordinance of the city of Miami, which ordinance prescribed a reduction in the rates for electric current being charged in said city, said judge improperly appointed one Cary T. Hutchinson, who had long been associated with and employed by power and utility interests, special master in chancery in said suit, and refused to revoke his order so appointing said Hutchinson. Thereafter, when criticism of such action had become current in the city of Miami, and within two weeks after a resolution (H. Res. 163, Seventy-third Congress) had been agreed to in the House of Representatives of the Congress of the United States, authorizing and directing the Judicial Committee thereof to investigate the official conduct of said judge and to make a report concerning said conduct to said House of Representatives an arrangement was entered into with the city commissioners of the city of Miami or with the city attorney of said city by which the said city commissioners were to pass a resolution expressing faith and confidence in the integrity of said judge, and the said judge recuse himself as judge in said power suit. The said agreement was carried out by the parties thereto, and said judge, after the passage of such resolution, recused himself from sitting as judge in said power suit, thereby bartering his judicial authority in said case for a vote of confidence. Nevertheless, the succeeding judge allowed said Hutchinson as special master in chancery in said case a fee of $5,000, although he performed little, if any, service as such, and in the order making such allowance recited: 'And it appearing to the court that a minimum fee of $5,000 was approved by the court for the said Cary T. Hutchinson, special master in this cause.'

"2. In that in the Trust Company of Florida cases (Illick against Trust Company of Florida and others numbered 1043-M-Eq., and Edmunds Committee and others against Marion Mortgage Company and others, numbered 1124-M-Eq.) after the State banking department of Florida, through its comptroller, Honorable Ernest Amos, had closed the doors of the Trust Company of Florida and appointed J. H. Therrell liquidator for said trust company, and had intervened in the said Illick case, said Judge Ritter wrongfully and erroneously refused to recognize the right of said State authority to adminis-

ter the affairs of the said trust company and appointed Julian E. Eaton and Clark D. Stearns as receivers of the property of said trust company. On appeal, the United States Circuit Court of Appeals for the Fifth Circuit reversed the said order or decree of Judge Ritter and ordered the said property surrendered to the State liquidator. Thereafter, on, to wit, September 12, 1932, there was filed in the United States District Court for the Southern District of Florida the Edmunds Committee case, supra. Marion Mortgage Company was a subsidiary of the Trust Company of Florida. Judge Ritter being absent from his district at the time of the filing of said case, an application for the appointment of receivers therein was presented to another judge of said district, namely, Honorable Alexander Akerman. Judge Ritter, however, prior to the appointment of such receivers, telegraphed Judge Akerman, requesting him to appoint the aforesaid Eaton and Stearns as receivers in said case, which appointments were made by Judge Akerman. Thereafter the United States Circuit Court of Appeals for the Fifth Circuit reversed the order of Judge Akerman, appointing said Eaton and Stearns as receivers in said case. In November 1932, J. H. Therrell, as liquidator, filed a bill of complaint in the Circuit Court of Dade County, Florida—a court of the State of Florida—alleging that the various trust properties of the Trust Company of Florida were burdensome to the liquidator to keep, and asking that the court appoint a succeeding trustee. Upon petition for removal of said cause from said State court into the United States District Court for the Southern District of Florida, Judge Ritter took jurisdiction, notwithstanding the previous rulings of the United States Circuit Court of Appeals above referred to, and again appointed the said Eaton and Stearns as the receivers of the said trust properties. In December 1932 the said Therrell surrender all of the trust properties to said Eaton and Stearns as receivers, together with all records of the Trust Company of Florida pertaining thereto. During the time said Eaton and Stearns, as such receivers, were in control of said trust properties, Judge Ritter wrongfully and improperly approved their accounts without notice or opportunity for objection thereto to be heard.

With the knowledge of Judge Ritter, said receivers appointed the sister-in-law of Judge Ritter, namely, Mrs. G. M. Wickard, who had had no previous hotel-management experience, to be manager of the Julia Tuttle Hotel and Apartment Building, one of said trust properties. On, to wit, January 1, 1933, Honorable J. M. Lee succeeded Honorable Ernest Amos as comptroller of the State of Florida and appointed M. A. Smith liquidator in said Trust Company of Florida cases to succeed J. H. Therrell. An appeal was again taken to the United States Circuit Court of Appeals for the Fifth Circuit from the then latest order or decree of Judge Ritter, and again the order or decree of Judge Ritter appealed from was reversed by the said circuit court of appeals which held that the State officer was entitled to the custody of the property involved and that said Eaton and Stearns as receivers were not entitled to such custody. Thereafter, and with the knowledge of the decision of the said circuit court of appeals, Judge Ritter wrongfully and improperly allowed said Eaton and Stearns and their attorneys some $26,000 as fees out of said trust-estate properties and endeavored to require, as a condition precedent to releasing said trust properties from the control of his court, a promise from counsel for the said State liquidator not to appeal from his order allowing the said fees to said Eaton and Stearns and their attorneys.

"3. In that the said Halsted L. Ritter, while such Federal judge, accepted, in addition to $4,500 from his former law partner as alleged in article I hereof other large fees or gratuities, to wit, $7,500 from J. R. Francis, on or about April 19, 1929, J. R. Francis at this said time having large property interests within the territorial jurisdiction of the court of which Judge Ritter was a judge; and on, to wit, the 4th day of April 1929 the said Judge Ritter accepted the sum of $2,000 from Brodek, Raphael and Eisner, representing Mulford Realty Corporation, as its attorneys, through Charles A. Brodeck, senior member of said firm and a director of said corporation, as a fee or gratuity, at which time the said Mulford Realty Corporation held and owned large interests in Florida real estate and citrus groves, and a large amount of securities of the Olympia Improvement Corporation, which was a company organized to develop and promote Olympia, Florida, said holding being within the territorial jurisdiction of the United States District Court of which Judge Ritter was a judge from, to wit, February 15, 1929.

"4. By his conduct as detailed in articles I, II, III, and IV hereof, and by his income-tax evasions as set forth in articles V and VI hereof.

"Wherefore, the said Judge Halsted L. Ritter was and is guilty of misbehavior, and was and is guilty of high crimes and misdemeanors in office."

JOSEPH W. BYRNS,
Speaker of the House of Representatives.

Attest:

[SEAL] SOUTH TRIMBLE, *Clerk.*

The PRESIDING OFFICER. What is the pleasure of counsel for the respondent with reference to the amendments?

Mr. HOFFMAN. Mr. President, with reference to the amendments, we ask the honorable Senate, sitting as a Court of Impeachment, to grant to us ample time within which to file our response to the amended or new articles. If I may be permitted to do so, I suggest that 48 hours will be ample time. We have no desire to take time that would interfere with the present arrangement for trial on the 6th of April.

The PRESIDING OFFICER. Counsel for the respondent has indicated that 48 hours would be ample time. Is there objection to that?

Mr. Manager SUMNERS. There is no objection on the part of the managers for the House.

The PRESIDING OFFICER. What is the pleasure of the Court? Is there objection?

Mr. ASHURST. Mr. President, am I correct in the understanding that the honorable counsel for the respondent are granted 48 hours within which to reply to all the pleadings?

Mr. HOFFMAN. Just the new articles. We are ready to file pleadings this morning directed to articles I, II, III, and the original article IV, which is now article VII.

Mr. ASHURST. Very well, Mr. President. I am sure there will be no objection to counsel for the respondent being granted 48 hours; and now is the appropriate time for counsel for the respondent to exhibit their reply to the various articles heretofore presented.

The PRESIDING OFFICER. There being no objection, the 48 hours requested will be allowed; and the Court will now hear counsel for the respondent.

Mr. ASHURST. Would the attorney for the respondent object to taking a place on the rostrum? It would facilitate audition very much if there is no objection.

Mr. HOFFMAN. There is no objection, sir.

The PRESIDING OFFICER. There is no objection.

The Impeachment of President Andrew Johnson

(A) Proceedings of the Senate Preliminary to the Trial of Articles of Impeachment of Andrew Johnson, President of the United States.

Tuesday, February 25, 1868.

A message from the House of Representatives, by Mr. McPherson, its Clerk:

Mr. President: The House of Representatives has passed the following resolution:

Resolved, That a committee of two be appointed to go to the Senate, and, at the bar thereof, in the name of the House of Representatives and of all the people of the United States, to impeach Andrew Johnson, President of the United States, of high crimes and misdemeanors in office, and acquaint the Senate that the House of Representatives will, in due time, exhibit particular articles of impeachment against him, and make good the same; and that the committee do demand that the Senate take order for the appearance of said Andrew Johnson to answer to said impeachment.

Ordered, That Mr. Thaddeus Stevens and Mr. John A. Bingham be appointed such committee.

The Sergeant at Arms announced a committee from the House of Representatives, Mr. Thaddeus Stevens and Mr. John A. Bingham, who appeared at the bar of the Senate and delivered the following message:

Mr. President: By order of the House of Representatives we appear at the bar of the Senate, and in the name of the House of Representatives, and of all the people of the United States, we do impeach Andrew Johnson, President of the United States, of high crimes and misdemeanors in office; and we do further inform the Senate that the House of Representatives will in due time exhibit particular articles of impeachment against him, and make good the same; and in their name we do demand that the Senate take order for the appearance of the said Andrew Johnson to answer to said impeachment.

The President of the Senate pro tempore replied that the Senate would take order in the premises, and the committee withdrew.

Mr. Howard submitted the following resolution; which was considered, by unanimous consent, and agreed to:

Resolved, That the message of the House of Representatives relating to the impeachment of Andrew Johnson, President of the United States, be referred to a select committee of seven, to be appointed by the Chair, to consider the same and report thereon; and

The President pro tempore appointed Mr. Howard, Mr. Trumbull, Mr. Conkling, Mr. Edmunds, Mr. Morton, Mr. Pomeroy, and Mr. Johnson.

WEDNESDAY, FEBRUARY 26, 1868.

Impeachment of Andrew Johnson, President.

Mr. Howard, from the select committee appointed to consider and report upon the message of the House of Representatives in relation to the impeachment of Andrew Johnson, President of the United States, reported the following resolution:

Whereas the House of Representatives on the 25th day of the present month, by two of their Members, Messrs. Thaddeus Stevens and John A. Bingham, at the bar of the Senate impeached Andrew Johnson, President of the United States, of high crimes and misdemeanors in office, and informed the Senate that the House of Representatives will in due time exhibit particular articles of impeachment against him and make good the same, and likewise demanded that the Senate take order for the appearance of said Andrew Johnson to answer to the said impeachment: Therefore,

Resolved, That the Senate will take proper order thereon, of which due notice shall be given to the House of Representatives.

And the committee further recommend to the Senate that the Secretary of the Senate be directed to notify the House of Representatives of the foregoing resolution.

On motion by Mr. Howard,

The Senate proceeded, by unanimous consent, to consider the said resolution; and

The resolution was agreed to.

Ordered, That the Secretary notify the House of Representatives thereof.

FRIDAY, FEBRUARY 28, 1868.

Impeachment of Andrew Johnson, President.

Mr. Howard, from the select committee appointed to consider and report upon the message of the House of Representatives relative to the impeachment of Andrew Johnson, President of the United States, submitted a report (No. 59) prescribing certain rules of proceeding for the Senate when sitting as a high court of impeachment.

Ordered, That the report be printed.

MONDAY, MARCH 2, 1868.

Impeachment of Andrew Johnson, President.

The following are the rules adopted by the Senate for rules of procedure and practice in the Senate when sitting on the trial of impeachments:

Rules of procedure and practice in the Senate when sitting on the trial of impeachments.

I. Whenever the Senate shall receive notice from the House of Representatives that managers are appointed on their part to conduct an impeachment against any person and are directed to carry articles of impeachment to the Senate the Secretary of the Senate shall immediately inform the House of Representatives that the Senate is ready to receive the managers for the purpose of exhibiting such articles of impeachment agreeably to said notice.

II. When the managers of an impeachment shall be introduced at the bar of the Senate, and shall signify that they are ready to exhibit articles of impeachment against any person, the presiding officer of the Senate shall direct the Ser-

geant at Arms to make proclamation, who shall, after making proclamation, repeat the following words, viz: "All persons are commanded to keep silence, on pain of imprisonment, while the House of Representatives is exhibiting to the Senate of the United States articles of impeachment against ——— ———;" after which the articles shall be exhibited, and then the presiding officer of the Senate shall inform the managers that the Senate will take proper order on the subject of the impeachment, of which due notice shall be given to the House of Representatives.

III. Upon such articles being presented to the Senate, the Senate shall, at 1 o'clock afternoon of the day (Sunday excepted) following such presentation, or sooner if so ordered by the Senate, proceed to the consideration of such articles, and shall continue in session from day to day (Sundays excepted), after the trial shall commence (unless otherwise ordered by the Senate), until final judgment shall be rendered, and so much longer as may, in its judgment, be needful. Before proceeding to the consideration of the articles of impeachment, the presiding officer shall administer the oath hereinafter provided to the members of the Senate then present, and to the other members of the Senate as they shall appear, whose duty it shall be to take the same.

IV. When the President of the United States, or the Vice President of the United States, upon whom the powers and duties of the office of President shall have devolved, shall be impeached, the Chief Justice of the Supreme Court of the United States shall preside; and in a case requiring the said Chief Justice to preside notice shall be given to him by the presiding officer of the Senate of the time and place fixed for the consideration of the articles of impeachment, as aforesaid, with a request to attend; and the said Chief Justice shall preside over the Senate during the consideration of said articles, and upon the trial of the person impeached therein.

V. The presiding officer shall have power to make and issue, by himself or by the Secretary of the Senate, all orders, mandates, writs, and precepts authorized by these rules, or by the Senate, and to make and enforce such other regulations and orders in the premises as the Senate may authorize or provide.

VI. The Senate shall have power to compel the attendance of witnesses, to enforce obedience to its orders, mandates, writs, precepts, and judgments, to preserve order, and to punish in a summary way contempts of and disobedience to its authority, orders, mandates, writs, precepts, or judgments, and to make all lawful orders, rules, and regulations, which it may deem essential or conducive to the ends of justice. And the Sergeant at Arms, under the direction of the Senate, may employ such aid and assistance as may be necessary to enforce, execute, and carry into effect the lawful orders, mandates, writs, and precepts of the Senate.

VII. The presiding officer of the Senate shall direct all necessary preparations in the Senate Chamber, and the presiding officer upon the trial shall direct all the forms of proceeding while the Senate are sitting for the purpose of trying an impeachment, and all forms during the trial not otherwise specially provided for. The presiding officer may, in the first instance, submit to the Senate without a division, all questions of evidence and incidental questions; but the same shall, on the demand of one-fifth of the members present, be decided by yeas and nays.

VIII. Upon the presentation of articles of impeachment and the organization of the Senate as hereinbefore provided, a writ of summons shall issue to the accused, reciting said articles, and notifying him to appear before the Senate upon a day and at a place to be fixed by the Senate and named in such writ, and file his answer to said articles of impeachment, and to stand to and abide the orders and judgment of the Senate thereon; which writ shall be served by such officer or person as shall be named in the precept thereof such number of day prior to the day fixed for such appearance as shall be named in such precept, either by the delivery of an attested copy thereof to the person accused, or if that can not conveniently be done, by leaving such copy at the last known place or abode of such person, or at his usual place of business in some conspicuous place therein; or if such service shall be, in the judgment of the Senate, impracticable, notice to the accused to appear shall be given in such other manner, by publication or otherwise, as shall be deemed just; and if the writ aforesaid shall fail of service in the manner aforesaid, the proceedings shall not thereby abate, but further service may be made in such manner as the Senate shall direct. If the accused, after service, shall fail to appear, either in person or by attorney, on the day so fixed therefor as aforesaid, or appearing shall fail to file

his answer to such articles of impeachment, the trial shall proceed, nevertheless, as upon a plea of not guilty. If a plea of guilty shall be entered, judgment may be entered thereon without further proceedings.

IX. At 12 o'clock and 30 minutes afternoon of the day appointed for the return of the summons against the person impeached, the legislative and executive business of the Senate shall be suspended, and the Secretary of the Senate shall administer an oath to the returning officer in the form following, viz: "I, ———— ————, do solemnly swear that the return made by me upon the process issued on the ——day of ————, by the Senate of the United States, against ———— ————, is truly made, and that I have performed such service as herein described; so help me God." Which oath shall be entered at large on the records.

X. The person impeached shall then be called to appear and answer the articles of impeachment against him. If he appear, or any person for him, the appearance shall be recorded, stating particularly if by himself, or by agent, or attorney, naming the person appearing, and the capacity in which he appears. If he do not appear, either personally or by agent or attorney, the same shall be recorded.

XI. At 12 o'clock and 30 minutes afternoon of the day appointed for the trial of an impeachment, the legislative and executive business of the Senate shall be suspended, and the Secretary shall give notice to the House of Representatives that the Senate is ready to proceed upon the impeachment of ———— ————, in the Senate Chamber, which Chamber is prepared with accommodations for the reception of the House of Representatives.

XII. The hour of the day at which the Senate shall sit upon the trial of an impeachment shall be (unless otherwise ordered) 12 o'clock m.; and when the hour for such sitting shall arrive the presiding officer of the Senate shall so announce; and thereupon the presiding officer upon such trial shall cause proclamation to be made, and the business of the trial shall proceed. The adjournment of the Senate sitting in said trial shall not operate as an adjournment of the Senate, but on such adjournment the Senate shall resume the consideration of its legislative and executive business.

XIII. The Secretary of the Senate shall record the proceedings in cases of impeachment as in the case of legislative proceedings, and the same shall be reported in the same manner as the legislative proceedings of the Senate.

XIV. Counsel for the parties shall be admitted to appear and be heard upon an impeachment.

XV. All motions made by the parties or their counsel shall be addressed to the presiding officer, and if he or any Senator shall require it, they shall be committed to writing and read at the Secretary's table.

XVI. Witnesses shall be examined by one person on behalf of the party producing them, and then cross-examined by one person on the other side.

XVII. If a Senator is called as a witness, he shall be sworn, and give his testimony standing in his place.

XVIII. If a Senator wishes a question to be put to witness, or to offer a motion or order (except a motion to adjourn), it shall be reduced to writing and put by the presiding officer.

XIX. At all times while the Senate is sitting upon the trial of an impeachment the doors of the Senate shall be kept open, unless the Senate shall direct the doors to be closed while deliberating upon its decisions.

XX. All preliminary or interlocutory questions and all motions shall be argued for not exceeding one hour on each side, unless the Senate shall, by order, extend the time.

XXI. The case on each side shall be opened by one person. The final argument on the merits may be made by two persons on each side (unless otherwise ordered by the Senate, upon application for that purpose), and the argument shall be opened and closed on the part of the House of Representatives.

XXII. On the final question whether the impeachment is sustained, the yeas and nays shall be taken on each article of impeachment separately; and if the impeachment shall not upon any of the articles presented be sustained by the votes of two-thirds of the members present, a judgment of acquittal shall be entered; but if the person accused in such articles of impeachment shall be convicted upon any of said articles by the votes of two-thirds of the members present, the Senate shall proceed to pronounce judgment, and a certified copy of such judgment shall be deposited in the office of the Secretary of State.

XXIII. All the orders and decisions shall be made and had by yeas and nays, which shall be entered on the record, and without debate, except when the doors shall be closed for deliberation, and in that case no Member shall speak

more than once on one question, and for not more than 10 minutes on an interlocutory question, and for not more than 15 minutes on the final question, unless by consent of the Senate, to be had without debate; but a motion to adjourn may be decided without the yeas and nays, unless they be demanded by one-fifth of the Members present.

XXIV. Witnesses shall be sworn in the following form, viz: "You, ——— ———, do swear (or affirm, as the case may be) that the evidence you shall give in the case now depending between the United States and ——— ——— shall be the truth, the whole truth, and nothing but the truth, so help you God." Which oath shall be administered by the Secretary, or any other duly authorized person.

Form of subpœna to be issued on the application of the managers of the impeachment, or of the party impeached, or of his counsel.

To ——— ———, greeting:

You and each of you are hereby commanded to appear before the Senate of the United States, on the ——— day of ———, at the Senate Chamber in the city of Washington, then and there to testify your knowledge in the cause which is before the Senate, in which the House of Representatives have impeached ——— ———.

Fail not.

Witness ——— ———, and Presiding Officer of the Senate, at the city of Washington, this ——— day of ———, in the year of our Lord ———, and of the Independence of the United States the ———.

Form of direction for the service of said subpœna.

The Senate of the United States to ——— ———, greeting:

You are hereby commanded to serve and return the within subpœna according to law.

Dated at Washington, this ——— day of ———, in the year of our Lord ———, and of the Independence of the United States the ———.

——— ———,

Secretary of the Senate.

Form of oath to be administered to the Members of the Senate sitting in the trial of impeachment

I solemnly swear (or affirm, as the case may be) that in all things appertaining to the trial of the impeachment of ——— ———, now pending, I will do impartial justice according to the Constitution and laws. So help me, God.

Form of summons to be issued and served upon the person impeached.

THE UNITED STATES OF AMERICA, *ss:*

The Senate of the United States, to ——— ———, greeting:

Whereas the House of Representatives of the United States of America did, on the —— day of ———, exhibit to the Senate articles of impeachment against you, the said ——— ———, in the words following:

[Here insert the articles.]

And demand that you, the said ——— ———, should be put to answer the accusations as set forth in said articles, and that such proceedings, examinations, trials, and judgments might be thereupon had as are agreeable to law and justice:

You, the said ——— ———, are therefore hereby summoned to be and appear before the Senate of the United States of America, at their Chamber in the city of Washington, on the —— day of ———, at 12 o'clock and 30 minutes afternoon, then and there to answer to the said articles of impeachment, and then and there to abide by, obey, and perform such orders, directions, and judgments as the Senate of the United States shall make in the premises according to the Constitution and laws of the United States.

Hereof you are not to fail.

Witness ——— ———, and Presiding Officer of the said Senate, at the city of Washington, this —— day of ———, in the year of our Lord ———, and of the Independence of the United States the ——.

Form of precept to be indorsed on said writ of summons.

THE UNITED STATES OF AMERICA, *ss:*

The Senate of the United States to ——— ———, *greeting:*

You are hereby commanded to deliver to and leave with ——— ———, if conveniently to be found, or if not, to leave at his usual place of abode, or at his usual place of business, in some conspicuous place, a true and attested copy of the within writ of summons, together with a like copy of this precept; and in whichsoever way you perform the service, let it be done at least —— days before the appearance day mentioned in said writ of summons.

Fail not, and make return of this writ of summons and precept, with your proceedings thereon indorsed, on or before the appearance day mentioned in the said writ of summons.

Witness ——— ———, and Presiding Officer of the Senate, at the city of Washington, this —— day of ———, in the year of our Lord ———, and of the Independence of the United States the ———.

All process shall be served by the Sergeant at Arms of the Senate, unless otherwise ordered by the court.

XXV. If the Senate shall at any time fail to sit for the consideration of articles of impeachment on the day or hour fixed therefor, the Senate may, by an order to be adopted without debate, fix a day and hour for resuming such consideration.

WEDNESDAY, MARCH 4, 1868.

Impeachment of Andrew Johnson, President.

The President pro tempore laid before the Senate the following letter from the Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United States:

To the Senate of the United States:

Inasmuch as the sole power to try impeachments is vested by the Constitution in the Senate, and it is made the duty of the Chief Justice to preside when the President is on trial, I take the liberty of submitting, very respectfully, some observations in respect to the proper mode of proceeding upon the impeachment which has been preferred by the House of Representatives against the President now in office.

That when the Senate sits for the trial of an impeachment it sits as a court seems unquestionable.

That for the trial of an impeachment of the President this court must be constituted of the members of the Senate, with the Chief Justice presiding, seems equally unquestionable.

The Federalist is regarded as the highest contemporary authority on the construction of the Constitution; and in the sixty-fourth number the functions of the Senate "sitting in their judicial capacity as a court for the trial of impeachments" are examined.

In a paragraph explaining the reasons for not uniting "the Supreme Court with the Senate in the formation of the court of impeachments" it is observed that "to a certain extent the benefits of that union will be obtained from making the Chief Justice of the Supreme Court the president of the court of impeachments, as is proposed by the plan of the convention, while the inconveniences of an entire incorporation of the former into the latter will be substantially avoided. This was, perhaps, the prudent mean."

This authority seems to leave no doubt upon either of the propositions just stated. And the statement of them will serve to introduce the question upon which I think it my duty to state the result of my reflections to the Senate, namely, at what period, in the case of an impeachment of the President, should the court of impeachment be organized under oath as directed by the Constitution?

It will readily suggest itself to anyone who reflects upon the abilities and the learning in the law which distinguish so many Senators, that besides the reason assigned in the Federalist there must have been still another for the provision requiring the Chief Justice to preside in the court of impeachment. Under the Constitution, in case of a vacancy in the office of President the

Vice President succeeds; and it was doubtless thought prudent and befitting that the next in succession should not preside in a proceeding through which a vacancy might be created.

It is not doubted that the Senate, while sitting in its ordinary capacity, must necessarily receive from the House of Representatives some notice of its intention to impeach the President at its bar; but it does seem to me an unwarranted opinion, in view of this constitutional provision, that the organization of the Senate as a court of impeachment, under the Constitution, should precede the actual announcement of the impeachment on the part of the House.

And it may perhaps be thought a still less unwarranted opinion that articles of impeachment should only be presented to a court of impeachment; that no summons or other process should issue except from the organized court, and that rules for the government of the proceedings of such a court should be framed only by the court itself.

I have found myself unable to come to any other conclusions than these, I can assign no reason for requiring the Senate to organize as a court under any other than its ordinary presiding officer for the latter proceedings upon an impeachment of the President which does not seem to me to apply equally to the earlier.

I am informed that the Senate has proceeded upon other views, and it is not my purpose to contest what its superior wisdom may have directed.

All good citizens will fervently pray that no occasion may ever arise when the grave proceedings now in progress will be cited as a precedent, but it is not impossible that such an occasion may come.

Inasmuch, therefore, as the Constitution has charged the Chief Justice with an important function in the trial of an impeachment of the President, it has seemed to me fitting and obligatory, where he is unable to concur in the views of the Senate concerning matters essential to the trial, that his respectful dissent should appear.

S. P. CHASE,
Chief Justice of the United States.

WASHINGTON, *March 4, 1868.*

The letter was read.

Ordered, That it be referred to the select committee appointed to consider and report upon the message of the House of Representatives relative to the impeachment of Andrew Johnson, President of the United States, and that it be printed.

At 1 o'clock p.m. the Sergeant at Arms announced the presence at the door of the Senate Chamber of the managers appointed by the House of Representatives, to wit: Mr. Bingham, Mr. Boutwell, Mr. James F. Wilson, Mr. Butler, Mr. Thomas Williams, Mr. Logan and Mr. Thaddeus Stevens, to conduct the impeachment against Andrew Johnson, President of the United States.

The President pro tempore requested the managers to take the seats assigned them within the bar of the Senate.

Mr. Bingham rose and announced, on the part of the managers, that they were ready to exhibit, on the part of the House of Representatives, articles of impeachment against Andrew Johnson, President of the United States.

The President pro tempore then directed the Sergeant at Arms to make proclamation; and

The Sergeant at Arms having made proclamation in the following words:

Hear ye! Hear ye! Hear ye! All persons are commanded to keep silence on pain of imprisonment, while the House of Representatives is exhibiting to the Senate of the United States articles of impeachment against Andrew Johnson, President of the United States;

The managers rose, and Mr. Bingham, their chairman, read the following articles:

FORTIETH CONGRESS, SECOND SESSION.

IN THE HOUSE OF REPRESENTATIVES UNITED STATES,
March 2, 1868.

Articles exhibited by the House of Representatives of the United States, in the name of themselves and all the people of the United States, against Andrew Johnson, President of the United States, in maintenance and support of their impeachment against him for high crimes and misdemeanors in office.

ARTICLE I. That said Andrew Johnson, President of the United States, on the twenty-first day of February, in the year of our Lord one thousand eight hundred and sixty-eight, at Washington, in the District of Columbia, unmindful of the high duties of his office, of his oath of office, and of the requirement of the Constitution that he should take care that the laws be faithfully executed, did unlawfully, and in violation of the Constitution and laws of the United States, issue an order in writing for the removal of Edwin M. Stanton from the office of Secretary for the Department of War, said Edwin M. Stanton having been therefore duly appointed and commissioned, by and with the advice and consent of the Senate of the United States, as such Secretary, and said Andrew Johnson, President of the United States, on the twelfth day of August, in the year of our Lord one thousand eight hundred and sixty-seven, and during the recess of said Senate, having suspended by his order Edwin M. Stanton from said office, and within twenty days after the first day of the next meeting of said Senate, that is to say on the twelfth day of December in the year last aforesaid, having reported to said Senate such suspension, with the evidence and reasons for his action in the case, and the name of the person designated to perform the duties of such office temporarily until the next meeting of the Senate, and said Senate thereafterwards, on the thirteenth day of January, in the year of our Lord one thousand eight hundred and sixty-eight, having duly considered the evidence and reasons reported by said Andrew Johnson for said suspension, and having refused to concur in said suspension, whereby and by force of the provisions of an act entitled "An act regulating the tenure of certain civil offices," passed March second, eighteen hundred and sixty-seven, said Edwin M. Stanton did forthwith resume the functions of his office, whereof the said Andrew Johnson had then and there due notice, and said Edwin M. Stanton, by reason of the premises, on said twenty-first day of February, being lawfully entitled to hold said office of Secretary for the Department of War, which said order for the removal of said Edwin M. Stanton is in substance as follows, that is to say:

EXECUTIVE MANSION,
Washington, D.C., February 21, 1868.

SIR: By virtue of the power and authority vested in me as President by the Constitution and laws of the United States, you are hereby removed from office as Secretary for the Department of War, and your functions as such will terminate upon the receipt of this communication.

You will transfer to Brevet Maj. Gen. Lorenzo Thomas, Adjutant General of the Army, who has this day been authorized and empowered to act as Secretary of War *ad interim*, all records, books, papers, and other public property now in your custody and charge.

Respectfully, yours,

ANDREW JOHNSON.

The Hon. EDWIN M. STANTON, *Washington, D.C.*

Which order was unlawfully issued with intent then and there to violate the act entitled "An act regulating the tenure of certain civil offices," passed March second, eighteen hundred and sixty-seven, and with the further intent, contrary to the provisions of said act, in violation thereof, and contrary to the provisions of the Constitution of the United States, and without the advice and consent of the Senate of the United States, the said Senate then and there being in session, to remove said Edwin M. Stanton from the office of Secretary for the Department of War, the said Edwin M. Stanton being then and there Secretary for the Department of War, and being then and there in the due and lawful execution and discharge of the duties of said office, whereby said Andrew Johnson, President of the United States, did then and there commit and was guilty of a high misdemeanor in office.

ART. II. That on said twenty-first day of February, in the year of our Lord one thousand eight hundred and sixty-eight, at Washington, in the District of Columbia, said Andrew Johnson, President of the United States, unmindful of the high duties of his office, of his oath of office, and in violation of the Constitution of the United States, and contrary to the provisions of an act entitled "An act regulating the tenure of certain civil offices," passed March second, eighteen hundred and sixty-seven, without the advice and consent of the Senate of the United States, said Senate then and there being in session, and without authority of law, did, with intent to violate the Constitution of the United States and the act aforesaid, issue and deliver to one Lorenzo Thomas a letter of authority in substance as follows, that is to say:

EXECUTIVE MANSION,
Washington, D.C., February 21, 1868.

SIR: The Hon. Edwin M. Stanton having been this day removed from office as Secretary for the Department of War, you are hereby authorized and empowered to act as Secretary of War *ad interim*, and will immediately enter upon the discharge of the duties pertaining to that office.

Mr. Stanton has been instructed to transfer to you all the records, books, papers, and other public property now in his custody and charge.

Respectfully, yours,

ANDREW JOHNSON.

To Brevet Maj. Gen. LORENZO THOMAS,
Adjutant General U.S. Army, Washington, D.C.

Then and there being no vacancies in said office of Secretary for the Department of War, whereby said Andrew Johnson, President of the United States, did then and there commit and was guilty of a high misdemeanor in office.

ART. III. That said Andrew Johnson, President of the United States, on the twenty-first day of February, in the year of our Lord one thousand eight hundred and sixty-eight, at Washington, in the District of Columbia, did commit and was guilty of a high misdemeanor in office in this, that, without authority of law, while the Senate of the United States was then and there in session, he did appoint one Lorenzo Thomas to be Secretary for the Department of War *ad interim*, without the advice and consent of the Senate, and with intent to violate the Constitution of the United States, no vacancy having happened in said office of Secretary for the Department of War during the recess of the Senate, and no vacancy existing in said office at the time, and which said appointment, so made by said Andrew Johnson, of said Lorenzo Thomas, is in substance as follows, that is to say:

EXECUTIVE MANSION,
Washington, D.C., February 21, 1868.

SIR: The Hon. Edwin M. Stanton having been this day removed from office as Secretary for the Department of War, you are hereby authorized and empowered to act as Secretary of War *ad interim*, and will immediately enter upon the discharge of the duties pertaining to that office.

Mr. Stanton has been instructed to transfer to you all the records, books, papers, and other public property now in his custody and charge.

Respectfully, yours,

ANDREW JOHNSON.

To Brevet Maj.-Gen. Lorenzo Thomas,
Adjutant-General U.S. Army, Washington, D.C.

ART. IV. That said Andrew Johnson, President of the United States, unmindful of the high duties of his office and his oath of office, in violation of the Constitution and laws of the United States, on the twenty-first day of February in the year of our Lord one thousand eight hundred and sixty-eight, at Washington, in the District of Columbia, did unlawfully conspire with one Lorenzo Thomas, and with other persons to the House of Representatives unknown, with intent, by intimidation and threats, unlawfully to hinder and prevent Edwin M. Stanton, then and there the Secretary for the Department of War, duly appointed under the laws of the United States, from holding said office of Secretary for the Department of War, contrary to and in violation of the Constitution of the United States, and of the provisions of an act entitled "An act to define and punish certain conspiracies," approved July thirty-first, eighteen hundred and sixty-one, whereby said Andrew Johnson, President of

the United States, did then and there commit and was guilty of a high crime in office.

ART. V. That said Andrew Johnson, President of the United States, unmindful of the high duties of his office and of his oath of office, on the twenty-first day of February, in the year of our Lord one thousand eight hundred and sixty-eight, and on divers other days and times in said year, before the second day of March, in the year of our Lord one thousand eight hundred and sixty-eight, at Washington, in the District of Columbia, did unlawfully conspire with one Lorenzo Thomas, and with other persons to the House of Representatives unknown, to prevent and hinder the execution of an act entitled "An act regulating the tenure of certain civil offices," passed March second, eighteen hundred and sixty seven, and in pursuance of said conspiracy did unlawfully attempt to prevent Edwin M. Stanton, then and there being Secretary for the Department of War, duly appointed and commissioned under the laws of the United States, from holding said office, whereby the said Andrew Johnson, President of the United States, did then and there commit and was guilty of a high misdemeanor in office.

ART. VI. That said Andrew Johnson, President of the United States, unmindful of the high duties of his office and of his oath of office, on the twenty-first day of February, in the year of our Lord one thousand eight hundred sixty-eight, at Washington, in the District of Columbia, did unlawfully conspire with one Lorenzo Thomas, by force to seize, take, and possess the property of the United States in the Department of War, and then and there in the custody and charge of Edwin M. Stanton, secretary for said department, contrary to the provisions of an act entitled "An act to define and punish certain conspiracies," approved July thirty-one, eighteen hundred and sixty-one, and with intent to violate and disregard an act entitled "An act regulating the tenure of certain civil offices," passed March second, eighteen hundred and sixty-seven, whereby said Andrew Johnson, President of the United States, did then and there commit a high crime in office.

ART. VII. That said Andrew Johnson, President of the United States, unmindful of the high duties of his office and of his oath of office, on the twenty-first day of February, in the year of our Lord one thousand eight hundred and sixty-eight, at Washington, in the District of Columbia, did unlawfully conspire with one Lorenzo Thomas, with intent unlawfully to seize, take, and possess the property of the United States in the Department of War, in the custody and charge of Edwin M. Stanton, secretary for said department, with intent to violate and disregard the act entitled "An act regulating the tenure of certain civil offices," passed March second, eighteen hundred and sixty-seven, whereby said Andrew Johnson, President of the United States, did then and there commit a high misdemeanor in office.

ART. VIII. That said Andrew Johnson, President of the United States, unmindful of the high duties of his office and of his oath of office, with intent unlawfully to control the disbursements of the moneys appropriated for the military service and for the Department of War, on the twenty-first day of February, in the year of our Lord one thousand eight hundred and sixty-eight, at Washington, in the District of Columbia, did unlawfully and contrary to the provisions of an act entitled "An act regulating the tenure of certain civil offices," passed March second, eighteen hundred and sixty-seven, and in violation of the Constitution of the United States, and without the advice and consent of the Senate of the United States, and while the Senate was then and there in session, there being no vacancy in the office of Secretary for the Department of War, and with intent to violate and disregard the act aforesaid, then and there issue and deliver to one Lorenzo Thomas a letter of authority in writing in substance as follows that is to say:

EXECUTIVE MANSION,
Washington, D.C., February 21, 1868.

SIR: The Hon. Edwin M. Stanton having been this day removed from office as Secretary for the Department of War, you are hereby authorized and empowered to act as Secretary of War ad interim, and will immediately enter upon the discharge of the duties pertaining to that office.

Mr. Stanton has been instructed to transfer to you all the records, books, papers, and other public property now in his custody and charge.

Respectfully yours,

ANDREW JOHNSON.

To Brevet Maj. Gen. LORENZO THOMAS,
Adjutant General, U.S. Army, Washington, D.C.

Whereby said Andrew Johnson, President of the United States, did then and there commit and was guilty of a high misdemeanor in office.

ART. IX. That said Andrew Johnson, President of the United States, on the twenty-second day of February, in the year of our Lord one thousand eight hundred and sixty-eight, at Washington, in the District of Columbia, in disregard of the Constitution and the laws of the United States duly enacted, as commander in chief of the Army of the United States, did bring before himself then and there William H. Emory, a major general by brevet in the Army of the United States, actually in command of the Department of Washington and the military forces thereof, and did then and there, as such commander in chief, declare to and instruct said Emory that part of a law of the United States, passed March second, eighteen hundred and sixty-seven, entitled "An act making appropriations for the support of the Army for the year ending June thirtieth, eighteen hundred and sixty-eight, and for other purposes," especially the second section thereof, which provides, among other things, that "all orders and instructions relating to military operations issued by the President or Secretary of War shall be issued through the General of the Army, and in case of his inability through the next in rank," was unconstitutional, and in contravention of the commission of said Emory, and which said provision of law had been theretofore duly and legally promulgated by general order for the government and direction of the Army of the United States, as the said Andrew Johnson then and there well knew, with intent thereby to induce said Emory, in his official capacity as commander of the Department of Washington, to violate the provisions of said act, and to take and receive, act upon, and obey such orders as he, the said Andrew Johnson, might make and give, and which should not be issued through the General of the Army of the United States, according to the provisions of said act, and with the further intent thereby to enable him, the said Andrew Johnson, to prevent the execution of the act entitled "An act regulating the tenure of certain civil offices," passed March second, eighteen hundred and sixty-seven, and to unlawfully prevent Edwin M. Stanton, then being Secretary for the Department of War, from holding said office and discharging the duties thereof, whereby said Andrew Johnson, President of the United States, did then and there commit and was guilty of a high misdemeanor in office.

And the House of Representatives, by protestation, saving to themselves the liberty of exhibiting at any time hereafter any further articles or other accusation or impeachment against the said Andrew Johnson, President of the United States, and also of replying to his answers which he shall make unto the articles herein preferred against him, and of offering proof to the same, and every part thereof, and to all and every other article, accusation, or impeachment which shall be exhibited by them, as the case shall require, no DEMAND that the said Andrew Johnson may be put to answer the high crimes and misdemeanors in office herein charged against him, and that such proceedings, examinations, trials, and judgments may be thereupon had and given as may be agreeable to law and justice.

SCHUYLER COLFAX,
Speaker of the House of Representatives.

Attest:
EDWARD MCPHERSON,
Clerk of the House of Representatives.

IN THE HOUSE OF REPRESENTATIVES UNITED STATES,
March 3, 1868.

The following additional articles of impeachment were agreed to, viz:

ART. X. That said Andrew Johnson, President of the United States, unmindful of the high duties of his office and the dignity and proprieties thereof, and of the harmony and courtesies which ought to exist and be maintained between the executive and legislative branches of the Government of the United States, designing and intending to set aside the rightful authority and powers of Congress, did attempt to bring into disgrace, ridicule, hatred, contempt, and reproach the Congress of the United States, and the several branches thereof, to impair and destroy the regard and respect of all the good people of the United

States for the Congress and legislative power thereof (which all officers of the Government ought inviolably to preserve and maintain), and to excite the odium and resentment of all the good people of the United States against Congress and the laws by it duly and constitutionally enacted; and in pursuance of his said design and intent, openly and publicly, and before divers assemblages of the citizens of the United States convened in divers parts thereof to meet and receive Andrew Johnson as the Chief Magistrate of the United States, did, on the eighteenth day of August, in the year of our Lord one thousand eight hundred and sixty-six, and on divers other days and times, as well before as afterward, make and deliver with a loud voice certain intemperate, inflammatory, and scandalous harangues, and did therein utter loud threats and bitter menaces as well against Congress as the laws of the United States duly enacted thereby, amid the cries, jeers, and laughter of the multitude then assembled and in hearing, which are set forth in the several specifications hereinafter written, in substance and effect, that is to say:

Specification first.—In this: that at Washington, in the District of Columbia, in the Executive Mansion, to a committee of citizens who called upon the President of the United States, speaking of and concerning the Congress of the United States, said Andrew Johnson, President of the United States, heretofore, to wit, on the eighteenth day of August, in the year of our Lord one thousand eight hundred and sixty-six, did, in a loud voice, declare in substance and effect, among other things, that is to say:

"So far as the executive department of the Government is concerned the effort has been made to restore the Union, to heal the breach, to pour oil into the wounds which were consequent upon the struggle, and (to speak in common phrase) to prepare, as the learned and wise physician would, a plaster healing in character and coextensive with the wound. We thought, and we think, that we had partially succeeded; but as the work progresses, as the reconstruction seemed to be taking place and the country was becoming reunited, we found a disturbing and marring element opposing us. In alluding to that element I shall go no further than your convention and the distinguished gentleman who delivered to me the report of its proceedings. I shall make no reference to it that I do not believe the time and the occasion justify.

"We have witnessed in one department of the Government every endeavor to prevent the restoration of peace, harmony, and union. We have seen hanging upon the verge of the Government, as it were, a body called, or which assumes to be, the Congress of the United States, while in fact it is a Congress of only a part of the States. We have seen this Congress pretend to be for the Union, when its every step and act tended to perpetuate disunion and made a disruption of the States inevitable. * * * We have seen Congress gradually encroach step by step upon constitutional rights, and violate, day after day and month after month, fundamental principles of the Government. We have seen a Congress that seemed to forget that there was a limit to the sphere and scope of legislation. We have seen a Congress in a minority assume to exercise power which, allowed to be consummated, would result in despotism or monarchy itself."

Specification second.—In this: that at Cleveland, in the State of Ohio, heretofore, to wit, on the third day of September, in the year of our Lord one thousand eight hundred and sixty-six, before a public assemblage of citizens and others, said Andrew Johnson, President of the United States, speaking of and concerning the Congress of the United States, did, in a loud voice, declare in substance and effect, among other things, that is to say:

"I will tell you what I did do. I called upon your Congress that is trying to break up the Government.

* * * * * * *

"In conclusion, beside that, Congress had taken much pains to poison their constituents against him. But what had Congress done? Have they done anything to restore the union of these States? No; on the contrary, they have done everything to prevent it; and because he stood now where he did when the rebellion commenced, he had been denounced as a traitor. Who had run greater risks or made greater sacrifices than himself? But Congress, factious and domineering, had undertaken to poison the minds of the American people."

Specification third.—In this: that at St. Louis, in the State of Missouri, heretofore, to wit, on the eighth day of September, in the year of our Lord one thousand eight hundred and sixty-six, before a public assemblage of citizens and

others, said Andrew Johnson, President of the United States, speaking of and concerning the Congress of the United States, did, in a loud voice, declare in substance and effect, among other things, that is to say:

"Go on. Perhaps if you had a word or two on the subject of New Orleans you might understand more about it than you do. And if you will go back—if you will go back and ascertain the cause of the riot at New Orleans perhaps you will not be so prompt in calling out 'New Orleans.' If you will take up the riot at New Orleans and trace it back to its source or its immediate cause you will find out who was responsible for the blood that was shed there. If you will take up the riot at New Orleans and trace it back to the radical Congress, you will find that the riot at New Orleans was substantially planned. If you will take up the proceedings in their caucuses you will understand that they there knew that a convention was to be called which was extinct by its power having expired; that it was said that the intention was that a new government was to be organized, and on the organization of that government the intention was to enfranchise one portion of the population, called the colored population, who had just been emancipated, and at the same time disfranchise white men. When you design to talk about New Orleans you ought to understand what you are talking about. When you read the speeches that were made, and take up the facts on the Friday and Saturday before that convention sat, you will there find that speeches were made incendiary in their character, exciting that portion of the population, the black population, to arm themselves and prepare for the shedding of blood. You will also find that that convention did assemble in violation of law, and the intention of that convention was to supersede the reorganized authorities in the State government of Louisiana, which had been recognized by the Government of the United States; and every man engaged in that rebellion in that convention, with the intention of superseding and upturning the civil government which had been recognized by the Government of the United States, I say that he was a traitor to the Constitution of the United States, and hence you find that another rebellion was commenced, having its origin in the radical Congress.

* * * * * * *

"So much for the New Orleans riot. And there was the cause and the origin of the blood that was shed; and every drop of blood that was shed is upon their skirts, and they are responsible for it. I could test this thing a little closer, but will not do it here to-night. But when you talk about the causes and consequences that resulted from proceedings of that kind, perhaps, as I have been introduced here, and you have provoked questions of this kind, though it does not provoke me, I will tell you a few wholesome things that have been done by this radical Congress in connection with New Orleans and the extension of the elective franchise.

"I know that I have been traduced and abused. I know it has come in advance of me here as elsewhere—that I have attempted to exercise an arbitrary power in resisting laws that were intended to be forced upon the Government; that I had exercised that power; that I had abandoned the party that elected me; and that I was a traitor, because I exercised the veto power in attempting and did arrest, for a time, a bill that was called a 'Freedmen's Bureau' bill; yes, that I was a traitor. And I have been traduced, I have been slandered, I have been maligned, I have been called Judas Iscariot and all that. Now, my countrymen, here to-night, it is very easy to indulge in epithets; it is easy to call a man Judas and cry out traitor, but when he is called upon to give arguments and facts he is very often found wanting. Judas Iscariot—Judas. There was a Judas, and he was one of the twelve apostles. O, yes; the twelve apostles had a Christ. The twelve apostles had a Christ, and He never could have had a Judas unless He had twelve apostles. If I have played the Judas, who has been my Christ that I have played the Judas with? Was it Thad. Stevens? Was it Wendell Phillips? Was it Charles Sumner? These are the men that stop and compare themselves with the Savior; and everybody that differs with them in opinion, and do try to stay and arrest their diabolical and nefarious policy, is to be denounced as a Judas."

* * * * * * *

"Well, let me say to you, if you will stand by me in this action, if you will stand by me in trying to give the people a fair chance—soldiers and citizens—to participate in these offices, God being willing, I will kick them out. I will kick them out just as fast as I can.

"Let me say to you, in concluding, that what I have said I intended to say. I was not provoked into this, and I care not for their menaces, the taunts, and the jeers. I care not for threats. I do not intend to be bullied by my enemies nor overawed by my friends. But, God willing, with your help, I will veto their measures whenever any of them come to me."

Which said utterances, declarations, threats, and harangues, highly censurable in any, are peculiarly indecent and unbecoming in the Chief Magistrate of the United States, by means whereof said Andrew Johnson has brought the high office of the President of the United States into contempt, ridicule, and disgrace to the great scandal of all good citizens, whereby said Andrew Johnson, President of the United States, did commit, and was then and there guilty of a high misdemeanor in office.

ART. XI. That said Andrew Johnson, President of the United States, unmindful of the high duties of his office, and of his oath of office, and in disregard of the Constitution and laws of the United States, did, heretofore, to wit, on the 18th day of August, A.D. 1866, at the city of Washington, and the District of Columbia, by public speech, declare and affirm, in substance, that the Thirty-ninth Congress of the United States was not a Congress of the United States authorized by the Constitution to exercise legislative power under the same, but, on the contrary, was a Congress of only part of the States, thereby denying, and intending to deny, that the legislation of said Congress was valid or obligatory upon him, the said Andrew Johnson, except so far as he saw fit to approve the same, and also thereby denying, and intending to deny, the power of the said Thirty-ninth Congress to propose amendments to the Constitution of the United States; and, in pursuance of said declaration, the said Andrew Johnson, President of the United States, afterwards, to wit, on the 21st day of February, A.D. 1868, at the city of Washington, in the District of Columbia, did, unlawfully and in disregard of the requirement of the Constitution that he should take care that the laws be faithfully executed, attempt to prevent the execution of an act entitled "An act regulating the tenure of certain civil offices," passed March 2, 1867, by unlawfully devising and contriving and attempting to devise and contrive, means by which he should prevent Edwin M. Stanton from forthwith resuming the functions of the office of Secretary for the Department of War, notwithstanding the refusal of the Senate to concur in the suspension theretofore made by said Andrew Johnson of said Edwin M. Stanton from said office of Secretary for the Department of War; and also by further unlawfully devising and contriving, and attempting to devise and contrive means, then and there, to prevent the execution of an act entitled "An act making appropriations for the support of the Army for the fiscal year ending June 30, 1868, and for other purposes," approved March 2, 1867, and also to prevent the execution of an act entitled "An act to provide for the more efficient government of the rebel States," passed March 2, 1867, whereby the said Andrew Johnson, President of the United States, did then, to wit, on the 21st day of February, A.D. 1868, at the city of Washington, commit, and was guilty of, a high misdemeanor in office.

SCHUYLER COLFAX,
Speaker of the House of Representatives.

Attest:
EDWARD MCPHERSON,
Clerk of the House of Representatives.

Mr. Bingham having concluded the reading of the articles of impeachment.

The President pro tempore informed the managers that the Senate would take proper order on the subject of the impeachment, of which due notice would be given to the House of Representatives.

The managers, by their chairman, Mr. Bingham, then delivered the articles of impeachment at the table of the Secretary and withdrew.

Mr. Howard from the select committee appointed to consider and report upon the message of the House of Representatives relative to the impeachment of Andrew Johnson, President of the United States, reported the following resolution and orders:

Resolved, That at 1 o'clock to-morrow afternoon the Senate will proceed to consider the impeachment of Andrew Johnson, President of the United States,

at which time the oath or affirmation required by the rules of the Senate sitting for the trial of an impeachment shall be administered by the Chief Justice of the United States as the presiding officer of the Senate, sitting as aforesaid, to each Member of the Senate; and that the Senate, sitting as aforesaid, will, at the time aforesaid, receive the managers appointed by the House of Representatives.

Ordered, That the Secretary lay this resolution before the House of Representatives.

Ordered, That the articles of impeachment exhibited against Andrew Johnson, President of the United States, be printed.

Ordered, That a copy of the rules of procedure and practice in the Senate, when sitting on the trial of impeachments, be communicated by the Secretary to the House of Representatives, and a copy thereof delivered by him to each Member of the House.

The Senate proceeded, by unanimous consent, to consider the said resolutions and orders; and

On motion to agree to the same,

On motion by Mr. Edmunds to amend the resolution by striking out all after the word "Resolved," and inserting,

That the Secretary be directed to inform the House of Representatives that at 1 o'clock to-morrow afternoon the Senate will, pursuant to its standing rule, proceed to the consideration of the articles of impeachment presented by the House of Representatives against Andrew Johnson, President of the United States.

It was determined in the negative; and

The question recurring on the resolution,

It was agreed to.

On the question to agree to the orders reported by the select committee.

They were severally agreed to.

On motion by Mr. Pomeroy,

Ordered, that the notice to the Chief Justice of the United States to meet the Senate in the trial of the case of impeachment, and requesting his attendance as presiding officer, be delivered to him by a committee of three Senators to be appointed by the Chair, who shall wait upon the Chief Justice to the Senate Chamber, and conduct him to the chair.

And the President pro tempore appointed Mr. Pomeroy, Mr. Wilson, and Mr. Buckalew said committee.

TUESDAY, MARCH 10, 1868.

Impeachment of Andrew Johnson, President

The following order in relation to the admission of persons to the galleries of the Senate during the trial of the impeachment of the President was adopted by the Senate:

Ordered, First, That during the trial of the impeachment now pending no persons besides those who now have the privilege of the floor, and clerks of the standing committees of the Senate, shall be admitted to that portion of the Capitol set apart for the use of the Senate and its officers, except upon tickets to be used by the Sergeant at Arms. The number of tickets shall not exceed 1,000. Tickets shall be numbered and dated, and be good only for the day on which they are dated.

Second. The portion of the gallery set apart for the diplomatic corps shall be exclusively appropriated to it, and 40 tickets of admission thereto shall be issued to the Baron Gerolt for the foreign legations.

Third. Four tickets shall be issued to each Senator; 4 tickets each to the Chief Justice of the United States and the Speaker of the House of Representatives;

2 tickets to each Member of the House of Representatives; 2 tickets each to the Associate Justices of the Supreme Court of the United States; 2 tickets each to the chief justice and associate justices of the supreme court of the District of Columbia; 2 tickets to the chief justice and each judge of the Court of Claims; 2 tickets to each Cabinet officer; 2 tickets to the General commanding the Army; 20 tickets to the private secretary of the President of the United States, for the use of the President; and 60 tickets shall be issued by the President pro tempore of the Senate to the reporters of the press. The residue of the tickets to be issued shall be distributed among the Members of the Senate in proportion to the representation of their respective States in the House of Representatives, and the seats now occupied by the Senators shall be reserved for them.

(B) Proceedings of the Senate Sitting for the Trial of the Impeachment of Andrew Johnson, President of the United States.

Thursday, March 5, 1868.

The United States *v.* Andrew Johnson, President.

The Senate sitting for the trial of Andrew Johnson, President of the United States, upon articles of impeachment exhibited against him by the House of Representatives,

The Chief Justice of the United States entered the Senate Chamber and was conducted to the chair by the committee appointed by the Senate for that purpose.

By direction of the Chief Justice the following oath was administered to him by Mr. Justice Nelson, the senior associate justice of the Supreme Court of the United States:

I do solemnly swear that in all things appertaining to the trial of the impeachment of Andrew Johnson, President of the United States, now pending, I will do impartial justice according to the Constitution and laws. So help me God.

The Chief Justice then took the chair and administered the same oath to the following Senators separately, as their names were called by the Secretary, to wit:

Messrs. Anthony, Bayard, Buckalew, Cameron, Cattell, Chandler, Cole, Conkling, Conness, Corbett, Cragin, Davis, Dixon, Drake, Ferry, Fessenden, Fowler, Frelinghuysen, Grimes, Harlan, Henderson, Hendricks, Howard, Howe, Johnson, McCreery, Morgan, Morrill of Maine, Morrill of Vermont, Morton, Norton, Nye, Patterson of Tennessee, Pomeroy, Ramsey, Ross, Sherman, Sprague, Stewart, Sumner, Thayer, Tipton, Trumbull, and Van Winkle.

When the name of Mr. Wade was called Mr. Hendricks rose and submitted to the Senate the question whether Mr. Wade, being the President of the Senate pro tempore, and by law made the successor to the office of President of the United States, in case the articles of impeachment exhibited by the House of Representatives against Andrew Johnson should be sustained, was competent to sit as a member of the court upon the trial of the impeachment of the President of the United States.

After debate,

Mr. Johnson moved that in administering the oath to Senators the name of the Senator from Ohio, Mr. Wade, be omitted in the call until the remaining names on the roll shall have been called.

After further debate,

On motion by Mr. Grimes, at 1.30 o'clock p. m., the Senate, sitting as aforesaid, adjourned to meet at 1 o'clock p.m. tomorrow.

FRIDAY, MARCH 6, 1868.

The United States *v.* Andrew Johnson, President.

At 1 o'clock p. m. the Chief Justice of the United States entered the Senate Chamber and resumed the chair.

The Chief Justice stated that the question before the Senate was the motion submitted yesterday by Mr. Johnson, that in administering the oath to Senators the name of the Senator from Ohio, Mr. Wade, be omitted in the call until the remaining names on the roll shall have been called.

Mr. Howard rose to a question of order, and, being requested by the Chief Justice to reduce his point of order to writing, presented it to the Chair in the following words:

That the objection raised to the administering the oath to Mr. Wade is out of order, and that the motion of the Senator from Maryland to postpone the administering the oath to Mr. Wade until other Senators are sworn in is also out of order under the rules adopted by the Senate on the 2d of March instant, and under the Constitution of the United States.

The Chief Justice submitted the question of order to the decision of the Senate.

Mr. Dixon rose and was proceeding to debate the question of order, when he was called to order by Mr. Drake, on the ground that the question of order should be decided without debate.

The Chief Justice decided that the question of order, having been submitted to the Senate for its decision, was debatable.

While Mr. Dixon was proceeding in his remarks upon the question of order,

Mr. Howard raised a question of order, viz: That it was not in order for the Senator from Connecticut to debate the question, under the 23d rule adopted by the Senate on the 2d instant, which provides that all the orders and decisions shall be made and had by yeas and nays, which shall be entered on the record, and without debate.

The Chief Justice decided that the 23d rule did not apply while the Senate was in process of organization for the trial of an impeachment, and overruled the question of order raised by Mr. Howard.

From this decision of the Chief Justice Mr. Drake appealed to the Senate; and

On the question, Shall the decision of the Chief Justice stand as the judgment of the Senate?

It was determined in the affirmative, [Yeas---------- 24
[Nays---------- 20

On motion of Mr. Ferry,

The yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are,

Messrs. Anthony, Buckalew, Corbett, Davis, Dixon, Fessenden, Fowler, Frelinghuysen, Grimes, Henderson, Hendricks, Johnson, McCreery, Morrill of Maine, Norton, Patterson of Tennessee, Pomeroy, Ross, Saulsbury, Sherman, Sprague, Van Winkle, Willey, Williams.

Those who voted in the negative are,

Messrs. Cameron, Cattell, Chandler, Cole, Conkling, Conness, Drake, Ferry, Harlan, Howard, Morgan, Morrill of Vermont, Morton, Nye, Stewart, Sumner, Thayer, Tipton, Wilson, Yates.

So the decision of the Chief Justice was sustained.

Mr. Dixon then resumed and having concluded his remarks,

Mr. Hendricks withdrew the objection yesterday raised by him to the administering the oath to Mr. Wade and to his sitting as a member of the court upon the trial of the President of the articles of impeachment exhibited against him.

The Chief Justice then administered the oath to Mr. Wade, and also to the following Senators, separately, to wit: Messrs. Willey, Williams, Wilson, Yates, and Saulsbury.

The Chief Justice then announced that all the Senators present having had the oath administered to them, the Senate was now organized for the trial of Andrew Johnson, President of the United States, upon the articles of impeachment exhibited against him by the House of Representatives, and directed the Sergeant at Arms to make proclamation; and

The Sergeant at Arms then made proclamation as follows:

Hear ye! Hear ye! Hear ye! All persons are commanded to keep silence on pain of imprisonment while the Senate of the United States is sitting for the trial of the articles of impeachment exhibited by the House of Representatives against Andrew Johnson, President of the United States.

Thereupon,

Mr. Howard submitted the following order for consideration:

Ordered, That the Secretary notify the House of Representatives that the Senate is now organized for the trial of the articles of impeachment against Andrew Johnson, President of the United States, and is ready to receive the managers of impeachment on the part of the House at its bar.

The Chief Justice said: Before submitting that question to the Senate, the Chief Justice thinks it is his duty to submit a question to the Senate relative to the rules of procedure. In the judgment of the Chief Justice, the Senate is now organized as a distinct body from the Senate sitting in its legislative capacity. It performs a distinct function, the members are under a different oath, and the presiding officer is not the President pro tempore of the Senate, but the Chief Justice of the United States. Under these circumstances the Chief Justice conceives that rules adopted by the Senate in its legislative capacity are not the rules for the government of the Senate sitting for the trial of an impeachment, unless they be also adopted by that body. In this judgment of the Chair, if it be erroneous, he desires to be corrected by the judgment of the court, or the Senate sitting for the trial of the impeachment of the President, which in his judgment are synonymous terms; and, therefore, if he be permitted to do so, he will take the sense of the Senate upon this question: Whether the rules adopted on the 2d March shall be considered as the rules of the proceedings in this body? And,

The question being put, Shall the rules of proceeding adopted by the Senate on the 2d of March be the rules of proceeding in the trial of the impeachment?

It was determined in the affirmative.

So it was

Resolved, That the rules adopted by the Senate on the 2d of March, instant, be the rules of procedure and practice in the Senate sitting on the trial of impeachments; which rules are as follows:

I. Whensoever the Senate shall receive notice from the House of Representatives that the managers are appointed on their part to conduct an impeachment against any person, and are directed to carry articles of impeachment to the Senate, the Secretary of the Senate shall immediately inform the House of Representatives that the Senate is ready to receive the managers for the purpose of exhibiting such articles of impeachment agreeably to said notice.

II. When the managers of an impeachment shall be introduced at the bar of the Senate, and shall signify that they are ready to exhibit articles of impeachment against any person, the presiding officer of the Senate shall direct the Sergeant at Arms to make proclamation, who shall, after making proclamation, repeat the following words, viz: "All persons are commanded to keep silence, on pain of imprisonment, while the House of Representatives is exhibiting to the Senate of the United States articles of impeachment against ——— ———;" after which the articles shall be exhibited, and then the presiding officer of the Senate shall inform the managers that the Senate will take proper order on the subject of the impeachment, of which due notice shall be given to the House of Representatives.

III. Upon such articles being presented to the Senate, the Senate shall, at 1 o'clock afternoon of the day (Sunday excepted) following such persentation, or sooner if so ordered by the Senate, proceed to the consideration of such articles, and shall continue in session from day to day (Sundays excepted), after the trial shall commence (unless otherwise ordered by the Senate), until final judgment shall be rendered, and so much longer as may, in its judgment, be needful. Before proceeding to the consideration of the articles of impeachment, the presiding officer shall administer the oath hereinafter provided to the members of the Senate then present, and to the other members of the Senate as they shall appear, whose duty it shall be to take the same.

IV. When the President of the United States, or the Vice President of the United States, upon whom the powers and duties of the office of President shall have devolved, shall be impeached, the Chief Justice of the Supreme Court of the United States shall preside; and in a case requiring the said Chief Justice to preside notice shall be given to him by the presiding officer of the Senate of the time and place fixed for the consideration of the articles of impeachment, as aforesaid, with a request to attend; and the said Chief Justice shall preside over the Senate during the consideration of said articles, and upon the trial of the person impeached therein.

V. The presiding officer shall have power to make and issue, by himself or by the Secretary of the Senate, all orders, mandates, writs, and precepts authorized by these rules, or by the Senate, and to make and enforce such other regulations and orders in the premises as the Senate may authorize or provide.

V. The Senate shall have power to compel the attendance of witnesses, to enforce obedience to its orders, mandates, writs, precepts, and judgments, to preserve order, and to punish in a summary way contempts of and disobedience to its authority, orders, mandates, writs, precepts, or judgments, and to make all lawful orders, rules, and regulations, which it may deem essential or conducive to the ends of justice. And the Sergeant at Arms, under the direction of the Senate, may employ such aid and assistance as may be necessary to enforce, execute, and carry into effect the lawful orders, mandates, writs, and precepts of the Senate.

VII. The presiding officer of the Senate shall direct all necessary preparations in the Senate Chamber, and the presiding officer upon the trial shall direct all the forms of proceeding while the Senate are sitting for the purpose of trying an impeachment, and all forms during the trial not otherwise specially provided for. The presiding officer may, in the first instance, submit to the Senate, without a division, all questions of evidence and incidental questions; but the same shall, on the demand of one-fifth of the members present, be decided by yeas and nays.

VIII. Upon the presentation of articles of impeachment and the organization of the Senate as hereinbefore provided, a writ of summons shall issue to the accused, reciting said articles, and notifying him to appear before the Senate upon a day and at a place to be fixed by the Senate and named in such writ, and file his answer to said articles of impeachment, and to stand to and abide

the orders and judgments of the Senate thereon; which writ shall be served by such officer or person as shall be named in the precept thereof, such number of days prior to the day fixed for such appearance as shall be named in such precept, either by the delivery of an attested copy thereof to the person accused, or if that can not conveniently be done, by leaving such copy at the last known place of abode of such person, or at his usual place of business in some conspicuous place therein; or if such service shall be, in the judgment of the Senate, impracticable, notice to the accused to appear shall be given in such other manner, by publication or otherwise, as shall be deemed just; and if the writ aforesaid shall fail of service in the manner aforesaid, the proceedings shall not thereby abate, but further service may be made in such manner as the Senate shall direct. If the accused, after service, shall fail to appear, either in person or by attorney, on the day so fixed therefor as aforesaid, or appearing shall fail to file his answer to such articles of impeachment, the trial shall proceed, nevertheless, as upon a plea of not guilty. If a plea of guilty shall be entered, judgment may be entered thereon without further proceedings.

IX. At 12 o'clock and 30 minutes afternoon of the day appointed for the return of the summons against the person impeached, the legislative and executive business of the Senate shall be suspended and the Secretary of the Senate shall administer an oath to the returning officer in the form following, viz: "I, ———— ————, do solemnly swear that the return made by me upon the process issued on the —— day of ————, by the Senate of the United States, against ———— ————, is truly made, and that I have performed such service as therein described. So help me God." Which oath shall be entered at large on the records.

X. The person impeached shall then be called to appear and answer the articles of impeachment against him. If he appear, or any person for him, the appearance shall be recorded, stating particularly if by himself or by agent or attorney, naming the person appearing and the capacity in which he appears. If he do not appear, either personally or by agent or attorney, the same shall be recorded.

XI. At 12 o'clock and 30 minutes afternoon of the day apointed for the trial of an impeachment, the legislative and executive business of the Senate shall be suspended, and the Secretary shall give notice to the House of Representatives that the Senate is ready to proceed upon the impeachment of ———— ————, in the Senate Chamber, which Chamber is prepared with accommodations for the reception of the House of Representatives.

XII. The hour of the day at which the Senate shall sit upon the trial of an impeachment shall be (unless otherwise ordered) at 12 o'clock m.; and when the hour for such sitting shall arrive the presiding officer of the Senate shall so announce; and thereupon the presiding officer upon such trial shall cause proclamation to be made, and the business of the trial shall proceed. The adjournment of the Senate, sitting in said trial, shall not operate as an adjournment of the Senate; but on such adjournment the Senate shall resume the consideration of its legislative and executive business.

XIII. The Secretary of the Senate shall record the procedings in cases of impeachment as in the case of legislative proceedings, and the same shall be reported in the same manner as the legislative procedings of the Senate.

XIV. Counsel for the parties shall be admitted to appear and be heard upon an impeachment.

XV. All motions made by the parties or their counsel shall be addressed to the presiding officer, and if he, or any Senator, shall require it, they shall be committed to writing and read at the Secretary's table.

XVI. Witnesses shall be examined by one person on behalf of the party producing them and then cross-examined by one person on the other side.

XVII. If a Senator is called as a witness, he shall be sworn, and give his testimony standing in his place.

XVIII. If a Senator wishes a question to be put to a witness, or to offer a motion or order (except a motion to adjourn), it shall be reduced to writing, and put by the presiding officer.

XIX. At all times while the Senate is sitting upon the trial of an impeachment the doors of the Senate shall be kept open, unless the Senate shall direct the doors to be closed while deliberating upon its decisions.

XX. All preliminary or interlocutory questions, and all motions, shall be argued for not exceeding one hour on each side, unless the Senate shall, by order, extend the time.

XXI. The case, on each side, shall be opened by one person. The final argument on the merits may be made by two persons on each side (unless otherwise

ordered by the Senate, upon application for that purpose), and the argument shall be opened and closed on the part of the House of Representatives.

XXII. On the final question whether the impeachment is sustained, the yeas and nays shall be taken on each article of impeachment separately; and if the impeachment shall not, upon any of the articles presented, be sustained by the votes of two-thirds of the Members present, a judgment of acquittal shall be entered; but if the person accused in such articles of impeachment shall be convicted upon any of said articles by the votes of two-thirds of the Members present, the Senate shall proceed to pronounce judgment, and a certified copy of such judgment shall be deposited in the office of the Secretary of State.

XXIII. All the orders and decisions shall be made and had by yeas and nays, which shall be entered on the record, and without debate, except when the doors shall be closed for deliberation, and in that case no Member shall speak more than once on one question, and for not more than 10 minutes on an interlocutory question, and for not more than 15 minutes on the final question, unless by consent of the Senate, to be had without debate; but a motion to adjourn may be decided without the yeas and nays, unless they be demanded by one-fifth of the Members present.

XXIV. Witnesses shall be sworn in the following form, viz: "You, ——— ———, do swear (or affirm, as the case may be) that the evidence you shall give in the case now depending between the United States and ——— ——— shall be the truth, the whole truth, and nothing but the truth. So help you God." Which oath shall be administered by the Secretary, or any other duly authorized person.

Form of subpœna to be issued on the application of the managers of the impeachment, or of the party impeached, or of his counsel.

To ——— ———, greeting:

You and each of you are hereby commanded to appear before the Senate of the United States, on the —— day of ————, at the Senate Chamber in the city of Washington, then and there to testify your knowledge in the cause which is before the Senate, in which the House of Representatives have impeached ——— ———.

Fail not,

Witness ——— ———, and presiding officer of the Senate, at the city of Washington, this —— day of ———, in the year of our Lord ———, and of the independence of the United States the ———.

Form of direction for the service of said subpœna:

The Senate of the United States ——— ———, greeting:

You are hereby commanded to serve and return the within subpœna according to law.

Dated at Washington, this —— day of ———, in the year of our Lord ———, and of the independence of the United States the ———.

————————,
Secretary of State.

Form of oath to be administered to the Members of the Senate sitting in the trial of impeachments.

I solemnly swear (or affirm, as the case may be), that in all things appearing to the trial of the impeachment of ——— ———, now pending, I will do impartial justice according to the Constitution and laws. So help me God.

Form of summons to be issued and served upon the person impeached.

THE UNITED STATES OF AMERICA, *ss:*

The Senate of the United States to ——— ———, greeting:

Whereas the House of Representatives of the United States of America did, on the ——— day of ———, exhibit to the Senate articles of impeachment against you, the said ——— ———, in the words following:

[Here insert the articles.]

And demand that you, the said ——— ———, should be put to answer the accusations as set forth in said articles, and that such proceedings, examinations, trials, and judgments might be thereupon had as are agreeable to law and justice.

You, the said ————————, are therefore hereby summoned to be and appear before the Senate of the United States of America, at their Chamber in the city of Washington, on the ——— day of ———, at twelve o'clock and thirty

minutes afternoon, then and there to answer to the said articles of impeachment, and then and there to abide by, obey, and perform such orders, directions, and judgments as the Senate of the United States shall make in the premises according to the Constitution and laws of the United States.

Hereof you are not to fail.

Witness ——— ——— and Presiding Officer of the said Senate, at the city of Washington, this ——— day of ———, in the year of our Lord ——, and of the independence of the United States the ———.

Form of precept to be indorsed on said writ of summons.

THE UNITED STATES OF AMERICA, *ss:*

The Senate of the United States to ——— ———, greeting:

You are hereby commanded to deliver to and leave with ——— ———, if conveniently to be found, or if not, to leave at his usual place of abode, or at his usual place of business in some conspicuous place, a true and attested copy of the within writ of summons, together with a like copy of this precept; and in whichsoever way you perform the service, let it be done at least ——— days before the appearance day mentioned in said writ of summons.

Fail not, and make return of this writ of summons and precept, with your proceedings thereon indorsed, on or before the appearance day mentioned in the said writ of summons.

Witness ——— ——— and Presiding Officer of the Senate, at the city of Washington, this ——— day of ———, in the year of our Lord ——, and of the independence of the United States the ———.

All process shall be served by the Sergeant at Arms of the Senate, unless otherwise ordered by the court.

XXV. If the Senate shall at any time fail to sit for the consideration of articles of impeachment on the day or hour fixed therefor, the Senate may, by an order to be adopted without debate, fix a day and hour for resuming such consideration.

The question recurring on the order submitted by Mr. Howard on the question to agree thereto,

It was determined in the affirmative.

Ordered, That the Secretary notify the House of Representatives thereof.

The Sergeant at Arms announced the presence at the door of the Senate Chamber of the managers appointed by the House of Representatives to conduct the trial of the impeachment of Andrew Johnson, President of the United States, to wit: Mr. Bingham, Mr. Boutwell, Mr. James F. Wilson, Mr. Butler, Mr. Thomas Williams, and Mr. Logan (Mr. Thaddeus Stevens, one of said managers, being absent).

The Chief Justice requested the managers to take the seats assigned them within the bar of the Senate.

Mr. Bingham, the chairman of the managers, rose and said: "We are instructed by the House of Representatives, as its managers, to demand that the Senate take process against Andrew Johnson, President of the United States; that he answer at the bar of the Senate the articles of impeachment heretofore preferred by the House of Representatives, through its managers, before the Senate;" which articles are in the words following, to wit:

IN THE HOUSE OF REPRESENTATIVES UNITED STATES,
March 2, 1868.

Articles exhibited by the House of Representatives of the United States, in the name of themselves and the people of the United States, against Andrew Johnson, President of the United States, in maintenance and support of their impeachment against him for high crimes and misdemeanors in office.

ARTICLE I. That said Andrew Johnson, President of the United States, on the twenty-first day of February, in the year of our Lord one thousand eight hun-

dred and sixty-eight, at Washington, in the District of Columbia, unmindful of the high duties of his office, of his oath of office, and of the requirement of the Constitution, that he should take care that the laws be faithfully executed, did unlawfully, and in violation of the Constitution and the laws of the United States, issue an order in writing for the removal of Edwin M. Stanton from the office of Secretary for the Department of War, said Edwin M. Stanton having been theretofore duly appointed and commissioned, by and with the advice and consent of the Senate of the United States, as such Secretary, and said Andrew Johnson, President of the United States, on the twelfth day of August, in the year of our Lord one thousand eight hundred and sixty-seven, and during the recess of said Senate, having suspended by his order Edwin M. Stanton from said office, and within twenty days after the first day of the next meeting of said Senate; that is to say, on the twelfth day of December, in the year last aforesaid, having reported to said Senate such suspension, with the evidence and reasons for his action in the case, and the name of the person designated to perform the duties of such office temporarily until the next meeting of the Senate, and said Senate thereafterwards on the thirteenth day of January, in the year of our Lord one thousand eight hundred and sixty-eight, having duly considered the evidence and reasons reported by said Andrew Johnson for said suspension, and having refused to concur in said suspension, whereby and by force of the provisions of an act entitled "An act regulating the tenure of certain civil offices," passed March second, eighteen hundred and sixty-seven, said Edwin M. Stanton did forthwith resume the functions of his office, whereof the said Andrew Johnson had then and there due notice; and said Edwin M. Stanton, by reason of the premises, on said twenty-first day of February, being lawfully entitled to hold said office of Secretary for the Department of War, which said order for the removal of said Edwin M. Stanton is in substance as follows; that is to say:

EXECUTIVE MANSION,
Washington, D.C., February 21, 1868.

SIR: By virtue of the power and authority vested in me as President by the Constitution and laws of the United States, you are hereby removed from office as Secretary for the Department of War, and your functions as such will terminate upon receipt of this communication.

You will transfer to Brevet Maj. Gen. Lorenzo Thomas, Adjutant General of the Army, who has this day been authorized and empowered to act as Secretary of War ad interim, all records, books, papers, and other public property now in your custody and charge.

Respectfully yours,

ANDREW JOHNSON.

To the Hon. EDWIN M. STANTON, *Washington, D.C.*

Which order was unlawfully issued with intent then and there to violate the act entitled "An act regulating the tenure of certain civil offices," passed March second, eighteen hundred and sixty-seven, and with the further intent, contrary to the provisions of said act, in violation thereof, and contrary to the provisions of the Constitution of the United States, and without the advice and consent of the Senate of the United States, the said Senate then and there being in session, to remove said Edwin M. Stanton from the office of Secretary for the Department of War, the said Edwin M. Stanton being then and there Secretary for the Department of War, and being then and there in the due and lawful execution and discharge of the duties of said office, whereby said Andrew Johnson, President of the United States, did then and there commit and was guilty of a high misdemeanor in office.

ART. II. That on said twenty-first day of February, in the year of our Lord one thousand eight hundred and sixty-eight, at Washington, in the District of Columbia, said Andrew Johnson, President of the United States, unmindful of the high duties of his office, of his oath of office, and in violation of the Constitution of the United States, and contrary to the provisions of an act entitled "An act regulating the tenure of certain civil offices," passed March second, eighteen hundred and sixty-seven, without the advice and consent of the Senate of the United States, said Senate then and there being in session, and without authority of law, did, with intent to violate the Constitution of the United States, the act aforesaid, issue and deliver to one Lorenzo Thomas a letter of authority in substance as follows; that is to say:

EXECUTIVE MANSION,
Washington, D.C., February 21, 1868.

SIR: The Hon. Edwin M. Stanton having been this day removed from office as Secretary for the Department of War, you are hereby authorized and empowered to act as Secretary of War ad interim, and will immediately enter upon the discharge of the duties pertaining to that office.

Mr. Stanton has been instructed to transfer to you all the records, books, papers, and other public property now in his custody and charge.

Respectfully yours,

ANDREW JOHNSON.

To Brevet Maj. Gen. LORENZO THOMAS,
Adjutant General U.S. Army, Washington, D.C.

Then and there being no vacancy in said office of Secretary for the Department of War, whereby said Andrew Johnson, President of the United States, did then and there commit, and was guilty of high misdemeanor in office.

ART. III. That said Andrew Johnson, President of the United States, on the twenty-first day of February, in the year of our Lord one thousand eight hundred and sixty-eight, at Washington, in the District of Columbia, did commit, and was guilty of a high misdemeanor in office in this, that, without authority of law, while the Senate of the United States was then and there in session, he did appoint one Lorenzo Thomas to be Secretary for the Department of War ad interim, without the advice and consent of the Senate, and with intent to violate the Constitution of the United States, no vacancy having happened in said office of Secretary for the Department of War during the recess of the Senate, and no vacancy existing in said office at the time, and which said appointment, so made by said Andrew Johnson, of said Lorenzo Thomas, is in substance as follows; that is to say:

EXECUTIVE MANSION,
Washington, D.C., February 21, 1868.

SIR: The Hon. Edwin M. Stanton having been this day removed from office as Secretary for the Department of War, you are hereby authorized and empowered to act as Secretary of War ad interim, and will immediately enter upon the discharge of the duties pertaining to that office.

Mr. Stanton has been instructed to transfer to you all the records, books, papers, and other public property now in his custody and charge.

Respectfully yours,

ANDREW JOHNSON.

To Brevet Maj. Gen. LORENZO THOMAS,
Adjutant General, U.S. Army, Washington, D.C.

ART. IV. That said Andrew Johnson, President of the United States, unmindful of the high duties of his office and of his oath of office, in violation of the Constitution and laws of the United States, on the twenty-first day of February, in the year of our Lord one thousand eight hundred and sixty-eight, at Washington, in the District of Columbia, did unlawfully conspire with one Lorenzo Thomas, and with other persons to the House of Representatives unknown, with intent, by intimidation and threats, unlawfully to hinder and prevent Edwin M. Stanton, then and there the Secretary for the Department of War, duly appointed under the laws of the United States, from holding said office of Secretary for the Department of War, contrary to and in violation of the Constitution of the United States, and of the provisions of an act entitled "An act to define and punish certain conspiracies," approved July thirty-first, eighteen hundred and sixty-one, whereby said Andrew Johnson, President of the United States, did then and there commit and was guilty of a high crime in office.

ART. V. That said Andrew Johnson, President of the United States, unmindful of the high duties of his office and of his oath of office, on the twenty-first day of February, in the year of our Lord one thousand eight hundred and sixty-eight, and on divers other days and times in said year, before the second day of March, in the year of our Lord one thousand eight hundred and sixty-eight, at Washington, in the District of Columbia, did unlawfully conspire with one Lorenzo Thomas, and with other persons to the House of Representatives unknown, to prevent and hinder the execution of an act entitled "An act regulating the tenure of certain civil offices," passed March second, eighteen hundred and sixty-seven, and in pursuance of said conspiracy did unlawfully attempt to prevent Edwin M.

Stanton, then and there being Secretary of the Department of War, duly appointed and commissioned under the laws of the United States, from holding said office, whereby the said Andrew Johnson, President of the United States, did then and there commit and was guilty of a high misdemeanor in office.

ART. VI. That said Andrew Johnson, President of the United States, unmindful of the high duties of his office and of his oath of office, on the twenty-first day of February, in the year of our Lord one thousand eight hundred and sixty-eight, at Washington, in the District of Columbia, did unlawfully conspire with one Lorenzo Thomas, by force to seize, take, and possess the property of the United States in the Department of War, and then and there in the custody and charge of Edwin M. Stanton, Secretary for said Department, contrary to the provisions of an act entitled "An act to define and punish certain conspiracies," approved July thirty-one, eighteen hundred and sixty-one, and with intent to violate and disregard an act entitled "An act regulating the tenure of certain civil offices," passed March second, eighteen hundred and sixty-seven, whereby said Andrew Johnson, President of the United States, did then and there commit a high crime in office.

ART. VII. That said Andrew Johnson, President of the United States, unmindful of the high duties of his office and of his oath of office, on the twenty-first day of February, in the year of our Lord one thousand eight hundred and sixty-eight, at Washington, in the District of Columbia, did unlawfully conspire with one Lorenzo Thomas with intent unlawfully to seize, take, and possess the property of the United States in the Department of War, in the custody and charge of Edwin M. Stanton, Secretary for said Department, with intent to violate and disregard the act entitled "An act regulating the tenure of certain civil offices," passed March second, eighteen hundred and sixty-seven, whereby said Andrew Johnson, President of the United States, did then and there commit a high misdemeanor in office.

ART. VIII. That said Andrew Johnson, President of the United States, unmindful of the high duties of his office and of his oath of office, with intent unlawfully to control the disbursements of the moneys appropriated for the military service and for the Department of War, on the twenty-first day of February, in the year of our Lord one thousand eight hundred and sixty-eight, at Washington, in the District of Columbia, did unlawfully, and contrary to the provisions of an act entitled "An act regulating the tenure of certain civil offices," passed March second, eighteen hundred and sixty-seven, and in violation of the Constitution of United States, and without the advice and consent of the Senate of the United States, and while the Senate was then and there in session, there being no vacancy in the office of Secretary for the Department of War, and with intent to violate and disregard the act aforesaid, then and there to issue and deliver to one Lorenzo Thomas a letter of authority in writing, in substance as follows, that is to say:

EXECUTIVE MANSION,
Washington, D.C., February 21, 1868.

SIR: The Hon. Edwin M. Stanton having been this day removed from office as Secretary for the Department of War, you are hereby authorized and empowered to act as Secretary of War ad interim, and will immediately enter upon the discharge of the duties pertaining to that office.

Mr. Stanton has been instructed to transfer to you all the records, books, papers, and other public property now in his custody and charge.

Respectfully yours,

ANDREW JOHNSON.

To Brevet Maj. Gen. LORENZO THOMAS,
Adjutant General U.S. Army, Washington, D.C.

Whereby said Andrew Johnson, President of the United States, did then and there commit and was guilty of a high misdemeanor in office.

ART. IX. That said Andrew Johnson, President of the United States, on the twenty-second day of February, in the year of our Lord one thousand eight hundred and sixty-eight, at Washington, in the District of Columbia, in disregard of the Constitution and the laws of the United States duly enacted, as Commander in Chief of the Army of the United States, did bring before himself then and there William H. Emory, a major general by brevet in the Army of the United States, actually in command of the Department of Washington and the military forces thereof, and did then and there, as such Commander in

Chief, declare to and instruct said Emory that part of a law of the United States, passed March second, eighteen hundred and sixty-seven, entitled "An act making appropriations for the support of the Army for the year ending June thirtieth, eighteen hundred and sixty-six, and for other purposes," especially the second section thereof, which provides, among other things, that "all orders and instructions relating to military operations issued by the President or the Secretary of War shall be issued through the General of the Army, and, in case of his inability, through the next in rank," was unconstitutional and in contravention of the commission of said Emory, and which said provision of law had been theretofore duly and legally promulgated by General Order for the government and direction of the Army of the United States, as the said Andrew Johnson then and there well knew, with intent thereby to induce said Emory, in his official capacity as commander of the Department of Washington, to violate the provisions of said act, and to take and receive, act upon, and obey such orders as he, the said Andrew Johnson, might make and give, and which should not be issued through the General of the Army of the United States, according to the provisions of said act, and with the further intent thereby to enable him, the said Andrew Johnson, to prevent the execution of the act entitled "An act regulating the tenure of certain civil offices," passed March second, eighteen hundred and sixty-seven, and to unlawfully prevent Edwin M. Stanton, then being Secretary for the Department of War, from holding said office and discharging the duties thereof, whereby said Andrew Johnson, President of the United States, did then and there commit and was guilty of a high misdemeanor in office.

And the House of Representatives, by protestation, saving to themselves the liberty of exhibiting at any time hereafter any further articles or other accusation, or impeachment, against the said Andrew Johnson, President of the United States, and also of replying to his answers which he shall make unto the articles herein preferred against him, and of offering proof to the same, and every part thereof, and to all and every other article, accusation, or impeachment, which shall be exhibited by them, as the case shall require, do demand that the said Andrew Johnson may be put to answer the high crimes and misdemeanors in office herein charged against him, and that such proceedings, examinations, trials, and judgments may be thereupon had any given as may be agreeable to law and justice.

SCHUYLER COLFAX,
Speaker of the House of Representatives.

Attest:

EDWARD MCPHERSON,
Clerk of the House of Representatives.

IN THE HOUSE OF REPRESENTATIVES UNITED STATES,
March 3, 1868.

The following additional articles of impeachment were agreed to, viz:

ART. X. That the said Andrew Johnson, President of the United States, unmindful of the high duties of his office and the dignity and proprieties thereof, and of the harmony and courtesies which ought to exist and be maintained between the executive and legislative branches of the Government of the United States, designing and intending to set aside the rightful authority and powers of Congress, did attempt to bring into disgrace, ridicule, hatred, contempt, and reproach the Congress of the United States, and the several branches thereof, to impair and destroy the regard and respect of all the good people of the United States for the Congress and legislative power thereof (which all officers of the Government ought inviolably to preserve and maintain), and to excite the odium and resentment of all the good people of the United States against Congress and the laws by it duly and constitutionally enacted; and in pursuance of his said design and intent, openly and publicly, and before divers assemblages of the citizens of the United States convened in divers parts thereof to meet and receive said Andrew Johnson as the Chief Magistrate of the United States, did, on the eighteenth day of August, in the year of our Lord one thousand eight hundred and sixty-six, and on divers other days and times, as well before as afterward, make and deliver with a loud voice certain intemperate, inflammatory, and scandalous harangues, and did

therein utter loud threats and bitter menaces as well against Congress as the laws of the United States duly enacted thereby, amid the cries, jeers, and laughter of the multitudes then assembled and in hearing, which are set forth in the several specifications hereinafter written, in substance and effect, that is to say:

Specification first.—In this: That at Washington, in the District of Columbia, in the Executive Mansion, to a committee of citizens who called upon the President of the United States, speaking of and concerning the Congress of the United States, said Andrew Johnson, President of the United States, heretofore, to wit, on the eighteenth day of August, in the year of our Lord one thousand eight hundred and sixty-six, did, in a loud voice, declare in substance and effect among other things, that is to say:

"So far as the executive department of the Government is concerned, the effort has been made to restore the Union, to heal the breach, to pour oil into the wounds which were consequent upon the struggle, and (to speak in common phrase) to prepare as the learned and wise physician would, a plaster healing in character and coextensive with the wound. We thought, and we think, that we had partially succeeded; but as the work progresses, as reconstruction seemed to be taking place, and the country was becoming reunited, we found a disturbing and marring element opposing us. In alluding to that element, I shall go no further than your convention and the distinguished gentleman who has delivered to me the report of its proceedings. I shall make no reference to it that I do not believe the time and the occasion justify.

"We have witnessed in one department of the Government every endeavor to prevent the restoration of peace, harmony, and union. We have seen hanging upon the verge of the Government, as it were, a body called, or which assumes to be, the Congress of the United States, while in fact it is a Congress of only a part of the States. We have seen this Congress pretend to be for the Union, when its every step and act tended to perpetuate disunion and make a disruption of the States inevitable. * * * We have seen Congress gradually encroach step by step upon constitutional rights and violate, day after day and month after month, fundamental principles of the Government. We have seen a Congress that seemed to forget that there was a limit to the sphere and scope of legislation. We have seen a Congress in a minority assume to exercise power which, allowed to be consummated, would result in despotism or monarchy itself."

Specification second.—In this: That at Cleveland, in the State of Ohio, heretofore, to wit, on the third day of September, in the year of our Lord one thousand eight hundred and sixty-six, before a public assemblage of citizens and others, said Andrew Johnson, President of the United States, speaking of and concerning the Congress of the United States, did, in a loud voice, declare in substance and effect, among other things, that is to say:

"I will tell you what I did do. I called upon your Congress that is trying to break up the Government.

* * * * * * *

"In conclusion, besides that, Congress had taken much pains to poison their constituents against him. But what had Congress done? Have they done anything to restore the union of these States? No; on the contrary, they had done everything to prevent it; and because he stood now where he did when the rebellion commenced, he had been denounced as a traitor. Who had run greater risks or made greater sacrifices than himself? But Congress, factious and domineering, had undertaken to poison the minds of the American people."

Specification third.—In this: That at St. Louis, in the State of Missouri, heretofore, to wit, on the eighth day of September, in the year of our Lord one thousand eight hundred and sixty-six, before a public assemblage of citizens and others, said Andrew Johnson, President of the United States, speaking of and concerning the Congress of the United States, did, in a loud voice, declare in substance and effect, among other things, that is to say:

"Go on. Perhaps, if you had a word or two on the subject of New Orleans you might understand more about it than you do. And if you will go back—if you will go back and ascertain the cause of the riot at New Orleans, perhaps you will not be so prompt in calling out "New Orleans." If you will take up the riot at New Orleans and trace it back to its source or its immediate cause, you will find out who was responsible for the blood that was shed there. If you will take up the riot at New Orleans and trace it back to the radical Con-

gress, you will find that the riot at New Orleans was substantially planned. If you will take up the proceedings in their caucuses you will understand that they there knew that a convention was to be called which was extinct by its power having expired; that it was said that the intention was that a new government was to be organized, and on the organization of that government the intention was to enfranchise one portion of the population, called the colored population, who had just been emancipated, and at the same time disfranchise white men. When you design to talk about New Orleans you ought to understand what you are talking about. When you read the speeches that were made, and take up the facts on the Friday and Saturday before that convention sat you will there find that speeches were made incendiary in their character, exciting that portion of the population—the black population—to arm themselves and prepare for the shedding of blood. You will also find that that convention did assemble in violation of law, and the intention of that convention was to supersede the reorganized authorities in the State government of Louisiana, which had been recognized by the Government of the United States; and every man engaged in that rebellion in that convention, with the intention of superseding and upturning the civil government which had been recognized by the Government of the United States, I say that he was a traitor to the Constitution of the United States, and hence you find that another rebellion was commenced, having its origin in the radical Congress."

* * * * * * *

"So much for the New Orleans riot. And there was the cause and the origin of the blood that was shed; and every drop of blood that was shed is upon their skirts, and they are responsible for it. I could test this thing a little closer, but will not do it here to-night. But when you talk about the causes and consequences that resulted from proceedings of that kind, perhaps, as I have been introduced here, and you have provoked questions of this kind, though it does not provoke me, I will tell you a few wholesome things that have been done by this radical Congress in connection with New Orleans and the extension of the elective franchise.

"I know that I have been traduced and abused. I know it has come in advance of me here as elsewhere—that I have attempted to exercise an arbitrary power in resisting laws that were intended to be forced upon the Government; that I had exercised that power; that I had abandoned the party that elected me; and that I was a traitor, because I exercised the veto power in attempting, and did arrest for a time, a bill that was called a 'Freedman's Bureau' bill; yes, that I was a traitor. And I have been traduced, I have been slandered, I have been maligned, I have been called Judas Iscariot, and all that. Now, my countrymen, here to-night, it is very easy to indulge in epithets; it is easy to call a man Judas and cry out traitor, but when he is called upon to give arguments and facts he is very often found wanting. Judas Iscariot—Judas. There was a Judas, and he was one of the Twelve Apostles. Oh, yes; the Twelve Apostles had a Christ. The Twelve Apostles had a Christ, and he never could have had a Judas unless he had had twelve apostles. If I have played the Judas, who has been my Christ that I have played the Judas with? Was it Thad. Stevens? Was it Wendell Phillips? Was it Charles Sumner? There are the men that stop and compare themselves with the Saviour; and everybody that differs from them in opinion, and to try to stay and arrest their diabolical and nefarious policy, is to be denounced as a Judas."

* * * * * * *

"Well, let me say to you, if you will stand by me in this action, if you will stand by me in trying to give the people a fair chance—soldiers and citizens—to participate in these offices, God being willing, I will kick them out. I will kick them out just as fast as I can.

"Let me say to you, in concluding, that what I have said I intended to say. I was not provoked into this, and I care not for their menaces, the taunts, and the jeers. I care not for threats. I do not intend to be bullied by my enemies nor overawed by my friends. But, God willing, with your help, I will veto their measures whenever any of them come to me."

Which said utterances, declarations, threats, and harangues, highly censurable in any, are peculiarly indecent and unbecoming in the Chief Magistrate of the United States, by means whereof said Andrew Johnson has brought the high

office of the President of the United States into contempt, ridicule, and disgrace, to the great scandal of all good citizens, whereby said Andrew Johnson, President of the United States, did commit, and was then and there guilty of, a high misdemeanor in office.

ART. XI. That the said Andrew Johnson, President of the United States, unmindful of the high duties of his office, and of his oath of office, and in disregard of the Constitution and laws of the United States, did, heretofore, to wit, on the eighteenth day of August, A. D. eighteen hundred and sixty-six, at the city of Washington, and the District of Columbia, by public speech, declare and affirm, in substance, that the Thirty-ninth Congress of the United States was not a Congress of the United States authorized by the Constitution to exercise legislative power under the same, but, on the contrary, was a Congress of only part of the States, thereby denying, and intending to deny, that the legislation of said Congress was valid or obligatory upon him, the said Andrew Johnson, except in so far as he saw fit to approve the same, and also thereby denying, and intending to deny, the power of the said Thirty-ninth Congress to propose amendments to the Constitution of the United States; and, in pursuance of said declaration, the said Andrew Johnson, President of the United States, afterwards, to wit, on the twenty-first day of February, A. D. eighteen hundred and sixty-eight, at the city of Washington, in the District of Columbia, did unlawfully and in disregard of the requirement of the Constitution that he should take care that the laws be faithfully executed attempt to prevent the execution of an act entitled "An act regulating the tenure of certain civil offices," passed March second, eighteen hundred and sixty-seven, by unlawfully devising and contriving, and attempting to devise and contrive, means by which he should prevent Edwin M. Stanton from forthwith resuming the functions of the office of Secretary for the Department of War, notwithstanding the refusal of the Senate to concur in the suspension theretofore made by said Andrew Johnson of said Edwin M. Stanton from said office of Secretary for the Department of War; and also by further unlawfully devising and contriving, and attempting to devise and contrive, means then and there to prevent the execution of an act entitled "An act making appropriations for the support of the Army for the fiscal year ending June thirtieth, eighteen hundred and sixty-eight, and for other purposes," approved March second, eighteen hundred and sixty-seven; and also to prevent the execution of an act entitled "An act to provide for the more efficient government of the rebel States," passed March second, eighteen hundred and sixty-seven, whereby the said Andrew Johnson, President of the United States, did then, to wit, on the twenty-first day of February, A. D. eighteen hundred and sixty-eight, at the city of Washington, commit, and was guilty of, a high misdemeanor in office.

SCHUYLER COLFAX,
Speaker of the House of Representatives.

Attest:

EDWARD MCPHERSON,
Clerk of the House of Representatives.

Thereupon,

Mr. Howard submitted the following order; which was considered, by unanimous consent, and agreed to:

Ordered, That a summons be issued, as required by the rules of procedure and practice in the Senate when sitting in the trial of impeachments, to Andrew Johnson, returnable on Friday, the 13th of March, instant, at 1 o'clock afternoon.

The managers on the part of the House of Representatives then withdrew.

Mr. Anthony submitted the following amendment to the rules of procedure and practice in the Senate when sitting on the trial of impeachments, viz:

Amend rule 7 by striking out the last clause thereof, which is in the following words: "The presiding officer may, in the first instance, submit to the Senate, without a division, all questions of evidence and incidental questions; but the same shall, on demand of one-fifth of the members present, be decided by yeas and nays;" and in lieu thereof inserting:

The presiding officer of the court may rule all questions of evidence and incidental questions, which ruling shall stand as the judgment of the court, unless some members of the court shall ask that a formal vote be taken thereon, in which case it shall be submitted to the court for a decision; or he may, at his option, in the first instance, submit any such question to a vote of the members of the court.

On motion by Mr. Anthony,

Ordered, That the proposed amendment lie on the table.

On motion by Mr. Howard,

The Senate, sitting for the trial of the President upon articles of impeachment, adjourned to Friday, the 13th March, instant, at 1 o'clock afternoon.

FRIDAY, MARCH 13, 1868.

The United States *v.* Andrew Johnson, President.

At 1 o'clock p. m. the Chief Justice of the United States entered the Senate Chamber and resumed the chair; and,

The Sergeant at Arms having made proclamation,

The Journal of the proceedings of the Senate, sitting for the trial of the President upon articles of impeachment, of March 6, was read.

The Chief Justice then administered the oath prescribed by the twenty-fourth rule to each of the following-named Senators, viz: Mr. Edmunds, Mr. Patterson of New Hampshire, and Mr. Vickers.

Mr. Howard submitted the following order; which was considered, by unanimous consent, and agreed to:

Ordered, That the Secretary inform the House of Representatives that the Senate is in its Chamber and ready to proceed on the trial of Andrew Johnson, President of the United States, and that seats are provided for the accommodation of the members.

The managers appointed to conduct the trial of the President upon articles of impeachment exhibited against him by the House of Representatives, to wit: Mr. Bingham, Mr. Boutwell, Mr. James F. Wilson, Mr. Butler, Mr. Thomas Williams, Mr. Logan, and Mr. Thaddeus Stevens having entered the Senate Chamber and taken the seats assigned them.

The Chief Justice directed the Secretary to read the return of the Sergeant at Arms on the writ of summons directed by the Senate to be issued to Andrew Johnson, President of the United States; and

The Secretary read the return of the Sergeant at Arms, as follows:

The foregoing writ of summons, addressed to Andrew Johnson, President of the United States, and the foregoing precept, addressed to me, were this day duly served upon the said Andrew Johnson, President of the United States, by delivery to and leaving with him true and attested copies of the same at the Executive Mansion, the usual place of abode of the said Andrew Johnson, on Saturday, the 7th day of March instant, at 7 o'clock in the afternoon of that day.

GEORGE T. BROWN,
Sergeant at Arms of the United States Senate.

The Secretary then administered the following oath to the Sergeant at Arms:

I, George T. Brown, Sergeant at Arms of the Senate of the United States, do swear that the return made and subscribed by me upon the process issued on the 7th day of March, A.D. 1868, by the Senate of the United States against Andrew Johnson, President of the United States, is truly made, and that I have performed said service therein described. So help me God.

By direction of the Chief Justice the Sergeant at Arms then made proclamation as follows:

Andrew Johnson, President of the United States! Andrew Johnson, President of the United States! appear and answer the articles of impeachment exhibited against you by the House of Representatives of the United States.

Thereupon,

Mr. Henry Stanbery, Mr. Benjamin R. Curtis, and Mr. Thomas A. R. Nelson appeared at the bar of the Senate as counsel for the President of the United States, and took the seats assigned them on the right of the Chair.

Mr. Conkling submitted the following order; which was considered, by unanimous consent, and agreed to:

Ordered, That the 23d rule respecting proceedings on trial of impeachments be amended by inserting after the word "debate," in the second line of the rule, the words, "subject, however, to the operation of rule seven."

The rule, as thus amended, is as follows:

23. All the orders and decisions shall be made and had by yeas and nays, which shall be entered on the record, and without debate, subject, however, to the operation of rule 7, except when the doors shall be closed for deliberation, and in that case no member shall speak more than once on one question, and for not more than ten minutes on an interlocutory question, and for not more than fifteen minutes on the final question, unless by consent of the Senate, to be had without debate; but a motion to adjourn may be decided without the yeas and nays, unless they be demanded by one-fifth of the members present.

The Sergeant at Arms announced at the door of the Senate Chamber the House of Representatives, and

The House of Representatives, as in Committee of the Whole House, preceded by its Chairman, Mr. E. B. Washburne, and accompanied by its Speaker and Clerk, entered the Senate Chamber and took the seats provided for them.

The Chief Justice announced that the Senate was now ready to proceed with the trial of the President upon the articles of impeachment exhibited against him by the House of Representatives.

The Chief Justice having informed the counsel of the President that the Senate was ready to receive from them his answer to the writ of summons,

Mr. Stanbery, in behalf of Andrew Johnson, the respondent, read the following paper; which he handed in at the Secretary's desk:

In the matter of the impeachment of Andrew Johnson, President of the United States.

Mr. CHIEF JUSTICE: I, Andrew Johnson, President of the United States, having been served with a summons to appear before this honorable court, sitting as a court of impeachment, to answer certain articles of impeachment found and presented against me by the honorable the House of Representatives of the United States, do hereby enter my appearance by my counsel, Henry Stanbery, Benjamin R. Curtis, Jeremiah S. Black, William M. Evarts, and Thomas A. R. Nelson, who have my warrant and authority therefor, and who are instructed by me to ask of this honorable court a reasonable time for the preparation of my answer to said articles. After a careful examination of the articles of impeachment and consultation with my counsel I am satisfied that at least forty days will be necessary for the preparation of my answer, and I respectfully ask that it be allowed.

ANDREW JOHNSON.

Mr. Stanbery then submitted a motion that the President be allowed 40 days to prepare and file his answer to the articles of impeachment exhibited against him by the House of Representatives,

After argument by the counsel for the President in favor of the said motion, and by the managers on the part of the House of Representatives against it,

The Chief Justice called the attention of the Senate to the twenty-first rule, which provides "that the case on each side shall be opened by one person," and to the twentieth rule, which provides that "all preliminary or interlocutory questions and all motions shall be argued for not exceeding one hour on each side unless the court shall, by order, extend the time," and stated that he had allowed argument to proceed without attempting to restrict it as to the number of persons on each side, and unless the Senate ordered otherwise he would proceed in that course.

After further argument on the part of the managers,

The Chief Justice stated the question before the Senate to be upon the motion of the counsel for the President to be allowed 40 days to prepare and file his answer to the articles of impeachment exhibited against him by the House of Representatives.

Whereupon,

Mr. Edmunds submitted the following motion for consideration:

Ordered, That the respondent file his answer to the articles of impeachment on or before the 1st of April next, and that the managers of the impeachment file their replication thereto within three days thereafter, and that the matter stand for trial on Monday, April 6, 1868.

Mr. Morton moved that the Senate retire to deliberate and confer in regard to its determination of the question; and,

The question being put,

It was determined in the affirmative; and

The Senate, with the Chief Justice, having retired to their conference chamber, proceeded to consider the motion submitted by Mr. Edmunds; and,

After debate,

On motion by Mr. Drake to amend the motion submitted by Mr. Edmunds by striking out all after the word "ordered," and in lieu thereof inserting, "That the respondent file answer to the articles of impeachment on or before Friday, the twentieth day of March instant."

It was determined in the affirmative.

Yeas	28
Nays	20

On motion by Mr. Drake,

The ayes and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are,

Messrs. Cameron, Cattell, Chandler, Cole, Conkling, Conness, Corbett, Drake, Ferry, Harlan, Howard, Howe, Morgan, Morrill of Vermont, Morton, Nye, Patterson of New Hampshire, Pomeroy, Ramsey, Sherman, Stewart, Sumner, Thayer, Trumbull, Willey, Williams, Wilson, Yates.

Those who voted in the negative are,

Messrs. Anthony, Bayard, Buckalew, Davis, Dixon, Edmunds, Fessenden, Fowler, Frelinghuysen, Grimes, Henderson, Hendricks, Johnson, McCreery, Morrill of Maine, Norton, Patterson of Tennessee, Saulsbury, Van Winkle, Vickers.

So the amendment of Mr. Drake to the motion of Mr. Edmunds was agreed to.

On the question to agree to the motion of Mr. Edmunds as amended,

After debate,

On motion of Mr. Trumbull that the Senate reconsider its vote agreeing to the amendment proposed by Mr. Drake to the motion of Mr. Edmunds,

It was determined in the affirmative, { Yeas ..... 27 / Nays 23

On motion by Mr. Drake,

The yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are,

Messrs. Anthony, Bayard, Buckalew, Cattell, Corbett, Davis, Dixon, Edmunds, Fessenden, Fowler, Frelinghuysen, Grimes, Henderson, Hendricks, Johnson, McCreery, Morrill of Vermont, Morton, Norton, Patterson of Tennessee, Saulsbury, Sherman, Sprague, Trumbull, Van Winkle, Vickers, Willey.

Those who voted in the negative are,

Messrs, Cameron, Chandler, Cole, Conkling, Conness, Drake, Ferry, Harlan, Howard, Howe, Morgan, Morrill of Maine, Nye, Patterson of New Hampshire, Pomeroy, Ramsey, Stewart, Sumner, Thayer, Tipton, Williams, Wilson, Yates.

So the Senate reconsidered its vote agreeing to the amendment of Mr. Drake to the motion of Mr. Edmunds; and

The question recurring on the amendment of Mr. Drake,

On motion by Mr. Trumbull to amend the amendment of Mr. Drake, by striking out the words "Friday, the 20th," and inserting the words "Monday, the 23d,"

It was determined in the affirmative; and

On the question to agree to the amendment as amended, on the motion of Mr. Trumbull,

It was determined in the affirmative.

The question again recurring on the motion of Mr. Edmunds, as amended on the motion of Mr. Drake, as amended by Mr. Trumbull, in the following words:

Ordered, That the respondent file answer to the articles of impeachment on or before Monday, the 23d day of March instant.

It was determined in the affirmative.

Thereupon,

The Senate returned to its Chamber; and

The Chief Justice announced to the counsel for the President that their motion to be allowed 40 days to prepare and file answer to the articles of impeachment was denied, and that the Senate had adopted the following order:

Ordered, That the respondent file answer to the articles of impeachment on or before Monday, the 23d day of March instant.

Mr. Bingham, on the part of the managers, submitted the following order for consideration:

Ordered, That upon the filing of a replication by the managers on the part of the House of Representatives, the trial of Andrew Johnson, President of the United States, upon the articles of impeachment exhibited by the House of Representatives, shall proceed forthwith.

After argument on the part of the managers in favor of the said order, and on the part of the counsel for the President against it,

On the question to agree to said order,

It was determined in the negative, { Yeas ..... 25 / Nays ..... 26 }

On motion by Mr. Sumner.

The yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are,

Messrs. Cameron, Cattell, Chandler, Cole, Conkling, Conness, Corbett, Drake, Ferry, Harlan, Howard, Morgan, Morton, Nye, Patterson of New Hampshire, Pomeroy, Ramsey, Ross, Stewart, Sumner, Thayer, Tipton, Williams, Wilson, Yates.

Those who voted in the negative are,

Messrs. Anthony, Bayard, Buckalew, Davis, Dixon, Edmunds, Fessenden, Fowler, Frelinghuysen, Grimes, Henderson, Hendricks, Howe, Johnson, McCreery, Morrill of Maine, Morrill of Vermont, Norton, Patterson of Tennessee, Saulsbury, Sherman, Sprague, Trumbull, Van Winkle, Vickers, Willey.

So the order was not agreed to.

Thereupon

Mr. Sherman submitted the following order for consideration:

Ordered, That the trial of the articles of impeachment shall proceed on the 6th day of April next.

After argument by the managers and by the counsel for the President.

On motion by Mr. Conkling to amend the order submitted by Mr. Sherman by striking out all after the word "ordered" and inserting the following:

On the question to agree thereto,

That unless otherwise ordered by the Senate, for cause shown, the trial of the pending impeachment shall proceed immediately after replication shall be filed;

It was determined in the affirmative, { Yeas ..... 40 / Nays ..... 10 }

On motion by Mr. Drake.

The yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are,

Messrs. Anthony, Cameron, Cattell, Chandler, Cole, Conkling, Conness, Corbett, Drake, Edmunds, Ferry, Fessenden, Fowler, Frelinghuysen, Grimes, Harlan, Henderson, Howard, Howe, Morgan, Morrill of Maine Morrill of Vermont, Morton, Nye, Patterson of New Hampshire, Pomeroy, Ramsey, Ross, Sherman, Sprague, Stewart, Sumner, Thayer, Tipton, Trumbull, Van Winkle, Willey, Williams, Wilson, Yates.

Those who voted in the negative are.

Messrs. Bayard, Buckalew, Davis, Dixon, Hendricks, Johnson, McCreery, Patterson of Tennessee, Saulsbury, Vickers.

So the amendment was agreed to; and

On the question to agree to the order as amended,

It was determined in the affirmative.

So it was

Ordered, That unless otherwise ordered by the Senate, for cause shown, the trial of the pending impeachment shall proceed immediately after replication shall be filed.

On motion by Mr. Howard,

The Senate, sitting for the trial of the President upon articles of impeachment, adjourned to Monday, the 23d day of March instant, and 1 o'clock p.m.

MONDAY, MARCH 23, 1868.

The United States *v.* Andrew Johnson, President.

At 1 o'clock p.m. the Chief Justice of the United States entered the Senate Chambers and resumed the chair; and,

The Sergeant at Arms having made proclamation,

The Chief Justice administered the oath prescribed by the 24th rule of the Senate, sitting for the trial of impeachments, to Mr. Doolittle.

The managers appointed to conduct the trial of the President of the United States upon articles of impeachment exhibited against him by the House of Representatives, to wit, Mr. Bingham, Mr. Boutwell, Mr. James F. Wilson, Mr. Butler, Mr. Thomas Williams, Mr. Logan, and Mr. Thaddeus Stevens, entered the Senate Chamber and took the seats assigned them.

The Sergeant at Arms announced the presence at the door of the Senate Chamber of the House of Representatives, and

The House of Representatives, as in Committee of the Whole House, preceded by its chairman, Mr. Elihu B. Washburne, and accompanied by its Speaker and Clerk, entered the Senate Chamber and took the seats assigned them.

The counsel of the President, to wit, Mr. Stanbery, Mr. Curtis, Mr. Evarts, Mr. Groesbeck, and Mr. Nelson, appeared at the bar of the Senate and took the seats assigned them.

The journal of proceedings of the Senate, sitting for the trial of the President upon articles of impeachment, of March 15, was read.

Mr. Davis submitted the following for consideration:

The Constitution having vested the Senate with the sole power to try the articles of impeachment of the President of the United States, preferred by the House of Representatives; and also declared that "the Senate of the United States shall be composed of two Senators from each State, chosen by the legislature thereof;" and the States of Virginia, North Carolina, South Carolina, Georgia, Alabama, Florida, Mississippi, Arkansas, Louisiana, and Texas, having each by its legislatures chosen two Senators who have been and continue to be excluded by the Senate from their seats, respectively, without any judgment by the Senate against them personally and individually on the points of their elections, returns, and qualifications: It is

Ordered, That a court of impeachment for the trial of the President can not be legally and constitutionally formed while the Senators from the States afore-

said are thus excluded from the Senate, and the case is continued until the Senators from those States are permitted to take their seats in the Senate, subject to all constitutional exceptions to their elections, returns, and qualifications, severally.

On the question to agree to the motion submitted by Mr. Davis,

It was determined in the negative, { Yeas ..... 2 / Nays 49

On motion of Mr. Davis,

The yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are,

Messrs. Davis, McCreery.

Those who voted in the negative are,

Messrs. Anthony, Buckalew, Cameron, Cattell, Chandler, Cole, Conkling, Conness, Corbett, Cragin, Dixon, Doolittle, Drake, Edmunds, Ferry, Fessenden, Fowler, Frelinghuysen, Grimes, Harlan, Henderson, Hendricks, Howard, Howe, Johnson, Morgan, Morrill of Maine, Morrill of Vermont, Morton, Norton, Nye, Patterson of New Hampshire, Patterson of Tennessee, Pomeroy, Ramsey, Ross, Sherman, Sprague, Stewart, Sumner, Thayer, Tipton, Trumbull, Van Winkle, Vickers, Willey, Williams, Wilson, Yates.

So the motion of Mr. Davis was not agreed to.

The Chief Justice then asked the counsel of the President if they were ready to file answer to the articles of impeachment exhibited against him by the House of Representatives, as required by the order of the Senate of the 13th of March instant.

The counsel of the President replied that they were now ready to make answer.

Thereupon

The answer of the respondent to the articles of impeachment exhibited against him by the House of Representatives was read by his counsel in the following words, to wit:

SENATE OF THE UNITED STATES, SITTING AS A COURT OF IMPEACHMENT FOR THE TRIAL OF ANDREW JOHNSON, PRESIDENT OF THE UNITED STATES

The answer of the said Andrew Johnson, President of the United States, to the articles of impeachment exhibited against him by the House of Representatives of the United States.

ANSWER TO ARTICLE I

For answer to the first article he says: That Edwin M. Stanton was appointed Secretary for the Department of War on the 15th day of January, A.D. 1862, by Abraham Lincoln, then President of the United States, during the first term of his Presidency, and was commissioned according to the Constitution and laws of the United States, to hold the said office during the pleasure of the President; that the office of Secretary for the Department of War was created by an act of the first Congress in its first session, passed on the 7th day of August, A.D. 1789, and in and by that act it was provided and enacted that the said Secretary for the Department of War shall perform and execute such duties as shall, from time to time, be enjoined on and intrusted to him by the President of the United States, agreeably to the Constitution, relative to the subjects within the scope of the said department; and furthermore, that the said Secretary shall conduct the business of the said department in such a manner as the President of the United States shall, from time to time, order and instruct.

And this respondent, further answering, says that by force of the act aforesaid and by reason of his appointment aforesaid the said Stanton became the

principal officer in one of the executive departments of the Government within the true intent and meaning of the second section of the second article of the Constitution of the United States, and according to the true intent and meaning of that provision of the Constitution of the United States; and, in accordance with the settled and uniform practice of each and every President of the United States, the said Stanton then became, and so long as he should continue to hold the said office of Secretary for the Department of War must continue to be, one of the advisers of the President of the United States, as well as the person intrusted to act for and represent the President in matters enjoined upon him or intrusted to him by the President touching the department aforesaid, and for whose conduct in such capacity, subordinate to the President, the President is by the Constitution and laws of the United States made responsible. And this respondent, further answering, says he succeeded to the office of President of the United States upon, and by reason of, the death of Abraham Lincoln, then President of the United States, on the 15th day of April, 1865, and the said Stanton was then holding the said office of Secretary for the Department of War under, and by reason of, the appointment and commission aforesaid; and, not having been removed from the said office by this respondent, the said Stanton continued to hold the same under the appointment and commission aforesaid, at the pleasure of the President, until the time hereinafter particularly mentioned; and at no time received any appointment or commission save as above detailed.

And this respondent, further answering, says that on and prior to the 5th day of August, A. D. 1867, this respondent, the President of the United States, responsible for the conduct of the Secretary for the Department of War, and having the constitutional right to resort to and rely upon the person holding that office for advice concerning the great and difficult public duties enjoined on the President by the Constitution and laws of the United States, became satisfied that he could not allow the said Stanton to continue to hold the office of Secretary for the Department of War without hazard of the public interest; that the relations between the said Stanton and the President no longer permitted the President to resort to him for advice, or to be, in the judgment of the President, safely responsible for his conduct of the affairs of the Department of War, as by law required, in accordance with the orders and instructions of the President; and thereupon, by force of the Constitution and laws of the United States, which devolve on the President the power and the duty to control the conduct of the business of that executive department of the Government, and by reason of the constitutional duty of the President to take care that the laws be faithfully executed, this respondent did necessarily consider and did determine that the said Stanton ought no longer to hold the said office of Secretary for the Department of War. And this respondent, by virtue of the power and authority vested in him as President of the United States, by the Constitution and laws of the United States, to give effect to such his decision and termination, did, on the 5th day of August, A. D. 1867, address to the said Stanton a note, of which the following is a true copy:

"Sir: Public considerations of a high character constrain me to say that your resignation as Secretary of War will be accepted."

To which note the said Stanton made the following reply:

WAR DEPARTMENT,
"*Washington, August 5, 1867.*

SIR: Your note of this day has been received stating that "public considerations of a high character constrain" you "to say that" my "resignation as Secretary of War will be accepted."

In reply I have the honor to say that public considerations of a high character, which alone have induced me to continue at the head of this department, constrain me not to resign the office of Secretary of War before the next meeting of Congress.

Very respectfully, yours,

EDWIN M. STANTON.

This respondent, as President of the United States, was thereon of opinion that, having regard to the necessary official relations and duties of the Secretary for the Department of War to the President of the United States according to the Constitution and laws of the United States, and having regard to the responsibility of the President for the conduct of the said Secretary, and having regard to the permanent executive authority of the office which the respondent holds

under the Constitution and laws of the United States, it was impossible consistently with the public interest to allow the said Stanton to continue to hold the said office of Secretary for the Department of War; and it then became the official duty of the respondent as President of the United States to consider and decide what act or acts should and might lawfully be done by him as President of the United States to cause the said Stanton to surrender the said office.

This respondent was informed and verily believed that it was practically settled by the First Congress of the United States, and had been so considered and uniformly and in great numbers of instances acted on by each Congress and President of the United States, in succession, from President Washington to and including President Lincoln, and from the First Congress to the Thirty-ninth Congress, that the Constitution of the United States conferred on the President, as part of the executive power and as one of the necessary means and instruments of performing the executive duty expressly imposed on him by the Constitution of taking care that the laws be faithfully executed, the power at any and all times of removing from office all executive officers for cause to be judged of by the President alone. This respondent had, in pursuance of the Constitution, required the opinion of each principal officer of the executive departments upon this question of constitutional executive power and duty, and had been advised by each of them, including the said Stanton, Secretary for the Department of War, that under the Constitution of the United States this power was lodged by the Constitution in the President of the United States, and that, consequently, it could be lawfully exercised by him and the Congress could not deprive him thereof; and this respondent, in his capacity of President of the United States, and because in that capacity he was both enabled and bound to use his best judgment upon this question, did, in good faith and with an earnest desire to arrive at the truth, come to the conclusion and opinion, and did make the same known to the honorable the Senate of the United States by a message dated on the 2d day of March, 1867 (a true copy whereof is hereunto annexed and marked "A"), that the power last mentitoned was conferred, and the duty of exercising it in fit cases was imposed, on the President by the Constitution of the United States, and that the President could not be deprived of this power or relieved of this duty, nor could the same be vested by law in the President and the Senate jointly, either in part or whole; and this has ever since remained and was the opinion of this respondent at the time when he was forced as aforesaid to consider and decide what act or acts should and might lawfully be done by this respondent, as President of the United States, to cause the said Stanton to surrender the said office.

This respondent was also then aware that by the first section of "An act regulating the tenure of certain civil offices," passed March 2, 1867, by a constitutional majority of both Houses of Congress, it was enacted as follows:

"That every person holding any civil office to which he has been appointed by and with the advice and consent of the Senate, and every person who shall hereafter be appointed to any such office, and shall become duly qualified to act therein, is and shall be entitled to hold such office until a successor shall have been in like manner appointed and duly qualified, except as herein otherwise provided: *Provided*, That the Secretaries of State, of the Treasury, of War, of the Navy, and of the Interior, the Postmaster General, and the Attorney General shall hold their offices, respectively, for and during the term of the President by whom they may have been appointed, and one month thereafter, subject to removal by and with the advice and consent of the Senate."

This respondent was also aware that this act was understood and intended to be an expression of the opinion of the Congress by which that act was passed; that the power to remove executive officers for cause might by law be taken from the President and vested in him and the Senate jointly; and although this respondent had arrived at and still retained the opinion above expressed and verily believed, as he still believes, that the said first section of the last-mentioned act was and is wholly inoperative and void by reason of its conflict with the Constitution of the United States, yet inasmuch as the same had been enacted by the constitutional majority in each of the two Houses of that Congress this respondent considered it to be proper to examine and decide whether the particular case of the said Stanton, on which it was this respondent's duty to act, was within or without the terms of that first section of the act; or, if within it, whether the President had not the power, according to the terms of the act, to remove the said Stanton from the office of Secretary for the Department of

War, and having, in his capacity of President of the United States, so examined and considered, did form the opinion that the case of the said Stanton and his tenure of office were not affected by the first section of the last-named act.

And this respondent, further answering, says that although a case thus existed which, in his judgment as President of the United States, called for the exercise of the executive power to remove the said Stanton from the office of Secretary for the Department of War; and although this respondent was of opinion, as is above shown, that under the Constitution of the United States the power to remove the said Stanton from the said office was vested in the President of the United States; and although this respondent was also of the opinion, as is above shown, that the case of the said Stanton was not affected by the first section of the last-named act; and although each of the said opinions had been formed by this respondent upon an actual case, requiring him, in his capacity of President of the United States, to come to some judgment and determination thereon, yet this respondent, as President of the United States, desired and determined to avoid, if possible, any question of the construction and effect of the said first section of the last-named act and also the broader question of the executive power conferred upon the President of the United States by the Constitution of the United States to remove one of the principal officers of one of the executive departments for cause seeming to him sufficient; and this respondent also desired and determined that if from causes over which he could exert no control it should become absolutely necessary to raise and have, in some way, determined either or both of the last-named questions, it was in accordance with the Constitution of the United States and was required of the President thereby, that questions of so much gravity and importance, upon which the legislative and executive departments of the Government had disagreed, which involved powers considered by all branches of the Government during its entire history down to the year 1867 to have been confided by the Constitution of the United States to the President, and to be necessary for the complete and proper execution of his constitutional duties, should be in some proper way submitted to that judicial department of the Government intrusted by the Constitution with the power and subjected by it to the duty, not only of determining finally the construction and effect of all acts of Congress, but of comparing them with the Constitution of the United States and pronouncing them inoperative when found in conflict with that fundamental law which the people have enacted for the government of all their servants. And to these ends, first, that through the action of the Senate of the United States the absolute duty of the President to substitute some fit person in place of Mr. Stanton as one of his advisers, and as a principal subordinate officer whose official conduct he was responsible for and had lawful right to control, might, if possible, be accomplished without the necessity of raising any one of the questions aforesaid; and, second, if this duty could not be so performed, then that these questions, or such of them as might necessarily arise, should be judicially determined in manner aforesaid, and for no other end or purpose this respondent, as President of the United States, on the 12th day of August, 1867, seven days after the reception of the letter of the said Stanton of the 5th of August, hereinbefore stated, did issue to the said Stanton the order following, namely:

EXECUTIVE MANSION, WASHINGTON, *August 12, 1867.*

SIR: By virtue of the power and authority vested in me as President by the Constitution and laws of the United States, you are hereby suspended from office as Secretary of War, and will cease to exercise any and all functions pertaining to the same.

You will at once transfer to Gen. Ulysses S. Grant, who has this day been authorized and empowered to act as Secretary of War ad interim, all records, books, papers, and other public property now in your custody and charge.

The Hon. EDWIN M. STANTON, *Secretary of War.*

To which said order the said Stanton made the following reply:

WAR DEPARTMENT, WASHINGTON CITY, *August 12, 1867.*

SIR: Your note of this date has been received, informing me that by virtue of the powers vested in you, as President, by the Constitution and laws of the United States, I am suspended from office as Secretary of War, and will cease to exercise any and all functions pertaining to the same; and also directing me at once to transfer to Gen. Ulysses S. Grant, who has this day been authorized and empowered to act as Secretary of War ad interim, all records, books, papers, and other public property now in my custody and charge. Under a sense of public

duty, I am compelled to deny your right, under the Constitution and laws of the United States, without the advice and consent of the Senate, and without legal cause, to suspend me from office as Secretary of War, or the exercise of any or all functions pertaining to the same, or without such advice and consent to compel me to transfer to any person the records, books, papers, and public property in my custody as Secretary. But inasmuch as the General Commanding the Armies of the United States has been appointed ad interim, and has notified me that he has accepted the appointment, I have no alternative but to submit, under protest, to superior force.

To the PRESIDENT.

And this respondent, further answering, says that it is provided in and by the second section of "An act to regulate the tenure of certain civil offices," that the President may suspend an officer from the performance of the duties of the office held by him, for certain causes therein designated, until the next meeting of the Senate and until the case shall be acted on by the Senate; that this respondent, as President of the United States, was advised, and he verily believed and still believes, that the executive power of removal from office confided to him by the Constitution as aforesaid, includes the power of suspension from office at the pleasure of the President, and this respondent, by the order aforesaid, did suspend the said Stanton from office, not until the next meeting of the Senate, or until the Senate should have acted upon the case, but by force of the power and authority vested in him by the Constitution and laws of the United States, indefinitely and at the pleasure of the President, and the order, in form aforesaid, was made known to the Senate of the United States on the 12th day of December, A.D. 1867, as will be more fully hereinafter stated.

And this respondent, further answering, says that in and by the act of February 13, 1795, it was, among other things, provided and enacted that, in case of vacancy in the office of Secretary for the Department of War, it shall be lawful for the President, in case he shall think it necessary, to authorize any person to perform the duties of that office until a successor be appointed or such a vacancy filled, but not exceeding the term of six months; and this respondent, being advised and believing that such law was in full force and not repealed, by an order dated August 12, 1867, did authorize and empower Ulysses S. Grant, General of the Armies of the United States, to act as Secretary for the Department of War ad interim, in the form in which similar authority had theretofore been given, not until the next meeting of the Senate and until the Senate should act on the case, but at the pleasure of the President, subject only to the limitation of six months in the said last-mentioned act contained; and a copy of the last-named order was made known to the Senate of the United States on the 12th day of December, A.D. 1867, as will be hereinafter more fully stated; and in pursuance of the design and intention aforesaid, if it should become necessary, to submit the said questions to a judicial determination, this respondent, at or near the date of the last-mentioned order, did make known such his purpose to obtain a judicial decision of the said questions, or such of them as might be necessary.

And this respondent, further answering, says that in further pursuance of his intention and design, if possible, to perform what he judged to be his imperative duty, to prevent the said Stanton from longer holding the office of Secretary for the Department of War, and at the same time avoiding, if possible, any question respecting the extent of the power of removal from executive office confided to the President by the Constitution of the United States, and any question respecting the construction and effect of the first section of the said "act regulating the tenure of certain civil offices," while he should not, by any act of his, abandon and relinquish either a power which he believed the Constitution had conferred on the President of the United States, to enable him to perform the duties of his office, or a power designedly left to him by the first section of the act of Congress last aforesaid, this respondent did, on the 12th day of December, 1867, transmit to the Senate of the United States a message, a copy whereof is hereunto annexed and marked "B," wherein he made known the orders aforesaid and the reasons which had induced the same, so far as this respondent then considered it material and necessary that the same should be set forth, and reiterated his views concerning the constitutional power of removal vested in the President, and also expressed his views concerning the construction of the said first section of the last-mentioned act, as respected the

power of the President to remove the said Stanton from the said office of Secretary for the Department of War, well hoping that this respondent could thus perform what he then believed, and still believes, to be his imperative duty in reference to the said Stanton, without derogating from the powers which this respondent believed were confided to the President by the Constitution and laws, and without the necessity of raising, judicially, any questions respecting the same.

And this respondent, further answering, says that this hope not having been realized, the President was compelled either to allow the said Stanton to resume the said office and remain therein contrary to the settled convictions of the President, formed as aforesaid, respecting the powers confided to him and the duties required of him by the Constitution of the United States, and contrary to the opinion formed as aforesaid, that the first section of the last-mentioned act did not affect the case of the said Stanton, and contrary to the fixed belief of the President that he could not longer advise with or trust or be responsible for the said Stanton, in the said office of Secretary for the Department of War, or else he was compelled to take such steps as might, in the judgment of the President, be lawful and necessary to raise, for a judicial decision, the questions affecting the lawful right of the said Stanton to resume the said office, or the power of the said Stanton to persist in refusing to quit the said office if he should persist in actually refusing to quit the same; and to this end, and to this end only, this respondent did, on the 21st day of February, 1868, issue the order for the removal of the said Stanton, in the said first article mentioned and set forth, and the order authorizing the said Lorenzo Thomas to act as Secretary of War ad interim, in the said second article set forth.

And this respondent, proceeding to answer specifically each substantial allegation in the said first article, says: He denies that the said Stanton, on the 21st day of February 1868, was lawfully in possession of the said office of Secretary for the Department of War. He denies that the said Stanton, on the day last mentioned, was lawfully entitled to hold the said office against the will of the President of the United States. He denies that the said order for the removal of the said Stanton was unlawfully issued. He denies that the said order was issued with intent to violate the act entitled "An act to regulate the tenure of certain civil offices." He denies that the said order was a violation of the last-mentioned act. He denies that the said order was a violation of the Constitution of the United States, or of any law thereof, or of his oath of office. He denies that the said order was issued with an intent to violate the Constitution of the United States or any law thereof, or this respondent's oath of office; and he respectfully but earnestly insists that not only was it issued by him in the performance of what he believed to be an imperative official duty, but in the performance of what this honorable court will consider was, in point of fact, an imperative official duty. And he denies that any and all substantive matters in the said first article contained, in manner and form as the same are therein stated, and set forth, do, by law, constitute a high misdemeanor in office, within the true intent and meaning of the Constitution of the United States.

ANSWER TO ARTICLE II.

And for answer to the second article this respondent says that he admits he did issue and deliver to said Lorenzo Thomas the said writing set forth in said second article, bearing date at Washington, D.C., February 21, 1868, addressed to Bvt. Maj. Gen. Lorenzo Thomas, Adjutant General United States Army, Washington, D.C., and he further admits that the same was so issued without the advice and consent of the Senate of the United States, then in session, but he denies that he thereby violated the Constitution of the United States or any law thereof, or that he did thereby intend to violate the Constitution of the United States or the provisions of any act of Congress; and this respondent refers to his answer to said first article for a full statement of the purposes and intentions with which said order was issued, and adopts the same as part of his answer to this article; and he further denies that there was then and there no vacancy in the said office of Secretary for the Department of War, or that he did then and there commit, or was guilty of, a high misdemeanor in office, and this respondent maintains and will insist:

1. That at the date and delivery of said writing there was a vacancy existing in the office of Secretary for the Department of War.

2. That, notwithstanding the Senate of the United States was then in session, it was lawful and according to long and well-established usage to empower and authorize the said Thomas to act as Secretary of War ad interim.

3. That if the said act regulating the tenure of civil offices be held to be a valid law, no provision of the same was violated by the issuing of said order, or by the designation of said Thomas to act as Secretary of War ad interim.

ANSWER TO ARTICLE III.

And for answer to said third article this respondent says that he abides by his answer to said first and second articles, in so far as the same are responsive to the allegations contained in the said third article, and, without here again repeating the same answer, prays the same be taken as an answer to this third article as fully as if here again set out at length; and as to the new allegation contained in said third article, that this respondent did appoint the said Thomas to be Secretary for the Department of War ad interim, this respondent denies that he gave any other authority to said Thomas than such as appears in said written authority set out in said article, by which he authorized and empowered said Thomas to act as Secretary for the Department of War ad interim; and he denies that the same amounts to an appointment, and insists that it is only a designation of an officer of that department to act temporarily as Secretary for the Department of War ad interim until an appointment should be made. But, whether the said written authority amounts to an appointment or to a temporary authority or designation, this respondent denies that in any sense he did thereby intend to violate the Constitution of the United States, or that he thereby intended to give the said order the character or effect of an appointment in the constitutional or legal sense of that term. He further denies that there was no vacancy in said office of Secretary for the Department of War existing at the date of said written authority.

ANSWER TO ARTICLE IV.

And for answer to said fourth article this respondent denies that on the said 21st day of February, 1868, at Washington aforesaid, or at any other time or place, he did unlawfully conspire with the said Lorenzo Thomas, or with the said Thomas and any other person or persons, with intent by intimidations and threats unlawfully to hinder and prevent the said Stanton from holding said office of Secretary for the Department of War in violation of the Constitution of the United States, or of the provisions of the said act of Congress in said article mentioned, or that he did then and there commit or was guilty of a high crime in office. On the contrary thereof, protesting that the said Stanton was not then and there lawfully the Secretary for the Department of War, this respondent states that his sole purpose in authorizing the said Thomas to act as Secretary for the Department of War ad interim was, as is fully stated in his answer to the said first article, to bring the question of the right of the said Stanton to hold said office, notwithstanding his said suspension and notwithstanding the said order of removal and notwithstanding the said authority of the said Thomas to act as Secretary of War ad interim, to the test of a final decision by the Supreme Court of the United States in the earliest practicable mode by which the question could be brought before that tribunal.

This respondent did not conspire or agree with the said Thomas or any other person or persons to use intimidation or threats to hinder or prevent the said Stanton from holding the said office of Secretary for the Department of War, nor did this respondent at any time command or advise the said Thomas or any other person or persons to resort to or use either threats or intimidation for that purpose. The only means in the contemplation or purpose of respondent to be used are set forth fully in the said orders of February 21, the first addressed to Mr. Stanton and the second to the said Thomas. By the first order the respondent notified Mr. Stanton that he was removed from the said office, and that his functions as Secretary for the Department of War were to terminate upon the receipt of that order, and he also thereby notified the said Stanton that the said Thomas had been authorized to act as Secretary for the Department of War ad interim, and ordered the said Stanton to transfer to him all the records, books, papers, and other public property in his custody

and charge; and by the second order this respondent notified the said Thomas of the removal from office of the said Stanton, and authorized him to act as Secretary for the Department of War ad interim, and directed him to immediately enter upon the discharge of the duties pertaining to the office, and to receive the transfer of all the records, books, papers, and other public property from Mr. Stanton then in his custody and charge.

Respondent gave no instructions to the said Thomas to use intimidation or threats to enforce obedience to these orders. He gave him no authority to call in the aid of the military or any other force to enable him to obtain possession of the office or of the books, papers, records, or property thereof. The only agency resorted to, or intended to be resorted to, was by means of the said Executive orders requiring obedience. But the Secretary for the Department of War refused to obey these orders, and still holds undisturbed possession and custody of that department, and of the records, books, papers, and other public property therein. Respondent further states that, in execution of the orders so by this respondent given to the said Thomas, he, the said Thomas, proceeded in a peaceful manner to demand of the said Stanton a surrender to him of the public property in the said department, and to vacate the possession of the same, and to allow him, the said Thomas, peaceably to exercise the duties devolved upon him by authority of the President. That, as this respondent has been informed and believes, the said Stanton peremptorily refused obedience to the orders so issued. Upon such refusal no force or threat of force was used by the said Thomas, by authority of the President or otherwise, to enforce obedience either then or at any subsequent time.

This respondent doth here except to the sufficiency of the allegations contained in said fourth article, and states for ground of exception that it is not stated that there was any agreement between this respondent and the said Thomas, or any other person or persons, to use intimidation and threats, nor is there any allegation as to the nature of said intimidations and threats or that there was any agreement to carry them into execution, or that any step was taken, or agreed to be taken, to carry them into execution, and that the allegation in said article that the intent of said conspiracy was to use intimidation and threats is wholly insufficient, inasmuch as it is not alleged that the said intent formed the basis or became part of any agreement between the said alleged conspirators, and, furthermore, that there is no allegation of any conspiracy or agreement to use intimidation or threats.

ANSWER TO ARTICLE V.

And for answer to the said fifth article this respondent denies that on the said 21st day of February, 1868, or at any other time or times in the same year before the said 2d day of March, 1868, or at any prior or subsequent time, at Washington aforesaid, or at any other place, this respondent did unlawfully conspire with the said Thomas, or with any other person or persons, to prevent or hinder the execution of the said act entitled "An act regulating the tenure of certain civil offices," or that, in pursuance of said alleged conspiracy, he did unlawfully attempt to prevent the said Edwin M. Stanton from holding the said office of Secretary for the Department of War, or that he did thereby commit, or that he was thereby guilty of, a high misdemeanor in office. Respondent, protesting that said Stanton was not then and there Secretary for the Department of War, begs leave to refer to his answer given to the fourth article and to his answer to the first article as to his intent and purpose in issuing the orders for the removal of Mr. Stanton and the authority given to the said Thomas, and prays equal benefit therefrom as if the same were here again repeated and fully set forth.

And this respondent excepts to the sufficiency of the said fifth article, and states his ground for such exception, that it is not alleged by what means or by what agreement the said alleged conspiracy was formed or agreed to be carried out, or in what way the same was attempted to be carried out, or what were the acts done in pursuance thereof.

ANSWER TO ARTICLE VI.

And for answer to the said sixth article this respondent denies that on the said 21st day of February, 1868, at Washington aforesaid, or at any other time

or place, he did unlawfully conspire with the said Thomas by force to seize, take, or possess the property of the United States in the Department of War, contrary to the provisions of the said acts referred to in the said article, or either of them, or with intent to violate either of them. Respondent, protesting that said Stanton was not then and there Secretary for the Department of War, not only denies the said conspiracy as charged but also denies any unlawful intent in reference to the custody and charge of the property of the United States in the said Department of War, and again refers to his former answers for a full statement of his intent and purpose in the premises.

ANSWER TO ARTICLE VII.

And for answer to the said seventh article respondent denies that on the said 21st day of February, 1868, at Washington aforesaid, or at any other time and place, he did unlawfully conspire with the said Thomas with intent unlawfully to seize, take, or possess the property of the United States in the Department of War with intent to violate or disregard the said act in the said seventh article referred to, or that he did then and there commit a high misdemeanor in office. Respondent, protesting that the said Stanton was not then and there Secretary for the Department of War, again refers to his former answers, in so far as they are applicable, to show the intent with which he proceeded in the premises, and prays equal benefit therefrom as if the same were here again fully repeated. Respondent further takes exception to the sufficiency of the allegations of this article as to the conspiracy alleged upon the same grounds as stated in the exception set forth in his answer to said article fourth.

ANSWER TO ARTICLE VIII.

And for answer to the said eighth article this respondent denies that on the 21st day of February, 1868, at Washington aforesaid, or at any other time and place, he did issue and deliver to the said Thomas the said letter of authority set forth in the said eighth article, with the intent unlawfully to control the disbursements of the money appropriated for the military service and for the Department of War. This respondent, protesting that there was a vacancy in the office of Secretary of War, admits that he did issue the said letter of authority set forth in the said eighth article, with the intent unlawfully to conspire either to violate the Constitution of the United States or any act of Congress. On the contrary, this respondent again affirms that his sole intent was to vindicate his authority as President of the United States, and by peaceful means to bring the question of the right of the said Stanton to continue to hold the said office of Secretary of War to a final decision before the Supreme Court of the United States, as has been hereinbefore set forth; and he prays the same benefit from his answer in the premises as if the same were here again repeated at length.

ANSWER TO ARTICLE IX.

And for answer to the said ninth article the respondent states that on the said 22d day of February, 1868, the following note was addressed to the said Emory by the private secretary of the respondent:

EXECUTIVE MANSION,
Washington, D. C. February 22, 1868.

GENERAL: The President directs me to say that he will be pleased to have you call upon him as early as practicable.

Respectfully and truly, yours,

WILLIAM G. MOORE,
United States Army.

Gen. Emory called at the Executive Mansion according to this request. The object of respondent was to be advised by Gen. Emory, as commander of the Department of Washington, what changes had been made in the military affairs of the department. Respondent had been informed that various changes had been made which in no wise had been brought to his notice or reported to him from the Department of War or from any other quarter, and desired to ascertain the facts. After the said Emory had explained in detail the changes which had taken place, said Emory called the attention of respondent to a

general order, which he referred to and which this respondent then sent for, when it was produced. It is as follows:

[General Orders, No. 17.]

WAR DEPARTMENT, ADJUTANT GENERAL'S OFFICE,
Washington, March 14, 1867.

The following acts of Congress are published for the information and government of all concerned:

* * * * * * *

II.—PUBLIC—No. 83.

AN ACT Making appropriations for the support of the Army for the year ending June 30, 1868, and for other purposes.

* * * * * * *

SEC. 2. *And be it further enacted*, That the headquarters of the General of the Army of the United States shall be at the city of Washington, and all orders and instructions relating to military operations issued by the President or Secretary of War shall be issued through the General of the Army, and in case of his inability through the next in rank. The General of the Army shall not be removed, suspended, or relieved from command or assigned to duty elsewhere than at said headquarters, except at his own request, without the previous approval of the Senate; and any orders or instructions relating to military operations issued contrary to the requirements of this section shall be null and void; and any officer who shall issue orders or instructions contrary to the provisions of this section shall be deemed guilty of a misdemeanor in office; and any officer of the Army who shall transmit, convey, or obey any orders or instructions so issued contrary to the provisions of this section, knowing that such orders were so issued, shall be liable to imprisonment for not less than two nor more than twenty years upon conviction thereof in any court of competent jurisdiction.

* * * * * * *

Approved, March 2, 1867.

* * * * * * *

By order of the Secretary of War.

E. D. TOWNSEND,
Assistant Adjutant General.

Official:

———— ————, *Assistant Adjutant General.*

Gen. Emory not only called the attention of respondent to this order, but to the fact that it was in conformity with a section contained in an appropriation act passed by Congress. Respondent, after reading the order, observed: "This is not in accordance with the Constitution of the United States, which makes me Commander in Chief of the Army and Navy, or of the language of the commission which you hold." Gen. Emory then stated that this order had not the respondent's approval. Respondent then said in reply, in substance: "Am I to understand that the President of the United States can not give an order but through the General in Chief, or Gen. Grant?" Gen. Emory again reiterated the statement that it had not respondent's approval, and that it was the opinion of some of the leading lawyers of the country that this order was constitutional. With some further conversation, respondent then inquired the names of the lawyers who had given the opinion, and he mentioned the names of two. Respondent then said that the object of the law was very evident, referring to the clause in the appropriation act upon which the order purported to be based. This, according to respondent's recollection, was the substance of the conversation had with Gen. Emory.

Respondent denies that any allegations in the said article of any instructions or declaration given to the said Emory then or at any other time contrary to or in addition to what is hereinbefore set forth are true. Respondent denies that in said conversation with said Emory he had any other intent than to express the opinion then given to the said Emory, nor did he then or at any

time request or order the said Emory to disobey any law or any order issued in conformity with any law, or intend to offer any inducement to the said Emory to violate any law. What this respondent then said to Gen. Emory was simply the expression of an opinion which he then fully believed to be sound, and which he yet believes to be so, and that is, that by the express provisions of the Constitution this respondent, as President, is made the Commander in Chief of the Armies of the United States, and as such he is to be respected, and that his orders, whether issued through the War Department or through the General in Chief, or by any other channel of communication, are entitled to respect and obedience, and that such constitutional power can not be taken from him by virtue of any act of Congress. Respondent doth therefore deny that by the expression of such opinion he did commit or was guilty of a high misdemeanor in office; and the respondent doth further say that the said article nine lays no foundation whatever for the conclusion stated in the said article, that the respondent, by reason of the allegations therein contained, was guilty of a high misdemeanor in office.

In reference to the statement made by Gen. Emory that this respondent had approved of said act of Congress containing the section referred to, the respondent admits that his formal approval was given to said act, but accompanied the same by the following message, addressed and sent with the act to the House of Representatives, in which House the said act originated, and from which it came to respondent:

To the House of Representatives:

The act entitled "An act making appropriations for the support of the Army for the year ending June 30, 1868, and for other purposes," contains provisions to which I must call attention. These provisions are contained in the second section, which in certain cases virtually deprives the President of his constitutional functions as Commander in Chief of the Army, and in the sixth section, which denies to 10 States of the Union their constitutional right to protect themselves in any emergency by means of their own militia. These provisions are out of place in an appropriation act, but I am compelled to defeat these necessary appropriations if I withhold my signature from the act. Pressed by these considerations, I feel constrained to return the bill with my signature, but to accompany it with my earnest protest against the sections which I have indicated.

WASHINGTON, D. C., *March 2, 1867.*

Respondent, therefore, did no more than to express to said Emory the same opinion which he had so expressed to the House of Representatives.

ANSWER TO ARTICLE X.

And in answer to the tenth article and specifications thereof the respondent says that on the 14th and 15th days of August, in the year 1866, a political convention of delegates from all or most of the States and Territories of the Union was held in the city of Philadelphia, under the name and style of the national Union convention, for the purpose of maintaining and advancing certain political views and opinions before the people of the United States, and for their support and adoption in the exercise of the constitutional suffrage in the elections of Representatives and Delegates in Congress, which were soon to occur in many of the States and Territories of the Union, which said convention, in the course of its proceedings and in furtherance of the objects of the same, adopted a "declaration of principles" and "an address to the people of the United States," and appointed a committee of two of its members from each State and of one from each Territory and one from the District of Columbia to wait upon the President of the United States and present to him a copy of the proceedings of the convention; that on the 18th day of said month of August this committee waited upon the President of the United States at the Executive Mansion and was received by him in one of the rooms thereof, and by their chairman, Hon. Reverdy Johnson, then and now a Senator of the United States, acting and speaking in their behalf, presented a copy of the proceedings of the convention and addressed the President of the United States in a speech, of which a copy (according to a published report of the same, and, as the respondent believes, substantially a correct report) is hereto annexed as a part of this answer and marked "Exhibit C."

That thereupon, and in reply to the address of said committee by their chairman, this respondent addressed the said committee so waiting upon him in one of the rooms of the Executive Mansion; and this respondent believes that this his address to said committee is the occasion referred to in the first specification of the tenth article; but this respondent does not admit that the passages therein set forth, as if extracts from a speech or address of this respondent upon said occasion, correctly or justly presents his speech or address upon said occasion, but, on the contrary, this respondent demands and insists that if this honorable court shall deem the said article and the said first specification thereof to contain allegation of matter cognizable by this honorable court as a high misdemeanor in office, within the intent and meaning of the Constitution of the United States, and shall receive or allow proof in support of the same, that proof shall be required to be made of the actual speech and address of this respondent on said occasion, which this respondent denies that said article and specification contain or correctly or justly represent.

And this respondent, further answering the tenth article and the specifications thereof, says that at Cleveland, in the State of Ohio, and on the 3d day of September, in the year 1866, he was attended by a large assemblage of his fellow citizens, and in deference and obedience to their call and demand he addressed them upon matters of public and political consideration; and this respondent believes that said occasion and address are referred to in the second specification of the tenth article; but this respondent does not admit that the passages therein set forth, as if extracts from a speech of this respondent on said occasion, correctly or justly present his speech or address upon said occasion, but, on the contrary, this respondent demands and insists that if this honorable court shall deem the said article and the said second specification thereof to contain allegation of matter cognizable by this honorable court as a high misdemeanor in office within the intent and meaning of the Constitution of the United States and shall receive or allow proof in support of the same, that proof shall be required to be made of the actual speech and address of this respondent on said occasion, which this respondent denies that said article and specification contain or correctly or justly represent.

And this respondent, further answering the tenth article and the specifications thereof, says that at St. Louis, in the State of Missouri, and on the 8th day of September, in the year 1866, he was attended by a numerous assemblage of his fellow citizens, and in deference and obedience to their call and demand he addressed them upon matters of public and political consideration; and this respondent believes that said occasion and address are referred to in the third specification of the tenth article; but this respondent does not admit that the passages therein set forth, as if extracts from a speech of this respondent on said occasion, correctly or justly present his speech or address upon said occasion, but, on the contrary, this respondent demands and insists that if this honorable court shall deem the said article and the said third specification thereof to contain allegation of matter cognizable by this honorable court as a high misdemeanor in office within the intent and meaning of the Constitution of the United States, and shall receive or allow proof in support of the same, that proof shall be required to be made of the actual speech and address of this respondent on said occasion, which this respondent denies that the said article and specification contain or correctly or justly represent.

And this respondent, further answering the tenth article, protesting that he has not been unmindful of the high duties of his office, or of the harmony or courtesies which ought to exist and be maintained between the executive and legislative branches of the Government of the United States, denies that he has ever intended or designed to set aside the rightful authority or powers of Congress, or attempted to bring into disgrace, ridicule, hatred, contempt, or reproach the Congress of the United States or either branch thereof, or to impair or destroy the regard or respect of all or any of the good people of the United States for the Congress or the rightful legislative power thereof, or to excite the odium or resentment of all or any of the good people of the United States against Congress and the laws by it duly and constitutionally enacted. This respondent further says that at all times he has, in his official acts as President, recognized the authority of the several Congresses of the United States as constituted and organized during his administration of the office of President of the United States.

And this respondent, further answering, says that he has, from time to time, under his constitutional right and duty as President of the United States, com-

municated to Congress his views and opinions in regard to such acts or resolutions thereof as, being submitted to him as President of the United States in pursuance of the Constitution, seemed to this respondent to require such communications; and he has, from time to time, in the exercise of that freedom of speech which belongs to him as a citizen of the United States, and, in his political relations as President of the United States to the people of the United States, is upon fit occasions a duty of the highest obligation, express to his fellow citizens his views and opinions respecting the measures and proceedings of Congress; and that in such addresses to his fellow citizens and in such his communications to Congress he has expressed his views, opinions, and judgment of and concerning the actual constitution of the two Houses of Congress without representation therein of certain States of the Union, and of the effect that in wisdom and justice, in the opinion and judgment of this respondent, Congress, in its legislation and proceedings, should give to this political circumstance; and whatsoever he has thus communicated to Congress or addressed to his fellow citizens or any assemblage thereof this respondent says was and is within and according to his right and privilege as an American citizen and his right and duty as President of the United States.

And this respondent, not waiving or at all disparaging his right of freedom of opinion and of freedom of speech, as hereinbefore or hereinafter more particularly set forth, but claiming and insisting upon the same, further answering the said tenth article, says that the views and opinions expressed by this respondent in his said addresses to the assemblages of his fellow citizens, as in said articles or in this answer thereto mentioned, are not and were not intended to be other or different from those expressed by him in his communications to Congress; that the 11 States lately in insurrection never had ceased to be States of the Union, and that they were then entitled to representation in Congress by loyal Representatives and Senators as fully as the other States of the Union, and that, consequently, the Congress, as then constituted, was not, in fact, a Congress of all the States, but a Congress of only a part of the States. This respondent, always protesting against the unauthorized exclusion therefrom of the said 11 States, nevertheless gave his assent to all laws passed by said Congress which did not, in his opinion and judgment, violate the Constitution, exercising his constitutional authority of returning bills to said Congress with his objections when they appeared to him to be unconstitutional or inexpedient.

And, further, this respondent has also expressed the opinion, both in his communications to Congress and in his addresses to the people, that the policy adopted by Congress in reference to the States lately in insurrection did not tend to peace, harmony, and union, but, on the contrary, did tend to disunion and the permanent disruption of the States, and that, in following its said policy, laws had been passed by Congress in violation of the fundamental principles of the Government, and which tended to consolidation and despotism; and, such being his deliberate opinions, he would have felt himself unmindful of the high duties of his office if he had failed to express them in his communications to Congress or in his addresses to the people when called upon by them to express his opinions on matters of public and political consideration.

And this respondent, further answering the tenth article, says that he has always claimed and insisted, and now claims and insists, that both in the personal and private capacity of a citizen of the United States and in the political relations of the President of the United States to the people of the United States, whose servant, under the duties and responsibilities of the Constitution of the United States, the President of the United States is and should always remain, this respondent had and has the full right, and in his office of President of the United States is held to the high duty of forming, and on fit occasions expressing opinions of and concerning the legislation of Congress, proposed or completed, in respect of its wisdom, expediency, justice, worthiness, objects, purposes, and public and political motives and tendencies; and within and as a part of such right and duty to form, and on fit occasions to express opinions of and concerning and public character and conduct, views, purposes, objects, motives, and tendencies of all men engaged in the public service, as well in Congress as otherwise, and under no other rules or limits upon this right of freedom of opinion and of freedom of speech, or of responsibility and amenability for the actual exercise of such freedom of opinion and freedom of speech than attend upon such rights and their exercise on the part of all other citizens of the United States, and on the part of all their public servants.

And this respondent, further answering said tenth article, says that the several occasions on which, as is alleged in the several specifications of said article,

this respondent addressed his fellow citizens on subjects of public and political considerations, were not, nor was any one of them, sought or planned by this respondent; but, on the contrary, each of said occasions arose upon the exercise of a lawful and accustomed right of the people of the United States to call upon their public servants and express to them their opinions, wishes, and feelings upon matters of public and political consideration, and to invite from such their public servants, an expression of their opinions, views, and feelings on matters of public and political consideration; and this respondent claims and insists before this honorable court, and before all the people of the United States, that of or concerning this his right of freedom of opinion and of freedom of speech, and this his exercise of such rights on all matters of public and political consideration, and in respect of all public servants or persons whatsoever engaged in or connected therewith, this respondent, as a citizen or as President of the United States, is not subject to question, inquisition, impeachment, or inculpation in any form or manner whatsoever.

And this respondent says that neither the said tenth article nor any specification thereof nor any allegation therein contained touches or relates to any official act or doing of this respondent in the office of President of the United States or in the discharge of any of its constitutional or legal duties or responsibilities; but said article and the specifications and allegations thereof, wholly and in every part thereof, question only the discretion of property of freedom of opinion or freedom of speech, as exercised by this respondent as a citizen of the United States in his personal right and capacity, and without allegation or imputation against this respondent of the violation of any law of the United States touching or relating to freedom of speech or its exercise by the citizens of the United States, or by this respondent as one of the said citizens, or otherwise; and he denies that by reason of any matter in said article or its specifications alleged he has said or done anything indecent or unbecoming in the Chief Magistrate of the United States, or that he has brought the high office of President of the United States into contempt, ridicule, or disgrace, or that he has committed or has been guilty of a high misdemeanor in office.

ANSWER TO ARTICLE XI.

And in answer to the eleventh article this respondent denies that on the 18th day of August, in the year 1866, at the city of Washington, in the District of Columbia, he did, by public speech or otherwise, declare or affirm, in substance or at all, that the Thirty-ninth Congress of the United States was not a Congress of the United States authorized by the Constitution to exercise legislative power under the same, or that he did then and there declare or affirm that the said Thirty-ninth Congress was a Congress of only a part of the States in any sense or meaning other than that 10 States of the Union were denied representation therein; or that he made any or either of the declarations or affirmations in this behalf, in the said article alleged, as denying or intending to deny that the legislation of said Thirty-ninth Congress was valid or obligatory upon his respondent, except so far as this respondent saw fit to approve the same; and as to the allegation in said article that he did thereby intend or mean to be understood that the said Congress had not power to propose amendments to the Constitution, this respondent says that in said address he said nothing in reference to the subject of amendments of the Constitution, nor was the question of the competency of the said Congress to propose such amendments, without the participation of said excluded States, at the time of said address, in any way mentioned or considered or referred to by this respondent, nor in what he did say had he any intent regarding the same, and he denies the allegation so made to the contrary thereof. But this respondent, in further answer to and in respect of the said allegations of the said eleventh article hereinbefore traversed and denied, claims and insists upon his personal and official right of freedom of opinion and freedom of speech, and his duty in his political relations as President of the United States to the people of the United States in the exercise of such freedom of opinion and freedom of speech in the same manner, form, and effect as he has in this behalf stated the same in his answer to the said tenth article, and with the same effect as if he here repeated the same; and he further claims and insists, as in said answer to said tenth article he has claimed and insisted, that he is not subject to question, inquisition, impeachment, or inculpation in any form or manner of or concern-

ing such rights of freedom of opinion or freedom of speech or his said alleged exercise thereof.

And this respondent further denies that on the 21st day of February, in the year 1868, or at any other time, at the city of Washington, in the District of Columbia, in pursuance of any such declaration as in that behalf in said eleventh article alleged or otherwise, he did unlawfully and in disregard of the requirement of the Constitution that he should take care that the laws should be faithfully executed, attempt to prevent the execution of an act entitled "An act regulating the tenure of certain civil offices," passed March 2, 1867, by unlawfully devising or contriving, or attempting to devise or contrive, means by which he should prevent Edwin M. Stanton from forthwith resuming the functions of Secretary for the Department of War; or by unlawfully devising or contriving, or attempting to devise or contrive, means to prevent the execution of an act entitled "An act making appropriations for the support of the Army for the fiscal year ending June 30, 1868, and for other purposes," approved March 2, 1867, or to prevent the execution of an act entitled "An act to provide for the more efficient government of the rebel States," passed March 2, 1867.

And this respondent, further answering the said eleventh article, says that he has, in his answer to the first article, set forth in detail the acts, steps, and proceedings done and taken by this respondent to and toward or in the matter of the suspension or removal of the said Edwin M. Stanton in or from the office of Secretary for the Department of War, with the times, modes, circumstances, intents, views, purposes, and opinions of official obligations and duty under and with which such acts, steps, and proceedings were done and taken; and he makes answer to this eleventh article of the matters in his answer to the first article, pertaining to the suspension or removal of said Edwin M. Stanton, to the same intent and effect as if they were here repeated and set forth.

And this respondent, further answering the said eleventh article, denies that by means or reason of anything in said article alleged this respondent, as President of the United States, did, on the 21st day of February, 1868, or at any other day or time, commit, or that he was guilty of, a high misdemeanor in office.

And this respondent, further answering the said eleventh article, says that the same and the matters therein contained do not charge or allege the commission of any act whatever by this respondent, in his office of President of the United States, nor the omission by this respondent of any act of official obligation or duty in his office of President of the United States; nor does the said article nor the matters therein contained name, designate, describe, or define any act or mode or form of attempt, device, contrivance, or means, or of attempt at device, contrivance, or means, whereby this respondent can know or understand what act or mode or form of attempt, device, contrivance, or means, or of attempt at device, contrivance, or means are imputed to or charged against this respondent, in his office of President of the United States, or intended so to be, or whereby this respondent can more fully or definitely make answer unto the said article than he hereby does.

And this respondent, in submitting to this honorable court this, his answer to the articles of impeachment exhibited against him, respectfully reserves leave to amend and add to the same from time to time, as may become necessary or proper, and when and as such necessity and propriety shall appear.

ANDREW JOHNSON.

HENRY STANBERY,
B. R. CURTIS,
THOMAS A. R. NELSON,
WILLIAM M. EVARTS,
W. S. GROESBECK,
Of Counsel.

EXHIBIT A.

Message to the Senate, March 2, 1867.

To the Senate of the United States:

I have carefully examined the bill to regulate the tenure of certain civil offices. The material portion of the bill is contained in the first section, and is of the effect following namely:

"That every person holding any civil office to which he has been appointed by and with the advice and consent of the Senate, and every person who shall hereafter be appointed to any such office and shall become duly qualified to act therein is and shall be entitled to hold such office until a successor shall have been appointed by the President, with the advice and consent of the Senate, and duly qualified; and that the Secretaries of State, of the Treasury, of War, of the Navy, and of the Interior, the Postmaster General, and the Attorney General shall hold their offices, respectively, for and during the term of the President by whom they may have been appointed and for one month thereafter, subject to removal by and with the advice and consent of the Senate."

These provisions are qualified by a reservation in the fourth section, "that nothing contained in the bill shall be construed to extend the term of any office the duration of which is limited by law." In effect the bill provides that the President shall not remove from their places any of the civil officers whose terms of service are not limited by law without the advice and consent of the Senate of the United States. The bill in this respect conflicts, in my judgment, with the Constitution of the United States. The question, as Congress is well aware, is by no means a new one. That the power of removal is constitutionally vested in the President of the United States is a principle which has been not more distinctly declared by judicial authority and judicial commentators than it has been uniformly practiced upon by the legislative and executive departments of the Government. The question arose in the House of Representatives so early as the 16th day of June, 1789, on the bill for establishing an executive department, denominated "The Department of Foreign Affairs." The first clause of the bill, after recapitulating the functions of that officer and defining his duties, had these words: "To be removable from office by the President of the United States." It was moved to strike out these words, and the motion was sustained with great ability and vigor. It was insisted that the President could not constitutionally exercise the power of removal exclusive of the Senate; that the Federalist so interpreted the Constitution when arguing for its adoption by the several States; that the Constitution had nowhere given the President power of removal, either expressly or by strong implication; but, on the contrary, had distinctly provided for removals from office by impeachment only. A construction which denied the power of removal by the President was further maintained by arguments drawn from the danger of the abuse of the power; from the supposed tendency of an exposure of public officers to capricious removal, to impair the efficiency of the civil service; from the alleged injustice and hardship of displacing incumbents, dependent upon their official stations, without sufficient consideration; from a supposed want of responsibility on the part of the President; and from an imagined defect of the guarantees against a vicious President who might incline to abuse the power.

On the other hand, an exclusive power of removal by the President was defended as a true exposition of the text of the Constitution. It was maintained that there are certain causes for which persons ought to be removed from office without being guilty of treason, bribery, or malfeasance, and that the nature of things demands that it should be so. "Suppose," it was said, "a man becomes lunsane by the visitation of God, and is likely to ruin our affairs; are the hands of Government to be confined from warding off the evil? Suppose a person in office not possessing the talents he was judged to have at the time of the appointment; is the error not to be corrected? Suppose he acquire vicious habits and incurable indolence, or totally neglect the duties of his office, which shall work mischief to the public welfare; is there no way to arrest the threatened danger? Suppose he become odious and unpopular by reason of the measure he pursues—and this he may do without committing any possible offenses against the law—must he preserve his office in despite of the popular will? Suppose him grasping for his own aggrandizement and the elevation of his connections by every means short of the treason defined by the Constitution, hurrying your affairs to the precipice of destruction, endangering your domestic tranquility, plundering you of the means of defense, alienating the affections of your allies, and promoting the spirit of discord: must the tardy, tedious, desultory road, by way of impeachment, be traveled to overtake the man who, barely confining himself within the letter of the law, is employed in drawing off the vital principle of the Government?" The nature of things the great objects of society, the express objects of the Constitution itself require that this thing should be otherwise. To unite the Senate with the President "in the exercise of the power" it was said, "would involve us" in the most serious difficulty,

"Suppose a discovery of any of these events should take place when the Senate is not in session, how is the remedy to be applied? The evil could be avoided in no other way than by the Senate sitting always." In regard to the danger of the power being abused if exercised by one man, it was said "that the danger is as great with respect to the Senate who are assembled from various parts of the continent, with different impressions and opinions"; that such a body is more likely to misuse the power of removal than the man whom the united voice of America calls to the presidential chair. As the nature of Government requires the power of removal, it was maintained "that it should be exercised in this way by the hand capable of exerting itself with effect, and the power must be conferred on the President by the Constitution as the executive officer of the Government." Mr. Madison, whose adverse opinion in the Federalist had been relied upon by those who denied the exclusive power, now participated in the debate. He declared that he had reviewed his former opinions, and he summed up the whole case as follows:

"The Constitution affirms that the executive power is vested in the President. Are there exceptions to this proposition? Yes; there are. The Constitution says that in appointing to office the Senate shall be associated with the President, unless in the case of inferior officers, when the law shall otherwise direct. Have we (that is, Congress) a right to extend this exception? I believe not. If the Constitution has invested all executive power in the President, I return to assert that the Legislature has no right to diminish or modify his executive authority. The question now resolves itself into this: Is there power of displacing an executive power? I conceive that if any power whatever is in the Executive it is in the power of appointing, overseeing, and controlling those who execute the laws. If the Constitution had not qualified the power of the President in appointing to office by associating the Senate with him in that business, would it not be clear that he would have the right by virtue of his executive power to make such appointment? Should we be authorized in defiance of that clause in the Constitution—'the executive power shall be vested in the President'—to unite the Senate with the President in the appointment of office? I conceive not. It is admitted that we should not be authorized to do this. I think it may be disputed whether we have a right to associate them in removing persons from office, the one power being as much of an executive nature as the other; and the first is authorized by being excepted out of the general rule established by the Constitution in these words: 'The executive power shall be vested in the President'."

The question thus ably and exhaustively argued was decided by the House of Representatives, by a vote of 31 to 20, in favor of the principle that the executive power of removal is vested by the Constitution in the Executive and in the Senate by the casting vote of the Vice President. The question has often been raised in subsequent times of high excitement, and the practice of the Government has nevertheless conformed in all cases to the decision thus early made.

The question was revived during the administration of President Jackson, who made, as is well recollected, a very large number of removals, which were made an occasion of close and rigorous scrutiny and remonstrance. The subject was long and earnestly debated in the Senate, and the early construction of the Constitution was nevertheless freely accepted as binding and conclusive upon Congress.

The question came before the Supreme Court of the United States in January, 1839, Ex parte Hennen. It was declared by the court on that occasion that the power of removal from office was a subject much disputed, and upon which a great diversity of opinion was entertained in the early history of the Government. This related, however, to the power of the President to remove officers appointed with the concurrence of the Senate, and the great question was whether the removal was to be by the President alone or with the concurrence of the Senate, both constituting the appointing power. No one denied the power of the President and Senate jointly to remove where the tenure of the office was not fixed by the Constitution, which was a full recognition of the principle that the power of the removal was incident to the power of appointment; but it was very early adopted as a practical construction of the Constitution that this power was vested in the President alone, and such would appear to have been the legislative construction of the Constitution, for in the organization of the three great Departments of State, War, and Treasury in 1789 provision was

made for the appointment of a subordinate officer by the head of the department, who should have charge of the records, books, and papers appertaining to the office when the head of the department should be removed from office by the President of the United States. When the Navy Department was established in the year 1798 provision was made for the charge and custody of the books, records, and documents of the department in case of vacancy in the office of Secretary by removal or otherwise. It is not here said "by removal of the President," as it is done with respect to the heads of the other departments, yet there can be no doubt that he holds his office with the same tenure as the other Secretaries and is removable by the President. The change of phraseology arose probably from its having become the settled and well-understood construction of the Constitution that the power of removal was vested in the President alone in such cases, although the appointment of the officer is by the President and Senate. (13 Peters, p. 139.)

Our most distinguished and accepted commentators upon the Constitution concur in the construction thus early given by Congress and thus sanctioned by the Supreme Court. After a full analysis of the congressional debate to which I have referred, Mr. Justice Story comes to this conclusion:

"After a most animated discussion the vote finally taken in the House of Representatives was affirmative of the power of removal in the President without any cooperation of the Senate by the vote of 34 Members against 20. In the Senate the clause in the bill affirming the power was carried by the casting vote of the Vice President. That the final decision of this question so made was greatly influenced by the exalted character of the President then in office was asserted at the time and has always been believed, yet the doctrine was opposed as well as supported by the highest talent and patriotism of the country. The public have acquiesced in this decision, and it constitutes perhaps the most extraordinary case in the history of the Government of a power conferred by implication on the Executive by the assent of a bare majority of Congress which has not been questioned on many other occasions."

The commentator adds:

"Nor is this general acquiescence and silence without a satisfactory explanation."

Chancellor Kent's remarks on the subject are as follows: "On the first organization of the Government it was made a question whether the power of removal in case of officers appointed to hold at pleasure resided nowhere but in the body which appointed," and, of course, whether the consent of the Senate was not requisite to remove. This was the construction given to the Constitution while it was pending for ratification before the State conventions by the author of the Federalist. But the construction which was given to the Constitution by Congress, after great consideration and discussion, was different. The words of the act (establishing the Treasury Department) are: "And whenever the same shall be removed from office by the President of the United States, or in any case of vacancy in the office, the assistant shall act." This amounted to a legislative construction of the Constitution, and it has ever since been acquiesced in and acted upon as a decisive authority in the case.

It applies equally to every other officer of the Government appointed by the President whose term of duration is not specially declared. It is supported by the weighty reason that the subordinate officers in the executive department ought to hold at the pleasure of the head of the department, because he is invested generally with the executive authority, and the participation in that authority by the Senate was an exception to a general principle and ought to be taken strictly. The President is the great responsible officer for the execution of the law, and the power of removal was incidental to that duty, and might often be requisite to fulfill it. Thus has the important question presented by this bill been settled, in the language of the late Daniel Webster (who, while dissenting from it, admitted that it was settled), by construction, settled by the practice of the Government, and settled by statute. The events of the last war furnished a practicable confirmation of the wisdom of the Constitution as it has hitherto been maintained in many of its parts, including that which is now the subject of consideration. When the war broke out rebel enemies, traitors, abettors, and sympathizers were found in every department of the Government, as well in the civil service as in the land and naval military service. They were found in Congress and among the keepers of the Capitol, in foreign missions, in each and all of the executive departments, in the judicial service, in the post

office, and among the agents for conducting Indian affairs, and upon probable suspicion they were promptly displaced by my predecessor, so far as they held their offices under Executive authority, and their duties were confided to new and loyal successors. No complaints against that power or doubts of its wisdom were entertained in any quarter. I sincerely trust and believe that no such civil war is likely to occur again. I can not doubt, however, that in whatever form and on whatever occasion sedition can arise, an effort to hinder or embarrass or defeat the legitimate action of this Government, whether by preventing the collection of revenue, or disturbing the public peace, or separating the States, or betraying the country to a foreign enemy, the power of removal from office by the Executive, as it has heretofore existed and been practiced, will be found indispensable. Under these circumstances, as a depository of the executive authority of the Nation, I do not feel at liberty to unite with Congress in reversing it by giving my approval of the bill.

At the early day when the question was settled, and, indeed, at the several periods when it has subsequently been agitated, the success of the Constitution of the United States as a new and peculiar system of free representative government was held doubtful in other countries and was even a subject of patriotic apprehension among the American people themselves. A trial of nearly 80 years, through the vicissitudes of foreign conflicts and of civil war, is confidently regarded as having extinguished all such doubts and apprehensions for the future. During that 80 years the people of the United States have enjoyed a measure of security, peace, prosperity, and happiness never surpassed by any nation. It can not be doubted that the triumphant success of the Constitution is due to the wonderful wisdom with which the functions of government were distributed between the three principal departments—the legislative, the executive, and the judicial—and to the fidelity with which each has confined itself or been confined by the general voice of the Nation within its peculiar and proper sphere.

While a just, proper, and watchful jealousy of executive power constantly prevails, as it ought ever to prevail, yet it is equally true that an efficient Executive, capable, in the language of the oath prescribed to the President, of executing the laws within the sphere of executive action, of preserving, protecting, and defending the Constitution of the United States, is an indispensable security for tranquility at home and peace, honor, and safety abroad. Governments have been erected in many countries upon our model. If one or many of them have thus far failed in fully securing to their people the benefits which we have derived from our system, it may be confidently asserted that their misfortune has resulted from their unfortunate failure to maintain the integrity of each of the three great departments while preserving harmony among them all.

Having at an early period accepted the Constitution in regard to the executive office in the sense to which it was interpreted with the concurrence of its founders, I have found no sufficient grounds in the arguments now opposed to that construction or in any assumed necessity of the times for changing those opinions. For these reasons I return the bill to the Senate, in which House it originated, for the further consideration of Congress, which the Constitution prescribes. Inasmuch as the several parts of the bill which I have not considered are matters chiefly of detail and are based altogether upon the theory of the Constitution from which I am obliged to dissent, I have not thought it necessary to examine them with a view to make them an occasion of distinct and special objections. Experience, I think, has shown that it is the easiest, as it is also the most attractive of studies, to frame constitutions for the self-government of free states and nations. But I think experience has equally shown that it is the most difficult of all political labors to preserve and maintain such free constitutions of self-government when once happily established. I know no other way in which they can be preserved and maintained except by a constant adherence to them through the various vicissitudes of national existence, with such adaptations as may become necessary, always to be effected, however, through the agencies and in the forms prescribed in the original constitutions themselves. Whenever administration fails, or seems to fail, in securing any of the great ends for which republican government is established, the proper course seems to be to renew the original spirit and forms of the Constitution itself.

ANDREW JOHNSON.

WASHINGTON, *March 2, 1867.*

EXHIBIT B.

Message to the Senate, December 12, 1867.

To the Senate of the United States:

On the 12th of August last I suspended Mr. Stanton from the exercise of the office of Secretary of War, and on the same day designated Gen. Grant to act as Secretary of War ad interim.

The following are copies of the Executive orders:

EXECUTIVE MANSION,
Washington, August 12, 1867.

SIR: By virtue of the power and authority vested in me as President by the Constitution and the laws of the United States you are hereby suspended from office as Secretary of War and will cease to exercise any and all functions pertaining to the same.

You will at once transfer to Gen. Ulysses S. Grant, who has this day been authorized and empowered to act as Secretary of War ad interim, all records, books, papers, and other public property now in your custody and charge.

Hon. EDWIN M. STANTON, *Secretary of War.*

EXECUTIVE MANSION,
Washington, D.C., August 12, 1867.

SIR: Hon. Edwin M. Stanton having been this day suspended as Secretary of War, you are hereby authorized and empowered to act as Secretary of War ad interim, and will at once enter upon the discharge of the duties of the office.

The Secretary of War has been instructed to transfer to you all the records, books, papers, and other public property now in his custody and charge.

Gen. ULYSSES S. GRANT, *Washington, D. C.*

The following communication was received from Mr. Stanton:

WAR DEPARTMENT,
Washington City, August 12, 1867.

SIR: Your note of this date has been received informing me that by virtue of the powers and authority vested in you as President by the Constitution and laws of the United States I am suspended from office as Secretary of War, and will cease to exercise any and all functions pertaining to the same; and also directing me at once to transfer to Gen. Ulysses S. Grant, who has this day been authorized and empowered to act as Secretary of War ad interim, all records, books, papers, and other public property now in my custody and charge.

Under a sense of public duty I am compelled to deny your right, under the Constitution and laws of the United States, without the advise and consent of the Senate, and without legal cause, to suspend me from office of Secretary of War, or the exercise of any or all functions pertaining to the same, or without such advice and consent to compel me to transfer to any person the records, books, papers, and public property in my custody as Secretary.

But inasmuch as the general commanding the armies of the United States has been appointed ad interim, and has notified me that he has accepted the appointment, I have no alternative but to submit, under protest, to superior force.

To the PRESIDENT.

The suspension has not been revoked, and the business of the War Department is conducted by the Secretary ad interim. Prior to the date of this suspension I had come to the conclusion that the time had arrived when it was proper Mr. Stanton should retire from my Cabinet. The mutual confidence and general accord which should exist in such a relation had ceased. I supposed that Mr. Stanton was well advised that his continuance in the Cabinet was contrary to my wishes, for I had repeatedly given him so to understand by every mode short of an express request that he should resign. Having waited full time for the voluntary action of Mr. Stanton, and seeing no manifestation on his part of an intention to resign, I addressed him the following note on the 5th of August:

"SIR: Public considerations of a high character constrain me to say that your resignation as Secretary of War will be accepted."

To this note I received the following reply:

WAR DEPARTMENT,
Washington, August 5, 1867.

SIR: Your note of this day has been received, stating that public considerations of a high character constrain you to say that my resignation as Secretary of War will be accepted.

In reply, I have the honor to say that public considerations of a high character, which alone have induced me to continue at the head of this department, constrain me not to resign the office of Secretary of War before the next meeting of Congress.

EDWIN M. STANTON,
Secretary of War.

This reply of Mr. Stanton was not merely a declination of compliance with the request for his resignation; it was a defiance, and something more. Mr. Stanton does not content himself with assuming that public considerations bearing upon his continuance in office form as fully a rule of action for himself as for the President, and that upon so delicate a question as the fitness of an officer for continuance in his office the officer is as competent and as impartial to decide as his superior, who is responsible for his conduct; but he goes further and plainly intimates what he means by "public considerations of a high character," and this is nothing less than his loss of confidence in his superior. He says that these public considerations have "alone induced me to continue at the head of this department," and that they "constrain me not to resign the office of Secretary of War before the next meeting of Congress."

This language is very significant. Mr. Stanton holds the position unwillingly. He continues in office only under a sense of high public duty. He is ready to leave when it is safe to leave, and as the danger he apprehends from his removal then will not exist when Congress is here, he is constrained to remain during the interim. What, then, is that danger which can only be averted by the presence of Mr. Stanton or of Congress? Mr. Stanton does not say that "public considerations of high character" constrain him to hold on to the office indefinitely. He does not say that no one other than himself can at any time be found to take his place and perform its duties. On the contrary, he expresses a desire to leave the office at the earliest moment consistent with these high public considerations. He says in effect that while Congress is away he must remain, but that when Congress is here he can go. In other words, he has lost confidence in the President. He is unwilling to leave the War Department in his hands or in the hands of anyone the President may appoint or designate to perform its duties. If he resigns, the President may appoint a Secretary of War that Mr. Stanton does not approve; therefore he will not resign. But when Congress is in session the President can not appoint a Secretary of War which the Senate does not approve. Consequently, when Congress meets Mr. Stanton is ready to resign.

Whatever cogency these "considerations" may have had upon Mr. Stanton, whatever right he may have had to entertain such considerations, whatever propriety there might be in the expression of them to others, one thing is certain, it was official misconduct, to say the least of it, to parade them before his superior officer. Upon the receipt of this extraordinary note I only delayed the order of suspension long enough to make the necessary arrangements to fill the office. If this were the only cause for his suspension, it would be ample. Necessarily it must end our most important official relations, for I can not imagine a degree of effrontery which would embolden the head of a department to take his seat at the council table in the Executive Mansion after such an act. Nor can I imagine a President so forgetful of the proper respect and dignity which belong to his office as to submit to such intrusion. I will not do Mr. Stanton the wrong to suppose that he entertained any idea of offering to act as one of my constitutional advisers after that note was written. There was an interval of a week between that date and the order of suspension,

during which two Cabinet meetings were held. Mr. Stanton did not present himself at either, nor was he expected. On the 12th of August Mr. Stanton was notified of his suspension and that Gen. Grant had been authorized to take charge of the department. In his answer to this notification, of the same date, Mr. Stanton expresses himself as follows:

"Under a sense of public duty I am compelled to deny your right, under the Constitution and laws of the United States, without the advice and consent of the Senate, to suspend me from office as Secretary of War or the exercise of any or all functions pertaining to the same, or without such advice and consent to compel me to transfer to any person the records, books, papers, and public property in my custody as Secretary. But inasmuch as the General Commanding the Armies of the United States has been appointed ad interim and has notified me that he has accepted the appointment, I have no alternative but to submit, under protest, to superior force."

It will not escape attention that in his note of August 5, Mr. Stanton stated that he had been constrained to continue in the office, even before he was requested to resign, by considerations of a high public character. In this note of August 12, a new and different sense of public duty compels him to deny the President's right to suspend him from office without the consent of the Senate. This last is the public duty of resisting an act contrary to law, and he charges the President with violation of the law in ordering his suspension.

Mr. Stanton refers generally to the "Constitution and laws of the United States," and says that a sense of public duty "under" these compels him to deny the right of the President to suspend him from office. As to his sense of duty under the Constitution, that will be considered in the sequel. As to his sense of duty under the Constitution, that will be considered in the sequel. As to his sense of duty under "the laws of the United States," he certainly can not refer to the law which creates the War Department, for that expressly confers upon the President the unlimited right to remove the head of the department. The only other law bearing upon the question is the tenure-of-office act, passed by Congress over the presidential veto, March 2, 1867. This is the law which, under a sense of public duty, Mr. Stanton volunteers to defend. There is no provision in this law which compels any officer coming within its provisions to remain in office. It forbids removals, but not resignations. Mr. Stanton was perfectly free to resign at any moment, either upon his own motion, or in compliance with a request or an order. It was a matter of choice or of taste. There was nothing compulsory in the nature of legal obligation. Nor does he put his action upon that imperative ground. He says he acts under a "sense of public duty," not of legal obligation, compelling him to hold on, and leaving him no choice. The public duty which is upon him arises from the respect which he owes to the Constitution and the laws, violated in his own case. He is, therefore, compelled by this sense of public duty to vindicate violated law and to stand as its champion.

This was not the first occasion in which Mr. Stanton, in discharge of a public duty, was called upon to consider the provisions of that law. That tenure-of-office law did not pass without notice. Like other acts it was sent to the President for approval. As is my custom, I submitted its consideration to my Cabinet for their advice upon the question whether I should approve it or not. It was a grave question of constitutional law, in which I would, of course, rely most upon the opinion of the Attorney General and of Mr. Stanton, who had once been Attorney General. Every member of my Cabinet advised me that the proposed law was unconstitutional. All spoke without doubt or reservation, but Mr. Stanton's condemnation of the law was the most elaborate and emphatic. He referred to the constitutional provisions, the debates in Congress—especially to the speech of Mr. Buchanan when a Senator—to the decisions of the Supreme Court, and to the usage from the beginning of the Government through every successive administration, all concurring to establish the right of removal, as vested by the Constitution in the President. To all these he added the weight of his own deliberate judgment, and advised me that it was my duty to defend the power of the President from usurpation and to veto the law.

I do not know when a sense of public duty is more imperative upon a head of department than upon such an occasion as this. He acts then under the gravest obligations of law; for when he is called upon the President for advice it is the Constitution which speaks to him. All his other duties are left by the Constitution to be regulated by statute; but this duty was deemed so momentous that it is imposed by the Constitution itself. After all this I was not prepared for the

ground taken by Mr. Stanton in his note of August 12, I was not prepared to find him compelled, by a new and indefinite sense of public duty under "the Constitution," to assume the vindication of a law which, under the solemn obligations of public duty, imposed by the Constitution itself, he advised me was a violation of that Constitution. I make great allowance for a change of opinion, but such a change as this hardly falls within the limits of greatest indulgence. Where our opinions take the shape of advice and influence the action of others, the utmost stretch of charity will scarcely justify us in repudiating them when they come to be applied to ourselves.

But to proceed with the narrative. I was so much struck with the full mastery of the question manifested by Mr. Stanton, and was at the time so fully occupied with the preparation of another veto upon the pending reconstruction act, that I requested him to prepare the veto upon this tenure-of-office bill. This he declined on the ground of physical disability to undergo, at the time, the labor of writing, but stated his readiness to furnish what aid might be required in the preparation of materials for the paper. At the time this subject was before the Cabinet it seemed to be taken for granted that as to those members of the Cabinet who had been appointed by Mr. Lincoln their tenure of office was not fixed by the provisions of the act. I do not remember that the point was distinctly decided; but I well recollect that it was suggested by one member of the Cabinet who was appointed by Mr. Lincoln, and that no dissent was expressed.

Whether the point was well taken or not did not seem to me of any consequence, for the unanimous expression of opinion against the constitutionality and policy of the act was so decided that I felt no concern, so far as the act had reference to the gentlemen then present, that I would be embarrassed in the future. The bill had not then become a law. The limitation upon the power of removal was not yet imposed, and there was yet time to make any changes. If any one of these gentlemen had then said to me that he would avail himself of the provisions of that bill in case it became a law, I should not have hesitated a moment as to his removal. No pledge was then expressly given or required. But there are circumstances when to give an express pledge is not necessary, and when to require it is an imputation of possible bad faith. I felt that if these gentlemen came within the purview of the bill it was, as to them, a dead letter, and that none of them would ever take refuge under its provisions. I now pass to another subject.

When on the 15th of April, 1865, the duties of the presidential office devolved upon me, I found a full Cabinet of seven members, all of them selected by Mr. Lincoln. I made no change. On the contrary, I shortly afterwards ratified a change determined upon, by Mr. Lincoln, but not perfected at his death, and admitted his appointee, Mr. Harlan, in the place of Mr. Usher, who was in office at the time. The great duty of the time was to reestablish government, law, and order in the insurrectionary States. Congress was then in recess, and the sudden overthrow of the rebellion required speedy action. This grave subject had engaged the attention of Mr. Lincoln in the last days of his life, and the plan according to which it was to be managed had been prepared and was ready for adoption. A leading feature of that plan was that it should be carried out by the Executive authority, for, so far as I have been informed, neither Mr. Lincoln nor any member of his Cabinet doubted his authority to act or proposed to call an extra session of Congress to do the work. The first business transacted in Cabinet after I became President was this unfinished business of my predecessor. A plan or scheme of reconstruction was produced which had been prepared for Mr. Lincoln by Mr. Stanton, his Secretary of War. It was approved, and, at the earliest moment practicable, was applied in the form of a proclamation to the State of North Carolina, and afterwards became the basis of action in turn for the other States.

Upon the examination of Mr. Stanton before the impeachment committee he was asked the following question:

"Did any one of the Cabinet express a doubt of the power of the executive branch of the Government to reorganize State governments which had been in rebellion without the aid of Congress?"

He answered:

"None whatever. I had myself entertained no doubt of the authority of the President to take measures for the organization of the rebel States on the plan proposed during the vacation of Congress, and agreed in the plan specified in the proclamation in the case of North Carolina."

There is, perhaps, no act of my administration for which I have been more denounced than this. It was not originated by me, but I shrank from no re-

sponsibility on that account, for the plan approved itself to my own judgment and I did not hesitate to carry it into execution. Thus far, and upon this vital policy, there was perfect accord between the Cabinet and myself, and I saw no necessity for a change. As time passed on there was developed an unfortunate difference of opinion and of policy between Congress and the President upon this same subject and upon the ultimate basis upon which the reconstruction of these States should proceed, especially upon the question of negro suffrage. Upon this point three members of the Cabinet found themselves to be in sympathy with Congress. They remained only long enough to see that the difference of policy could not be reconciled. They felt that they should remain no longer, and a high sense of duty and propriety constrained them to resign their positions. We parted with mutual respect for the sincerity of each other in opposite opinions, and mutual regret that the difference was on points so vital as to require a severance of official relations. This was in the summer of 1866. The subsequent sessions of Congress developed new complications when the suffrage bill for the District of Columbia and the reconstruction acts of March 2 and March 23, 1867, all passed over the veto. It was in Cabinet consultations upon these bills that a difference of opinion upon the most vital points was developed. Upon these questions there was perfect accord between all the members of the Cabinet and myself, except Mr. Stanton. He stood alone, and the difference of opinion could not be reconciled. That unity of opinion which upon great questions of public policy or administration is so essential to the Executive was gone.

I do not claim that the head of a department should have no other opinions than those of the President. He has the same right, in the conscientious discharge of duty, to entertain and express his own opinions as has the President. What I do claim is that the President is the responsible head of the administration, and when the opinions of a head of department are irreconcilably opposed to those of the President in grave matters of policy and administration, there is but one result which can solve the difficulty, and that is a severance of the official relation. This, in the past history of the Government, has always been the rule, and it is a wise one, for such differences of opinion among its members must impair the efficiency of any administration.

I have now referred to the general grounds upon which the withdrawal of Mr. Stanton from my administration seemed to me to be proper and necessary; but I can not omit to state a special ground which, if it stood alone, would vindicate my action.

The sanguinary riot which occurred in the city of New Orleans on the 30th of August, 1866, justly aroused public indignation and public inquiry, not only as to those who were engaged in it, but as to those who, more or less remotely, might be held to responsibility for its occurrence. I need not remind the Senate of the effort made to fix that responsibility on the President. The charge was openly made, and again and again reiterated through all the land, that the President was warned in time, but refused to interfere.

By telegrams from the lieutenant governor and attorney general of Louisiana, dated the 27th and 28th of August, I was advised that a body of delegates, claiming to be a constitutional convention, were about to assemble in New Orleans; that the matter was before the grand jury, but that it would be impossible to execute civil process without a riot, and this question was asked: "Is the military to interfere to prevent process of court?" This question was asked at a time when the civil courts were in the full exercise of their authority, and the answer sent by telegraph, on the same 28th of August, was this:

"The military will be expected to sustain, and not to interfere with, the proceedings of the courts."

On the same 28th of August the following telegram was sent to Mr. Stanton by Maj. Gen. Baird, then (owing to the absence of Gen. Sheridan) in command of the military at New Orleans:

"Hon. EDWIN M. STANTON, *Secretary of War:*

"A convention has been called, with the sanction of Gov. Wells, to meet here on Monday. The lieutenant governor and city authorities think it unlawful, and propose to break it up by arresting the delegates. I have given no orders on the subject, but have warned the parties that I could not countenance or permit such action without instructions to that effect from the President. Please instruct me at once by telegraph."

The 28th of August was on Saturday. The next morning, the 29th, this dispatch was received by Mr. Stanton at his residence in this city. He took no action upon it, and neither sent instructions to Gen. Baird himself nor presented it to me for such instructions. On the next day (Monday) the riot occurred. I never saw this dispatch from Gen. Baird until some 10 days or two weeks after the riot, when upon my call for all the dispatches, with a view to their publication, Mr. Stanton sent it to me. These facts all appear in the testimony of Mr. Stanton before the Judiciary Committee in the impeachment investigation. On the 30th, the day of the riot, and after it was suppressed, Gen. Baird wrote to Mr. Stanton a long letter, from which I make the following extracts:

"SIR: I have the honor to inform you that a very serious riot occurred here today. I had not been applied to by the convention for protection, but the lieutenant governor and the mayor had freely consulted with me, and I was so fully convinced that it was so strongly the intent of the city authorities to preserve the peace, in order to prevent military interference, that I did not regard an outbreak as a thing to be apprehended. The lieutenant governor had assured me that even if a writ of arrest was issued by the court the sheriff would not attempt to serve it without my permission, and for today they designed to suspend it. I enclose herewith copies of my correspondence with the mayor, and of a dispatch which the lieutenant governor claims to have received from the President. I regret that no reply to my dispatch to you of Saturday has yet reached me. Gen. Sheridan is still absent in Texas."

The dispatch of Gen. Baird, of the 28th, asks for immediate instructions, and his letter of the 30th after detailing the terrible riot which had just happened, ends with the expression of regret that the instructions, which he asked for were not sent. It is not the fault or the error or the omission of the President that this military commander was left without instructions; but for all omissions, for all errors, for all failures to instruct, when instruction might have averted this calamity, the President was openly and persistently held reponsible. Instantly, without waiting for proof, the delinquency of the President was heralded in every form of utterance. Mr. Stanton knew then that the President was not responsible for this delinquency. The exculpation was in his power, but it was not given by him to the public, and only to the President in obedience to a requisition for all the dispatches.

No one regrets more than myself that Gen. Baird's request was not brought to my notice. It is clear, from his dispatch and letter, that if the Secretary of War had given him proper instructions the riot which arose on the assembling of the convention would have been averted. There may be those ready to say that I would have given no instructions even if the dispatch had reached me in time, but all must admit that I ought to have had the opportunity.

The following is the testimony given by Mr. Stanton before the impeachment investigation committee as to the dispatch:

Q. Referring to the dispatch of the 28th of July by Gen. Baird, I ask you whether that dispatch, on its receipt, was communicated?—A. I received that dispatch on Sunday forenoon; I examined it carefully and considered the question presented; I did not see that I could give any instructions different from the line of action which Gen. Baird proposed, and made no answer to the dispatch.

"Q. I see it stated that this was received at 10 o'clock and 20 minutes p.m. Was that the hour at which it was received by you?—A. That is the date of its reception in the telegraph office Saturday night. I received it on Sunday forenoon, at my residence; a copy of the dispatch was furnished to the President several days afterward along with all the other dispatches and communications on that subject, but it was not furnished by me before that time; I suppose it may have been 10 or 15 days afterwards.

"Q. The President himself being in correspondence with those parties upon the same subject, would it not have been proper to have advised him of the reception of that dispatch?—A. I know nothing about his correspondence, and know nothing about any correspondence except this one dispatch. We had intelligence of the riot on Thursday morning. The riot had taken place on Monday."

It is a difficult matter to define all the relations which exist between the heads of department and the President. The legal relations are well enough defined. The Constitution places these officers in the relation of his advisers when he calls upon them for advice. The acts of Congress go further. Take for example, the act of 1789, creating the War Department. It provides that:

"There shall be a principal officer therein, to be called the Secretary for the Department of War, who shall perform and execute such duties as shall from

time to time be enjoined on or intrusted to him by the President of the United States;" and furthermore, "the said principal officer shall conduct the business of the said department in such manner as the President of the United States shall from time to time order and instruct."

Provision is also made for the appointment of an inferior officer by the head of the department, to be called the chief clerk, "who, whenever said principal officer shall be removed from office by the President of the United States," shall have the charge and custody of the books, records, and papers of the department.

The legal relation is analogous to that of the principal and agent. It is the President upon whom the Constitution devolves, as head of the executive department, the duty to see that the laws are faithfully executed; but as he can not execute them in person, he is allowed to select his agents, and is made responsible for their acts within just limits. So complete is the presumed delegation of authority in the relation of a head of department to the President, that the Supreme Court of the United States have decided that an order made by a head of department is presumed to be made by the President himself.

The principal, upon whom such responsibility is placed for the acts of a subordinate, ought to be left as free as possible in the matter of selection and of dismissal. To hold him to responsibility for an officer beyond his control; to leave the question of the fitness of such an agent to be decided for him and not by him; to allow such a subordinate, when the President, moved by "public considerations of a high character," requests his resignation to assume for himself an equal right to act upon his own views of "public considerations," and to make his own conclusions paramount to those of the President—to allow all this is to reverse the just order of administration, and to place the subordinate above the superior.

There are, however, other relations between the President and a head of department beyond these defined legal relations which necessarily attend them, though not expressed. Chief among these is mutual confidence. This relation is so delicate that it is sometimes hard to say when or how it ceases. A single flagrant act may aid it at once, and then there is no difficulty. But confidence may be just as effectually destroyed by a series of causes too subtle for demonstration. As it is a plant of slow growth, so, too, it may be slow in decay. Such has been the process here. I will not pretend to say what acts or omissions have broken up this relation. They are hardly susceptible of statement, and still less of formal proof. Nevertheless no one can read the correspondence of the 5th of August without being convinced that this relation was affectually gone on both sides, and that, while the President was unwilling to allow Mr. Stanton to remain in his administration, Mr. Stanton was equally unwilling to allow the President to carry on his administration without his presence. In the great debate which took place in the House of Representatives in 1789, on the first organization of the principal departments, Mr. Madison spoke as follows:

"It is evidently the intention of the Constitution that the First Magistrate should be responsible for the executive department. So far, therefore, as we do not make the officers who are to aid him in the duties of that department responsible to him, he is not responsible to the country. Again, is there no danger that an officer, when he is appointed by the concurrence of the Senate and his friends in that body, may choose rather to risk his establishment on the favor of that branch than rest it upon the discharge of his duties to the satisfaction of the executive branch, which is constitutionally authorized to inspect and control his conduct? And if it should happen that the officers connect themselves with the Senate, they may mutually support each other, and, for want of efficacy, reduce the power of the President to a mere vapor, in which case his responsibility would be annihilated, and the expectation of it is unjust. The high executive officers joined in cabal with the Senate would lay the foundation of discord, and end in an assumption of the executive power, only to be removed by a revolution of the Government."

Mr. Sedgwick, in the same debate, referring to the proposition that a head of department should only be removed or suspended by the concurrence of the Senate, uses this language:

"But if proof be necessary, what is then the consequence? Why, in nine cases out of ten, where the case is very clear to the mind of the President that the man ought to be removed, the effect can not be produced, because it is absolutely impossible to produce the necessary evidence. Are the Senate to proceed without

evidence? Some gentleman contend not. Then the object will be lost. Shall a man, under these circumstances, be saddled upon the President, who has been appointed for no other purpose but to aid the President in performing certain duties? Shall he be continued, I ask again, against the will of the President? If he is, where is the responsibility? Are you to look for it in the President, who has no control over the officer, no power to remove him if he acts unfeelingly or unfaithfully? Without you make him responsible, you weaken and destroy the strength and beauty of your system. What is to be done in cases which can only be known from a long acquaintance with the conduct of an officer?"

I have indulged the hope that upon the assembling of Congress Mr. Stanton would have ended this unpleasant complication according to the intimation given in his note of August 12. The duty which I have felt myself called upon to perform was by no means agreeable, but I feel that I am not responsible for the controversy or for the consequences.

Unpleasant as this necessary change in my Cabinet has been to me, upon personal considerations, I have the consolation to be assured that, so far as the public interests are involved, there is no cause for regret. Salutary reforms have been introduced by the Secretary ad interim, and great reductions of expenses have been effected under his administration of its War Department to the saving of millions to the Treasury.

ANDREW JOHNSON.

WASHINGTON, *December 12, 1867.*

EXHIBIT C.

Address to the President by Hon. Reverdy Johnson, August 18, 1868.

Mr. PRESIDENT: We are before you as a committee of the Union national convention, which met in Philadelphia on Tuesday, the 14th instant, charged with the duty of presenting you with an authentic copy of its proceedings.

Before placing it in your hands, you will permit us to congratulate you that in the object for which the convention was called, in the enthusiasm with which in every State and Territory the call was responded to, in the unbroken harmony of its deliberations, in the unanimity with which the principles it has declared were adopted, and more especially in the patriotic and constitutional character of the principles themselves, we are confident that you and the country will find gratifying and cheering evidence that there exists among the people a public sentiment which renders an early and complete restoration of the Union as established by the Constitution certain and inevitable. Party faction, seeking the continuance of its misrule, may momentarily delay it, but the principles of political liberty, for which our fathers successfully contended, and to secure which they adopted the Constitution, are so glaringly inconsistent with the condition in which the country has been placed by such misrule that it will not be permitted a much longer duration.

We wish, Mr. President, you could have witnessed the spirit of concord and brotherly affection which animated every member of the convention. Great as your confidence has ever been in the intelligence and patriotism of your fellow-citizens, in their deep devotion to the Union and their present determination to reinstate and maintain it, that confidence would have become a positive conviction could you have seen and heard all that was done and said upon the occasion. Every heart was evidently full of joy, every eye beamed with patriotic animation; despondency gave place to the assurance that, our late dreadful civil strife ended, the blissful reign of peace, under the protection not of arms but of the Constitution and laws, would have sway and be in every part of our land, cheerfully acknowledged, and in perfect good faith obeyed. You would not have doubted that the recurrence of dangerous domestic insurrections in the future is not to be apprehended.

If you could have seen the men of Massachusetts and South Carolina coming into the convention on the first day of its meeting hand in hand, amid the rapturous applause of the whole body, awakened by heartfelt gratification at the event, filling the eyes of thousands with tears of joy, which they neither could not nor desired to repress, you would have felt, as every person present felt, that the time had arrived when all sectional or other perilous dissensions has ceased and that nothing should be heard in the future but the voice of harmony proclaiming

devotion to a common country, of pride in being bound together by a common union, existing and protected by forms of government proved by experience to be eminently fitted for the exigencies of either war or peace.

In the principles announced by the convention and in the feeling there manifested we have every assurance that harmony throughout our entire land will soon prevail. We know that, as in former days, as was eloquently declared by Webster, the Nation's most gifted statesman, Massachusetts and South Carolina went "shoulder to shoulder through the Revolution," and stood hand in hand "around the administration of Washington and felt his own great arm lean on them for support," so will they again, with like magnanimity, devotion, and power, stand round your administration and cause you to feel that you may also lean on them for support.

In the proceedings, Mr. President, which we are to place in your hands, you will find that the convention performed the grateful duty imposed upon them by their knowledge of your "devotion to the Constitution and laws and interests of your country," as illustrated by your entire presidential career, of declaring that in you they "recognize a Chief Magistrate worthy of the Nation and equal to the great crisis upon which your lot is cast"; and in this declaration it gives us marked pleasure to add we are confident that the convention has but spoken the intelligent and patriotic sentiment of the country. Ever inaccessible to the low influences which often control the mere partisan, governed alone by an honest opinion of constitutional obligations and rights, and of the duty of looking solely to the true interests, safety, and honor of the Nation, such a class is incapable of resorting to any bait for popularity at the expense of the public good.

In the measures which you have adopted for the restoration of the Union the convention saw only a continuance of the policy which for the same purpose was inaugurated by your immediate predecessor. In his reelection by the people, after that policy had been fully indicated and had been made one of the issues of the contest, those of his political friends who are now assailing you for sternly pursuing it are forgetful or regardless of the opinions which their support of his reelection necessarily involved. Being upon the same ticket with that much-lamented public servant, whose foul assassination touched the heart of the civilized world with grief and horror, you would have been false to obvious duty if you had not endeavored to carry out the same policy; and, judging now by the opposite one which Congress has pursued, its wisdom and patriotism are indicated by the fact that that of Congress has but continued a broken Union by keeping 10 of the States, in which at one time the insurrection existed (as far as they could accomplish it), in the condition of subjugated provinces, denying to them the right to be represented, with subjecting their people to every species of legislation, including that of taxation. That such a state of things is at war with the very genius of our Government, inconsistent with every idea of political freedom, and most perilous to the peace and safety of the country, no reflecting man fail to believe.

We hope, sir, that the proceedings of the convention will cause you to adhere, if possible, with even greater firmness to the course which you are pursuing, by satisfying you that the people are with you, and that the wish which lies nearest to their heart is that a perfect restoration of our Union at the earliest moment be attained, and a conviction that the result can only be accomplished by the measures which you are pursuing. And in the discharge of the duties which these impose upon you, we, as did every member of the convention, again for ourselves individually tender to you our profound respect and assurance of our cordial and sincere support.

With a reunited Union, with no foot but that of a freeman treading or permitted to tread our soil, with a nation's faith pledged forever to a strict observance of all its obligations, with kindness and fraternal love everywhere prevailing, the desolations of war will soon be removed; its sacrifices of life, sad as they have been, will, with Christian resignation, be referred to a providential purpose of fixing our beloved country on a firm and enduring basis, which will forever place our liberty and happiness beyond the reach of human peril. Then, too, and forever, will our Government challenge the admiration and receive the respect of the nations of the world, and be in no danger of any efforts to impeach our honor.

And permit me, sir, in conclusion, to add that, great as your solicitude for the restoration of our domestic peace and your labors to that end, you have also a watchful eye to the rights of the Nation, and that any attempt by an

assumed or actual foreign power to enforce an illegal blockade against the Government or citizens of the United States, to use your own mild but expressive words, "will be disallowed." In this determination I am sure you will receive the unanimous approval of your fellow citizens.

Now, sir, as the chairman of this committee, and in behalf of the convention, I have the honor to present you with an authentic copy of its proceedings.

The reading of the answer of the respondent having been concluded,

The Chief Justice submitted the question to the Senate, Shall the answer of the respondent as read by his counsel be received and filed? and

It was determined in the affirmative.

Mr. Boutwell, on the part of the managers, submitted the following motion; which was considered and agreed to:

Ordered, That the managers have time to consult the House of Representatives on a replication, and that they be furnished with a copy of the answer of the respondent; and

Ordered, That the Secretary communicate to the House of Representatives an attested copy of the answer of the President to the articles of impeachment, together with a copy of the foregoing order.

Mr. Evarts, in behalf of the respondent, submitted the following motion:

To the Senate of the United States, sitting as a court of impeachment:

And now, on this 23d day of March, in the year 1868, the counsel for the President of the United States, upon reading and filing his answer to the articles of impeachment exhibited against him, respectfully represent to the honorable court that after the replication shall have been filed to the said answer the due and proper preparation of and for the trial of the cause will require, in the opinion and judgment of such counsel, that a period of not less than 30 days should be allowed to the President of the United States and his counsel for such preparation and before the said trial should proceed.

HENRY STANBERY,
B. R. CURTIS,
THOMAS A. R. NELSON,
WM. M. EVARTS,
W. S. GROESBECK,
Of Counsel.

After argument by the counsel for the President in favor of said order, and by the managers of the impeachment against it,

Mr. Henderson submitted the following order:

Ordered, That the application of the counsel for the President to be allowed 30 days to prepare for the trial of the impeachment be postponed until after replication filed.

After argument by Mr. Butler on the part of the managers against the adoption of said order.

On the question to agree thereto,

It was determined in the negative—

Yeas	----------	25
Nays	----------	28

On motion by Mr. Trumbull,

The yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are:

Messrs. Anthony, Buckalew, Cattell, Cole, Dixon, Doolittle, Edmunds, Fessenden, Fowler, Frelinghuysen, Grimes, Henderson, Hendricks, Johnson, McCreery, Merrill of Maine, Norton, Patterson of Tennessee, Ross, Saulsbury, Sherman, Sprague, Trumbull, Van Winkle, Vickers.

Those who voted in the negative are:

Messrs. Bayard, Cameron, Chandler, Conkling, Conness, Corbett, Cragin, Davis, Drake, Ferry, Harlan, Howard, Howe, Morgan, Morrill of Vermont, Morton, Nye, Patterson of New Hampshire, Pomeroy, Ramsey, Stewart, Sumner, Thayer, Tipton, Willey, Williams, Wilson, Yates.

So the order was not agreed to; and,

On the question to agree to the motion of counsel for the respondent to be allowed 30 days to prepare for trial after filing of replication by the managers,

It was determined in the negative—{Yeas ---------- 12
{Nays ---------- 41

On motion by Mr. Drake,

The yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are.

Messrs. Bayard, Buckalew, Davis, Dixon, Doolittle, Hendricks, Johnson, McCreery, Norton, Patterson of Tennessee, Saulsbury, Vickers.

Those who voted in the negative are,

Messrs. Anthony, Cameron, Cattell, Chandler, Cole, Conkling, Conness, Corbett, Cragin, Drake, Edmunds, Ferry, Fessenden, Fowler, Frelinghuysen, Grimes, Harlan, Henderson, Howard, Howe, Morgan, Morrill of Maine, Morrill of Vermont, Morton, Nye, Patterson of New Hampshire, Pomeroy, Ramsey, Ross, Sherman, Sprague, Stewart, Sumner, Thayer, Tipton, Trumbull, Van Winkle, Willey, Williams, Wilson, Yates.

So the motion was not agreed to.

Thereupon,

Mr. Evarts, in behalf of the respondent, submitted the following motion:

That there be allowed for the preparation of the President of the United States for the trial, after the replication shall be filed and before the trial shall be required to proceed, such reasonable time as shall now be fixed by the Senate.

Whereupon

Mr. Johnson submitted the following motion:

Ordered, That 10 days be allowed the President to prepare for trial after filing of the replication by the managers on the part of the House of Representatives.

On motion by Mr. Sherman,

The Senate, sitting for the trial of the President upon articles of impeachment, adjourned to 1 o'clock p.m. to-morrow.

TUESDAY, MARCH 24, 1868.

The United States *v.* Andrew Johnson, President.

At 1 o'clock p.m. the Chief Justice of the United States entered the Senate Chamber and resumed the chair; and

The Sergeant at Arms having made proclamation,

The managers appointed to conduct the trial of the President of the United States upon articles of impeachment exhibited against him by the House of Representatives, to wit, Mr. Bingham, Mr.

Boutwell, Mr. James F. Wilson, Mr. Butler, Mr. Thomas Williams, Mr. Logan, and Mr. Thaddeus Stevens, entered the Senate Chamber and took the seats assigned them.

The Sergeant at Arms announced the presence at the door of the Senate Chamber of the House of Representatives; and

The House of Representatives, as in Committee of the Whole House, preceded by its Chairman, Mr. Elihu B. Washburne, and accompanied by its Speaker and Clerk, entered the Senate Chamber and took the seats provided for them.

The counsel of the President, to wit, Mr. Stanbery, Mr. Curtis, Mr. Nelson, Mr. Evarts, and Mr. Groesbeck, appeared at the bar of the Senate and took the seats assigned them.

The Journal of proceedings of the Senate, sitting for the trial of the President upon articles of impeachment exhibited against him by the House of Representatives, of yesterday was read.

The following resolution, received from the House of Representatives, was then read:

Resolved, That a message be sent to the Senate by the Clerk of the House informing the Senate that the House of Representatives has adopted a replication to the answer of the President of the United States to the articles of impeachment exhibited against him, and that the same will be presented to the Senate by the managers on the part of the House.

The Chief Justice informed the managers that the Senate would hear the replication of the House of Representatives to the answer of the President of the United States to the articles of impeachment exhibited against him.

Thereupon

Mr. Boutwell, on the part of the managers, read the replication of the House of Representatives, as follows:

REPLICATION BY THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES TO THE ANSWER OF ANDREW JOHNSON, PRESIDENT OF THE UNITED STATES, TO THE ARTICLES OF IMPEACHMENT EXHIBITED AGAINST HIM BY THE HOUSE OF REPRESENTATIVES

The House of Representatives of the United States have considered the several answers of Andrew Johnson, President of the United States, to the several articles of impeachment against him by them exhibited in the name of themselves and of all the people of the United States, and reserving to themselves all advantage of exception to the insufficiency of his answer to each and all of the several articles of impeachment exhibited against said Andrew Johnson, President of the United States, do deny each and every averment in said several answers, or either of them, which denies or traverses the acts, intents, crimes, or misdemeanors charged against said Andrew Johnson in the said articles of impeachment, or either of them, and for replication to the said answer do say that said Andrew Johnson, President of the United States, is guilty of the high crimes and misdemeanors mentioned in said articles, and that the House of Representatives are ready to prove the same.

SCHUYLER COLFAX,
Speaker of the House of Representatives.
EDW'D MCPHERSON,
Clerk of the House of Representatives.

On motion by Mr. Johnson,

Ordered, That the Secretary of the Senate be directed to furnish the counsel of the President an authenticated copy of the replication of the House of Representatives to the answer of the President to the articles of impeachment exhibited against him by the House of Representatives.

The Chief Justice stated that at the adjournment yesterday of the Senate, sitting for the trial of the President upon articles of impeachment, the question before the Senate was the application of the counsel of the President for reasonable time to prepare for trial, and that the motion of the Senator from Maryland, Mr. Johnson, that 10 days be allowed the President to prepare for trial was the pending question.

The motion of Mr. Johnson, having been modified by him, was read, as follows:

Ordered, That the Senate proceed to the trial of the President upon the articles of impeachment exhibited against him at the expiration of 10 days from this day, unless for cause shown to the contrary.

On motion by Mr. Sumner to amend the motion of Mr. Johnson by striking out all after the word "Ordered" and in lieu thereof inserting: "Now that replication has been filed, the Senate, adhering to its rule already adopted, will proceed with the trial from day to day (Sundays excepted) unless otherwise ordered on reason shown,"

Mr. Edmunds moved that the Senate retire to its conference chamber to consider the question involved in the motion of Mr. Johnson and the amendment proposed by Mr. Sumner; and,

On the question to agree to the motion of Mr. Edmunds,

It was determined in the affirmative—{ Yeas 29 / Nays 23

On motion by Mr. Conkling.

The yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are,

Messrs. Anthony, Bayard, Buckalew, Corbett, Davis, Dixon, Doolittle, Edmunds, Fessenden, Fowler, Freylinghuysen, Grimes, Henderson, Hendricks, Howe, Johnson, McCreery, Morrill of Maine, Morrill of Vermont, Morton, Norton, Patterson of New Hampshire, Patterson of Tennessee, Saulsbury, Sprague, Van Winkle, Vickers, Willey, Williams.

Those who voted in the negative are,

Messrs. Cameron, Cattell, Chandler, Cole, Conkling, Conness, Cragin, Drake, Ferry, Harlan, Howard, Morgan, Nye, Pomeroy, Ramsey, Ross, Sherman, Stewart, Sumner, Thayer, Tipton, Trumbull, Wilson.

So the motion was agreed to; and

The Senate, with the Chief Justice, having retired to its conference chamber,

The Chief Justice stated the question to be on the amendment proposed by Mr. Sumner to the motion of Mr. Johnson.

Ordered, That the Senate will commence the trial of the President upon the articles of impeachment exhibited against him on Thursday, the 2d day of April next.

After debate,

On motion by Mr. Williams to amend the amendment proposed by Mr. Sumner to the motion of Mr. Johnson by striking out all after the word "that," in the first line, and in lieu thereof inserting: "the further consideration of the respondent's application for time be postponed until the managers have opened their case and submitted their evidence."

After further debate,

On motion by Mr. Conkling to amend the motion of Mr. Johnson by striking out the words "Thursday, the 2d day of April next," and in lieu thereof inserting "Monday the thirtieth of March instant,"

It was determined in the affirmative—{Yeas ---------- 28
{Nays ---------- 24

On motion by Mr. Sumner,

The yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are,

Messrs. Cameron, Cattell, Chandler, Cole, Conkling, Conness, Cragin, Drake, Ferry, Harlan, Howard, Howe, Morgan, Morrill of Maine, Morrill of Vermont, Morton, Nye, Patterson of New Hampshire, Pomeroy, Ramsey, Ross, Stewart, Sumner, Thayer, Tipton, Willey, Williams, Wilson.

Those who voted in the negative are,

Messrs. Anthony, Bayard, Buckalew, Corbett, Davis, Dixon, Doolittle, Edmunds, Fessenden, Fowler, Frelinghuysen, Grimes, Henderson, Hendricks, Johnson, McCreery, Norton, Patterson of Tennessee, Saulsbury, Sherman, Sprague, Trumbull, Van Winkle, Vickers.

So the amendment of Mr. Conkling to the motion of Mr. Johnson was agreed to.

The Chief Justice stated that the question now recurred upon the amendment proposed by Mr. Williams to the amendment of Mr. Sumner; and,

On the question to agree to the amendment of Mr. Williams,

It was determined in the negative---------{Yeas ---------- 9
{Nays ---------- 42

On motion by Mr. Williams,

The yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are,

Messrs. Anthony, Chandler, Dixon, Grimes, Harlan, Howard, Morgan, Patterson of Tennessee, Williams.

Those who voted in the negative are,

Messrs. Bayard, Buckalew, Cameron, Cattell, Cole, Conkling, Conness, Cragin, Davis, Doolittle, Drake, Edmunds, Ferry, Fessenden, Fowler, Frelinghuysen, Henderson, Hendricks, Howe, Johnson, McCreery, Morrill of Maine, Morrill of Vermont, Morton, Norton, Nye, Patterson of New Hampshire, Pomeroy, Ramsey, Ross, Saulsbury, Sherman, Sprague, Stewart, Sumner, Thayer, Tipton, Trumbull, Van Winkle, Vickers, Willey, Wilson.

So the amendment of Mr. Williams to the amendment of Mr. Sumner was not agreed to; and

The question recurring on the amendment proposed by Mr. Sumner to the motion of Mr. Johnson,

Mr. Sumner asked, and obtained leave, to withdraw his amendment; and the same being withdrawn,

The Chief Justice then stated the question to be on the motion of Mr. Johnson, as amended on the motion of Mr. Conkling.

A motion was made by Mr. Hendricks to further amend the motion of Mr. Johnson by inserting at the end thereof the words, "unless for good cause shown"; which motion was modified at the suggestion of Mr. Drake, to read: At the end of the motion of Mr. Johnson insert the words, "and proceed therein with all convenient dispatch

under the rules of the Senate sitting upon the trial of an impeachment"; and

On the question to agree thereto,

It was determined in the affirmative; and

On the question to agree to the motion of Mr. Johnson, as amended,

It was determined in the affirmative.

So it was

Ordered, That the Senate will commence the trial of the President upon the articles of impeachment exhibited against him on Monday, the 30th of March instant, and proceed therein with all convenient dispatch under the rules of the Senate sitting upon the trial of an impeachment.

On motion by Mr. Morton,

The Senate then returned to its Chamber; and

The Chief Justice announced to the counsel for the President that the Senate had adopted an order in answer to their application, which would be read by the Secretary.

The Secretary then read the order, as follows:

Ordered, That the Senate will commence the trial of the President upon the articles of impeachment exhibited against him on Monday, the 30th of March instant, and proceed therein with all convenient dispatch under the rules of the Senate sitting upon the trial of an impeachment.

The Chief Justice then inquired of the managers if they had anything further to propose.

Mr. Bingham, on the part of the managers, replying in the negative,

The Chief Justice inquired of the counsel for the President if they had anything further to propose; and

The counsel for the President replying in the negative,

On motion by Mr. Wilson,

The Senate sitting for the trial of the President upon articles of impeachment adjourned to Monday, the 30th March instant, at 12 o'clock and 30 minutes p.m.

MONDAY, MARCH 30, 1868

The United States *v.* Andrew Johnson, President.

At half past 12 o'clock p.m. the Chief Justice of the United States entered the Senate Chamber and resumed the chair; and

The Sergeant at Arms having made proclamation,

The managers appointed to conduct the trial of the President of the United States upon articles of impeachment exhibited against him by the House of Representatives, to wit, Mr. Bingham, Mr. Boutwell, Mr. James F. Wilson, Mr. Butler, Mr. Thomas Williams, Mr. Logan, and Mr. Thaddeus Stevens, entered the Senate Chamber and took the seats assigned them.

The Sergeant at Arms announced the presence at the door of the Senate Chamber of the House of Representatives; and

The House of Representatives, as in Committee of the Whole House, preceded by its chairman, Mr. Elihu B. Washburne, and accompanied by its Speaker and Clerk, entered the Senate Chamber and took the seats provided for them.

The counsel of the president, to wit: Mr. Stanbery, Mr. Curtis, Mr. Nelson, Mr. Evarts, and Mr. Groesbeck, appeared at the bar of the Senate and took the seats assigned them.

The Journal of proceedings of the Senate, sitting for the trial of the President upon articles of impeachment, of March 24 was read.

The Chief Justice then informed the managers that they could now proceed in the trial of the impeachment.

Whereupon,

Mr. Butler, on the part of the managers, addressed the Senate in support of the articles of impeachment exhibited by the House of Representatives against the President; and having proceeded in his argument until 5 minutes before 3 o'clock p.m.

On motion by Mr. Wilson,

The Senate took a recess for 10 minutes.

After which,

Mr. Butler resumed his argument; and having concluded the same,

Mr. Bingham, on behalf of the managers, announced that the managers were ready to proceed with the testimony to make good the articles of impeachment exhibited by the House of Representatives against Andrew Johnson, and that Mr. Wilson, one of the managers would present the evidence on the part of the House of Representatives.

Mr. Wilson on the part of the managers, then offered the following documentary evidence; which he read and laid upon the desk of the Secretary:

First. A copy of the oath of office taken and subscribed by Andrew Johnson upon assuming the duties and position of President of the United States, certified by F. W. Seward, Acting Secretary of State.

Second. A copy of the message of Abraham Lincoln, President of the United States, dated January 13, 1862, nominating Edwin M. Stanton, of Pennsylvania, to be Secretary of War, and the resolution of the Senate advising and consenting to the appointment of Edwin M. Stanton to be Secretary of War, certified to by the Secretary of the Senate.

Third. A copy of the message of Andrew Johnson, President of the United States, to the Senate of the United States, informing the Senate that he had suspended Edwin M. Stanton from the office of Secretary of War and appointed Gen. Grant Secretary of War ad interim.

While Mr. Wilson was about to present further documentary evidence on the part of the House of Representatives.

On motion by Mr. Sherman,

The Senate, sitting for the trial of the President upon articles of impeachment, adjourned.

TUESDAY, MARCH 31, 1868.

The United States *v.* Andrew Johnson, President.

At 12 o'clock m. the Chief Justice of the United States entered the Senate Chamber and resumed the chair; and

The Sergeant at Arms having made proclamation,

The managers appointed to conduct the trial of the President of the United States upon articles of impeachment exhibited against him by the House of Representatives, to wit, Mr. Bingham, Mr. James F. Wilson, Mr. Butler, Mr. Thomas Williams, Mr. Boutwell,

Mr. Logan, and Mr. Thaddeus Stevens, entered the Senate Chamber and took the seats assigned them.

The Sergeant at Arms announced the presence at the door of the Senate Chamber of the House of Representatives; and

The House of Representatives, as in Committee of the Whole House, preceded by its chairman, Mr. Elihu B. Washburne, and accompanied by the Speaker and Clerk, entered the Senate Chamber and took the seats provided for them.

The counsel of the President, to wit: Mr. Stanbery, Mr. Curtis, Mr. Nelson, Mr. Evarts, and Mr. Groesbeck, appeared at the bar of the Senate and took the seats assigned them.

The Journal of the proceedings of the Senate, sitting for the trial of the President upon articles of impeachment, of yesterday was read.

Mr. Wilson, on the part of the managers, presented further documentary evidence in support of the articles of impeachment, as follows:

First. A copy of the resolution of the Senate of the 13th of January disapproving the suspension of Edwin M. Stanton from the office of Secretary of War, and the order of the Senate directing the Secretary to communicate an authenticated copy thereof to the President of the United States and to the Secretary of War ad interim.

Second. A copy of the message of the President of the United States of the 21st of February, 1868, communicating to the Senate the removal of Edwin M. Stanton from the office of Secretary of War, and the appointment of Lorenzo Thomas, Adjutant General of the Army, to act as Secretary of War ad interim, together with copies of the letters addressed by the President to those officers relative thereto.

Third. A copy of the resolution of the Senate of the 21st of February, 1868, declaring that, under the Constitution and laws of the United States, the President had no power to remove Edwin M. Stanton from the office of Secretary of War and designate another person to perform the duties of that office ad interim, and the order of the Senate directing the Secretary to communicate copies thereof to the President of the United States, to the Secretary of War, and to the Adjutant General of the Army.

Fourth. A copy of the commission issued to Edwin M. Stanton, as Secretary of war, by Abraham Lincoln, President of the United States.

Fifth. A certified copy of the resolution of the Senate of January 13, 1868, disapproving the suspension of Edwin M. Stanton as Secretary of War, and also a certified copy of the resolution of the Senate of February 21, 1868, declaring that the President had no power, under the Constitution and laws, to remove the Secretary of War and appoint any other officer to perform the duties of that office.

The managers then requested that the witnesses on the part of the United States be called.

William J. McDonald, a witness on the part of the United States, was then called; and being duly sworn by the Secretary, was examined by the managers.

Mr. Wilson, on the part of the managers, then offered in evidence an attested copy of the resolution of the Senate of February 21, 1868, declaring that under the Constitution and laws the President had no power to remove the Secretary of War and designate any other officer to perform the duties of that office ad interim.

John W. Jones, a witness on the part of the United States, was then called; and being duly sworn, was examined by the managers.

Charles E. Creecy, a witness on the part of the United States, was then called; and being duly sworn, was examined by the managers and cross-examined by the counsel for the President.

Burt Van Horn, a witness on the part of the United States, was called; and being duly sworn, was examined by the managers and cross-examined by the counsel for the President.

Burt Van Horn, a witness on the part of the United States, was called; and being duly sworn, was examined by the managers and cross-examined by the counsel for the President.

James K. Moorehead, a witness on the part of the United States, was called; and being duly sworn, was examined by the managers and cross-examined by the counsel for the President.

Walter A. Burleigh, a witness on the part of the United States, was next called; and being duly sworn, and while under examination, a question was propounded to him by Mr. Butler, on the part of the managers.

Mr. Evarts, of counsel for the President, objected to the question.

The Chief Justice expressed the opinion that the testimony was competent, and that it should be heard, unless the Senate should decide otherwise.

Mr. Drake raised the question of order that the Chief Justice was not authorized by the rules of the Senate, sitting for the trial of an impeachment, to decide questions of that character, but that they should be submitted to the Senate for decision.

The Chief Justice stated that in his judgment it was his duty to state his opinion on questions of evidence in the first instance, subject to the decision of the Senate upon the question by vote upon the demand of any Senator.

From this decision of the Chief Justice Mr. Drake appealed to the Senate and was proceeding in remarks on the question when he was called to order by Mr. Johnson.

Mr. Butler on the part of the managers, inquired of the Chief Justice if the question was subject to debate.

The Chief Justice decided it to be debatable by the managers on the part of the House and by the counsel for the President, but not by Senators.

After argument by the managers,

The Chief Justice stated that Mr. Butler, on the part of the managers, had propounded a question to the witness which was objected to by Mr. Stanbery, of counsel for the respondent; that the Chief Justice had ruled that the testimony was competent and overruled the objections raised by the counsel for the President, subject to the decision of the Senate, if demanded by any Senator.

From this decision of the Chief Justice the Senator from Missouri, Mr. Drake, had appealed to the Senate, and that the question before the Senate was:

Shall the decision of the Chief Justice, as to his right and duty in ruling, preliminarily, a question of evidence, stand as the judgment of the Senate?

Mr. Sherman submitted the following question:

I ask the managers what are the precedents in cases of impeachment in the United States upon this point?

Did the Vice President, as presiding officer, decide preliminary questions, or did he submit them in the first instance to the Senate?

Mr. Wilson moved that the Senate retire to their conference chamber to consider the ruling of the Chief Justice and the appeal taken therefrom by Mr. Drake; and

The question being put,

The yeas were 25 and the nays were 25.

On motion by Mr. Thayer,

The yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are,

Messrs. Anthony, Buckalew, Cole, Conness, Corbett, Davis, Dixon, Edmunds, Fowler, Grimes, Hendricks, Howe, Johnson, McCreery, Morrill of Maine, Morrill of Vermont, Morton, Norton, Patterson of New Hampshire, Patterson of Tennessee, Pomeroy, Ross, Vickers, Williams, Wilson.

Those who voted in the negative are,

Messrs. Cameron, Cattell, Chandler, Conkling, Cragin, Doolittle, Drake, Ferry, Fessenden, Frelinghuysen, Henderson, Howard, Morgan, Nye, Ramsey, Saulsbury, Sherman, Sprague, Stewart, Sumner, Thayer, Tipton, Trumbull, Van Winkle, Willey.

The Senate being equally divided,

The Chief Justice voted in the affirmative; and

The Senate accordingly retired to their conference room; and

The Chief Justice having again stated the question before the Senate for decision,

Mr. Sherman submitted the following order for consideration:

Ordered, That under the rules and in accordance with the precedents in the United States, in cases of impeachment, all questions, other than those of order, should be submitted to the Senate.

Mr. Henderson moved that the further consideration of the question on the appeal taken by Mr. Drake from the decision of the Chair, for the purpose of enabling him to move an amendment to the rules of the Senate sitting for the trial of impeachments, be postponed; and

The question being put,

It was determined to be in the affirmative—{Yeas ——— 32 / Nays ——— 18}

On motion by Mr. Conness,

The yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are,

Messrs. Anthony, Bayard, Buckalew, Cameron, Cattell, Cole, Corbett, Cragin, Davis, Dixon, Doolittle, Edmunds, Fessenden, Fowler, Frelinghuysen, Henderson, Hendricks, Johnson, McCreery, Morrill of Vermont, Norton, Patterson of New Hampshire, Patterson of Tennessee, Pomeroy, Ross, Saulsbury, Sprague, Trumbull, Van Winkle, Vickers, Willey, Williams.

Those who voted in the negative are,

Messrs. Chandler, Conkling, Conness, Drake, Ferry, Howard, Howe, Morgan, Morrill of Maine, Morton, Nye, Ramsey, Sherman, Stewart, Sumner, Thayer, Tipton, Wilson.

So the question on the appeal was postponed, and

Thereupon,

Mr. Henderson submitted the following resolution for consideration:

Resolved, That the seventh rule of the Senate, sitting for the trial of impeachments, be amended to read as follows:

"VII. The presiding officer of the Senate shall direct all necessary preparations in the Senate Chamber, and the presiding officer on the trial shall direct all the forms of proceeding while the Senate are sitting for the purpose of trying an impeachment, and all forms during the trial not otherwise specially provided for. And the presiding officer on the trial may rule all questions of evidence and incidental questions, while ruling shall stand as the judgment of the Senate, unless some Member of the Senate shall ask that a formal vote be taken thereon, in which case it shall be submitted to the Senate for decision; or he may, at his option, in the first instance, submit any such question to a vote of the Members of the Senate."

After debate,

On motion by Mr. Morrill of Maine to amend the resolution submitted by Mr. Henderson by striking out the words "which ruling shall stand as the judgment of the Senate."

It was determined in the negative.

On motion by Mr. Sumner to amend the resolution submitted by Mr. Henderson by inserting at the end thereof the following:

That the Chief Justice, presiding in the Senate on the trial of the President of the United States, is not a Member of the Senate, and has no authority under the Constitution to vote on any question during the trial; and he can pronounce decisions only as the organ of the Senate and with its assent;

After debate,

It was determined in the negative—{Yeas—22 / Nays—26}

On motion by Mr. Sumner,

The yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are,

Messrs. Cameron, Cattell, Chandler, Conkling, Conness, Corbett, Cragin, Drake, Howard, Morgan, Morrill of Maine, Morton, Nye, Pomeroy, Ramsey, Stewart, Sumner, Thayer, Tipton, Trumbull, Williams, Wilson.

Those who voted in the negative are,

Messrs. Bayard, Buckalew, Cole, Davis, Dixon, Doolittle, Edmunds, Ferry, Fessenden, Fowler, Frelinghuysen, Henderson, Hendricks, Howe, Johnson, McCreery, Morrill of Vermont, Norton, Patterson of New Hampshire, Patterson of Tennessee, Ross, Sherman, Sprague, Van Winkle, Vickers, Willey.

So the amendment of Mr. Sumner was not agreed to.

On motion by Mr. Drake to amend the resolution submitted by Mr. Henderson by striking out all after the the word "follows" and inserting:

It is the judgment of the Senate that under the Constitution the Chief Justice, presiding over the Senate in the pending trial, has no privilege of ruling questions of law arising therein, but that all such questions should be submitted to and decided by the Senate alone;

After debate,

It was determined in the negative—{Yeas—20 / Nays—30}

On motion by Mr. Drake,

The yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are,

Messrs. Cameron, Cattell, Chandler, Cole, Conkling, Conness, Drake, Ferry, Howard, Howe, Morgan, Morrill of Maine Morton, Nye, Ramsey, Stewart, Sumner, Thayer, Tipton, Wilson.

Those who voted in the negative are,

Messrs. Anthony, Bayard, Buckalew, Corbett, Cragin, Davis, Dixon, Doolittle, Edmunds, Fessenden, Fowler, Frelinghuysen, Henderson, Hendricks, Johnson, McCreery, Morrill of Vermont, Norton, Patterson of New Hampshire, Patterson of Tennessee, Pomeroy, Ross, Saulsbury, Sherman, Sprague, Trumbull, Van Winkle, Vickers, Willey, Williams.

So the amendment of Mr. Drake was not agreed to; and

On the question to agree to the resolution submitted by Mr. Henderson,

It was determined in the affirmative—{Yeas 31 / Nays 19}

On motion by Mr. Ferry,

The yeas and nays being desired by one-fifth of the Senators present.

Those who voted in the affirmative are,

Messrs. Anthony, Bayard, Buckalew, Cameron, Corbett, Cragin, Davis, Dixon, Doolittle, Edmunds, Fessenden, Fowler, Frelinghuysen, Henderson, Hendricks, Johnson, McCreery, Morrill of Vermont, Norton, Patterson of New Hampshire, Patterson of Tennessee, Pomeroy, Ross, Saulsbury, Sherman, Sprague, Trumbull, Van Winkle, Vickers, Willey, Williams.

Those who voted in the negative are,

Messrs. Cattell, Chandler, Cole, Conkling, Conness, Drake, Ferry, Howard, Howe, Morgan, Morrill of Maine, Morton, Nye, Ramsey, Stewart, Sumner, Thayer, Tipton, Wilson.

So the resolution of Mr. Henderson was agreed to, and the seventh rule amended to read as follows:

VII. The Presiding Officer of the Senate shall direct all necessary preparations in the Senate Chamber, and the presiding officer on the trial shall direct all the forms of proceeding while the Senate are sitting for the purpose of trying an impeachment, and all forms during the trial not otherwise specially provided for. And the presiding officer on the trial may rule all questions of evidence and incidental questions, which ruling shall stand as the judgment of the Senate, unless some Member of the Senate shall ask that a formal vote be taken thereon, in which case it shall be submitted to the Senate for decision; or he may, at his option, in the first instance, submit any such question to a vote of the Members of the Senate.

On motion of Mr. Sumner to further amend the rules of the Senate sitting for the trial of impeachments, by inserting after Rule VII the following as an additional rule:

That the Chief Justice, presiding in the Senate on the trial of the President of the United States, is not a Member of the Senate, and has no authority under the Constitution to vote on any question during the trial.

Mr. Hendricks raised the question of order, that as the proposed amendment did not relate to the question which the Senate had retired to their conference room to deliberate upon, it was not in order.

On motion by Mr. Hendricks,

The Senate returned to its Chamber; and

The Chief Justice stated that the Senate had considered the questions before it at the time of retiring to their conference chamber, and had adopted the following rule:

The Secretary read the rule, as follows:

VII. The Presiding Officer of the Senate shall direct all necessary preparations in the Senate Chamber, and the presiding officer on the trial shall direct all the forms of proceeding while the Senate are sitting for the purpose of trying an impeachment, and all forms during the trial not otherwise specially provided for. And the presiding officer on the trial may rule all questions of evidence and incidental questions, which ruling shall stand as the judgment of the Senate, unless some Member of the Senate shall ask that a formal vote be taken thereupon, in which case it shall be submitted to the Senate for decision; or he may, at his option, in the first instance, submit any such question to a vote of the Members of the Senate.

On motion by Mr. Williams,

Ordered, That the rules, as amended, be printed.

On motion by Mr. Trumbull, at 20 minutes after 6 o'clock p.m., the Senate, sitting for the trial of the President upon articles of impeachment, adjourned.

WEDNESDAY, APRIL 1, 1868.

The United States *v.* Andrew Johnson, President.

At 12 o'clock m. the Chief Justice of the United States entered the Senate Chamber and resumed the chair; and

The Sergeant at Arms having made proclamation,

The managers appointed to conduct the trial of the President of the United States upon articles of impeachment exhibited against him by the House of Representatives, to wit, Mr. Bingham, Mr. Boutwell, Mr. James F. Wilson, Mr. Butler, Mr. Thomas Williams, Mr. Logan, and Mr. Thaddeus Stevens, entered the Senate Chamber and took the seats assigned them.

The Sergeant at Arms announced the presence at the door of the Senate Chamber of the House of Representatives; and

The House of Representatives, as in Committee of the Whole, preceded by its Chairman, Mr. Elihu B. Washburn, and accompanied by its Speaker and Clerk, entered the Senate Chamber and took the seats provided for them.

The counsel for the President, to wit, Mr. Stanbery, Mr. Curtis, Mr. Nelson, Mr. Evarts, and Mr. Groesbeck, appeared at the bar of the Senate and took the seats assigned them.

The journal of proceedings of the Senate, sitting for the trial of the President upon articles of impeachment of yesterday, having been read,

Mr. Sumner submitted the following motion for consideration:

It appearing from the reading of the Journal of yesterday that, on a question where the Senate were equally divided, the Chief Justice, presiding on the trial of the President, gave a casting vote, it is hereby declared that, in the judgment of the Senate, such vote was without authority under the Constitution of the United States.

The Senate proceeded to consider the said motion; and

On the question to agree thereto,

It was determined in the negative—{Yeas ---------- 21
Nays ---------- 27

On motion by Mr. Sumner,

The yeas and nays being desired by one-fifth of the Senators present.

Those who voted in the affirmative are.

Messrs. Cameron, Chandler, Cole, Conkling, Conness, Cragin, Drake, Howard, Howe, Morgan, Morrill of Maine, Morton, Pomeroy, Ramsey, Stewart, Sumner, Thayer, Tipton, Trumbull, Williams, Wilson.

Those who voted in the negative are,

Messrs. Anthony, Bayard, Buckalew, Corbett, Davis, Dixon, Doolittle, Edmunds, Ferry, Fessenden, Fowler, Frelinghuysen, Grimes, Henderson, Hendricks, Johnson, McCreey, Morrill of Vermont, Norton, Patterson of New Hampshire, Patterson of Tennessee, Ross, Sherman, Sprague, Van Winkle, Vickers, Willey.

So the motion of Mr. Sumner was not agreed to.

The Chief Justice then stated that when the court adjourned yesterday the question before it was whether a question propounded by the managers to the witness then under examination (Walter A. Burleigh) and objected to by the counsel for the President, should be put, and requested the managers to reduce their question to writing:

Whereupon,

Mr. Butler, on the part of the managers, having reduced the question to writing, it was read by the Secretary, as follows:

You said yesterday, in answer to my question, that you had a conversation with Gen. Lorenzo Thomas on the evening of February 21 last. State if he said anything as to the means by which he intended to obtain, or was directed by the President to obtain, possession of the War Department. If so, state all he said as nearly as you can.

Mr. Frelinghuysen submitted the following question to the managers:

Do the managers intend to connect the conversation between the witness and Gen. Thomas with the respondent?

To which question Mr. Butler, on behalf of the managers, responded that they did propose so to connect the question.

After argument by the counsel for the President in support of the objection raised by them to the question, and by the managers in favor of the question propounded by them to the witness,

Mr. Johnson submitted the following question to the managers:

The honorable managers are requested to say whether evidence hereafter will be produced to show—

First. That the President, before the time when the declarations of Thomas, which they propose to prove, were made, authorized him to obtain possession of the office by force, or threats, or intimidations, if necessary; and

Second. If not, that he, the President, had knowledge of such declarations had been made and approved of them.

To which question Mr. Bingham, on behalf of the managers, responded that they did not deem it their duty, being so general in its terms, to make answer.

After further argument by Mr. Bingham and Mr. Butler, on the part of the managers,

The Chief Justice submitted the question to the Senate, Shall the question proposed by the managers be put to the witness? and

It was determined in the affirmative. { Yeas ..... 39 / Nays 11

On motion by Mr. Drake,

The yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are,

Messrs. Anthony, Cameron, Cattell, Chandler, Cole, Conkling, Conness, Corbett, Cragin, Drake, Edmunds, Ferry, Fessenden, Fowler, Frelinghuysen, Grimes, Henderson, Howard, Howe, Morgan, Morrill of Maine, Morrill of Vermont, Morton, Nye, Patterson of New Hampshire, Pomeroy, Ramsey, Ross, Sherman, Sprague, Stewart, Sumner, Thayer, Tipton, Trumbull, Van Winkle, Williams, Wilson.

Those who voted in the negative are,

Messrs. Bayard, Buckalew, Davis, Dixon, Doolittle, Hendricks, Johnson, McCrerry, Norton, Patterson of Tennessee, Vickers.

So the objection of the counsel for the President was overruled; and the witness having been again placed upon the stand, the question proposed by the managers was put to him.

The witness having answered the question, and while under further examination, Mr. Manager Butler proposed the following question:

Shortly before this conversation about which you have testified, and after the President restored Maj. Gen. Thomas to the office of Adjutant General, if you know the fact that he was so restored, were you present in the War Department, and did you hear Thomas make any statements to the officers and clerks, or either of them, belonging to the War Office, as to the rules and orders of Mr. Stanton or of the office which he, Thomas, would revoke, relax, or rescind in favor of such officers and employees when he had control of the affairs therein? If so, state when it was such conversation, as near as you can, occurred; and state all he said, as nearly as you can.

The question being objected to by the counsel for the President.

The Chief Justice stated that, in his opinion, no sufficient foundation has been laid for the introduction of the testimony offered, and that the question was, therefore, inadmissible. He then inquired if any Senator desired that the question should be submitted to the Senate.

Thereupon,

Mr. Howard desired that the question be submitted to the Senate; and

The question was then submitted by the Chief Justice to the Senate, Shall the question proposed by the managers be put to the witness? and

It was determined in the affirmative ..... { Yeas ..... 28 / Nays 22

On motion by Mr. Howard,

The yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are,

Messrs. Anthony, Cameron, Cattell, Chandler, Cole, Coukling, Conness, Corbett, Cragin, Drake, Henderson, Howard, Howe, Morgan, Morrill of Vermont, Morton, Nye, Patterson of New Hampshire, Pomeroy, Ramsey, Ross, Sprague, Stewart, Sumner, Thayer, Tipton, Trumbull, Wilson.

Those who voted in the negative are,

Messrs. Bayard, Buckalew, Davis, Dixon, Doolittle, Edmonds, Ferry, Fessenden, Fowler, Frelinghuysen, Grimes, Hendricks, Johnson, McCreery, Morrill of Maine, Norton, Patterson of Tennessee, Sherman, Van Winkle, Vickers, Wiley, Williams.

So the objection of the counsel for the President was overruled, and the question was put to the witness.

After further examination of the witness,

Mr. Manager Butler propounded to him the following question:

Have you had any conversation since the first one, and since his appointment as Secretary of War ad interim, with Thomas, wherein he has said anything about using force in getting into the War Office, or in any way or manner reasserting the former conversation? And if so, state what he said.

The counsel for the President objecting to the question,

The Chief Justice, in accordance with previous ruling of the Senate, overruled the objection and directed that the question be put to the witness; and

After further examination by the managers and cross-examination by the counsel for the President, the witness was dismissed.

Samuel Wilkeson, a witness on the part of the United States, was then called, and being sworn, was examined by the managers and cross-examined by the counsel for the President.

George W. Karsner, a witness on the part of the United States, was next called, and being duly sworn, was examined by the managers and cross-examined by the counsel for the President; and,

On motion by Mr. Doolittle, at 10 minutes past 5 o'clock p.m., the Senate, sitting for the trial of the President upon articles of impeachment, adjourned.

THURSDAY, APRIL 2, 1868.

The United States *v.* Andrew Johnson, President.

At 12 o'clock m. the Chief Justice of the United States entered the Senate Chamber and resumed the chair; and

The Sergeant at Arms having made proclamation,

The managers appointed to conduct the trial of the President of the United States upon articles of impeachment exhibited against him by the House of Representatives, to wit, Mr. Bingham, Mr. Boutwell, Mr. James F. Wilson, Mr. Butler, Mr. Thomas Williams, Mr. Logan, and Mr. Thaddeus Stevens, entered the Senate Chamber and took the seats assigned them.

The Sergeant at Arms announced the presence, at the door of the Senate Chamber, of the House of Representatives; and

The House of Representatives, as in Committee of the Whole House, preceded by its chairman, Mr. Elihu B. Washburne, and accompanied by its Speaker and Clerk, entered the Senate Chamber and took the seats provided for them.

The counsel for the President, to wit, Mr. Stanbery, Mr. Curtis, Mr. Nelson, Mr. Evarts, and Mr. Grosbeck, appeared at the bar of the Senate and took the seats assigned them.

The journal of proceedings of the Senate, sitting for the trial of the President upon articles of impeachment, of yesterday was read.

Mr. Drake submitted the following, as an amendment to the rules of the Senate sitting on the trial of impeachment, for consideration, viz:

Amend Rule VII by inserting at the end thereof the following: "Upon all such questions the vote shall be without a division, unless the yeas and nays be demanded by one-fifth of the members present, or requested by the presiding officer, when the same shall be taken."

The Chief Justice requested the managers on the part of the House of Representatives to proceed with their evidence.

At the request of the counsel for the President,

George W. Karsner, a witness on the part of the United States, was recalled and cross-examined by the counsel for the President.

Thomas W. Ferry, a witness on the part of the United States, was called; and being duly sworn, was examined by the managers and cross-examined by the counsel for the President.

William H. Emory, a witness on the part of the United States, was next called; and being duly sworn, was examined by the managers and cross-examined by the counsel for the President.

Mr. Wilson, on the part of the managers, presented the following documentary evidence in support of the articles of impeachment; which, having been read, was admitted:

1. A copy of the commission of William H. Emory as major general by brevet in the Army of the United States; and a copy of the order of the General of the Army assigning him to the command of the Department of Washington.

2. Letters of the President of the United States, addressed to the General of the Army, expressing his desire that Bvt. Maj. Gen. Lorenzo Thomas resume his duties as Adjutant General of the Army.

3. Letter of the General of the Army to the President of the United States requesting him to give in writing his verbal order of the 19th of January, 1868, to disregard the orders of Edwin M. Stanton as Secretary of War, unless specially otherwise directed by the Executive, together with the indorsement of the President thereon giving the order desired.

Mr. Wilson then proposed to offer in evidence a letter of the President of the United States, dated the 10th of February, 1868, and addressed to the General of the Army, in reply to a letter of the latter of the 3d of February, 1868, relative to his withdrawal from the office of Secretary of War ad interim.

The counsel for the President objecting to the letter of the President of the 10th of February, 1868, being admitted as evidence unless the letters therein referred to be also produced,

The Chief Justice directed the counsel for the President to reduce their objection to writing.

Thereupon,

The counsel for the President submitted their objection, as follows:

The counsel of the President object that the letter is not evidence in the case unless the honorable managers shall also read the inclosures therein referred to, and by the letter made part of the same.

After argument by the managers against the objection of the counsel for the respondent, and by the counsel in support of their objection,

Mr. Conkling submitted the following question to the counsel for the President:

The counsel for the respondent will please read the words in the letter relied upon touching inclosures; and

The counsel for the President having read the portion of the letter as requested,

The Chief Justice submitted the question to the Senate, Shall the objection of the counsel for the President to the evidence proposed to be offered be sustained?

It was determined in the negative—

Yeas	20
Nays	29

On motion by Mr. Conness,

The yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are,

Messrs. Bayard, Conkling, Davis, Dixon, Doolittle, Fowler, Grimes, Henderson, Hendricks, Johnson, McCreery, Morrill of Vermont, Norton, Patterson of Tennessee, Ross, Sprague, Trumbull, Van Winkle, Vickers, Willey.

Those who voted in the negative are,

Messrs. Anthony, Buckalew, Cameron, Cattell, Chandler, Cole, Conness, Corbett, Cragin, Drake, Edmunds, Ferry, Fessenden, Frelinghuysen, Howard, Howe, Morgan, Morrill of Maine, Nye, Patterson of New Hampshire, Pomeroy, Ramsey, Sherman, Stewart, Sumner, Thayer, Tipton, Williams, Wilson.

So the objection of the counsel for the respondent was overruled; and it was decided by the Senate that the evidence be admitted.

Mr. Wilson, on the part of the managers, then offered in further evidence the following; which was read and admitted:

1. A copy of a letter from the President to Bvt. Maj. Gen. Lorenzo Thomas, stating that Hon. Edwin M. Stanton having been removed from the office as Secretary of War, he authorized and empowered him to act as Secretary of War ad interim.

2. A copy of a letter from the President to Hon. Edwin M. Stanton, removing him from the office of Secretary of War, and directing him to transfer to Bvt. Maj. Gen. Lorenzo Thomas all records, books, papers, and other public property.

3. An official copy of General Orders, No. 17, dated War Department, Adjutant General's Office, Washington, March 14, 1867.

George W. Wallace, a witness on the part of the United States, was then called; and being duly sworn, was examined by the managers.

On motion by Mr. Drake, at half past 2 o'clock p.m., the Senate took a recess for 10 minutes; at the expiration of which

Mr. Wilson, on behalf of the managers, offered in evidence an order of Gen. Grant, dated February 14, 1868, directing Gen. Lorenzo Thomas to resume his duties as Adjutant General of Army.

William E. Chandler, a witness on the part of the United States, was then called and sworn; and while under examination by the managers touching the appointment of Edmund Cooper as Assistant Secretary of the Treasury,

The counsel for the President requested the managers to state what they proposed to prove by the witness, and objected to his testimony; and,

After argument by the managers and by the counsel for the President,

Mr. Butler, on behalf of the managers, submitted the following:

We offer to prove that after the President had determined on the removal of Mr. Stanton, Secretary of War, in spite of the action of the Senate, there being no vacancy in the office of Assistant Secretary of the Treasury, the President unlawfully appointed his friend and theretofore private secretary, Edmund Cooper, to that position, as one of the means by which he intended to defeat the tenure-of-civil-office act, and other laws of Congress.

Mr. Evarts, on the part of the counsel for the President, objected to the evidence as not relevant to any of the articles of impeachment against the President.

Mr. Sherman submitted the following question to the managers:

Will the managers read the particular clauses of the eighth and eleventh articles, to prove which this testimony is offered?

Whereupon,

Mr. Butler, on the part of the managers, read portions of the eighth and eleventh articles of impeachment, to prove which the testimony was offered.

Mr. Johnson submitted the following question to the managers:

The managers are requested to say whether they propose to show that Cooper was appointed by the President in November, 1867, as a means to obtain the unlawful possession of the public money other than by the appointment itself.

To which question Mr. Butler responded that the managers proposed to show that the President appointed Mr. Cooper, and that he entered upon the duties of Assistant Secretary before his appointment could be legal; and to show that he had been controlling other public moneys since.

Mr. Cameron proposed the following interrogatory to the witness:

Can the Assistant Secretary of the Treasury, under the law, draw warrants for the payment of money by the Treasurer without the direction of the Secretary of the Treasury?

The witness having made answer,

Mr. Fessenden proposed the following interrogatories to the witness:

Has it been the practice, since the passage of the law, for an Assistant Secretary to sign warrants unless specially appointed and authorized by the Secretary of the Treasury?

Has any Assistant Secretary been authorized to sign any warrants except such as are specified in the act?

The witness having made answer.

The Chief Justice submitted the question to the Senate:

Shall the evidence proposed to be offered on the part of the managers be admitted?

It was determined in the negative.

Yeas	22
Nays	27

On motion by Mr. Howard,

The yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are,

Messrs. Anthony, Cameron, Cattell, Chandler, Cole, Conkling, Corbett, Cragin, Drake, Howard, Howe, Morgan, Morrill of Vermont, Nye, Pomeroy, Ramsey, Ross, Sprague, Sumner, Thayer, Tipton, Wilson.

Those who voted in the negative are,

Messrs. Bayard, Buskalew, Conness, Davis, Dixon, Doolittle, Edmunds, Ferry, Fessenden, Fowler, Frelinghuysen, Grimes, Henderson, Hendricks, Johnson, McCreery, Morrill of Maine, Norton, Patterson of New Hampshire, Patterson of Tennessee, Sherman, Stewart, Trumbull, Van Winkle, Vickers, Willey, Williams.

So the Senate decided that the evidence proposed to be offered by the managers be not admitted.

Charles A. Tinker, a witness on the part of the United States, was then called and sworn; and while undergoing examination by Mr. Butler, on the part of the managers,

The counsel for the President objected to the testimony as not being relevant to any of the articles of impeachment against the President.

Thereupon,

Mr. Butler, on behalf of the managers, submitted the following:

The managers offer, in support of the several accusations of the House of Representatives, the telegraphic messages of Lewis E. Parsons and Andrew Johnson in answer thereto, in the words and figures following, that is to say:

MONTGOMERY, ALA., *January 17, 1867.*

His Excellency ANDREW JOHNSON, *President:*

Legislature in session. Efforts making to reconsider vote constitutional amendment. Reports from Washington say it is probable an enabling act will pass. We do not know what to believe. I find nothing here.

LEWIS E. PARSONS, *Exchange Hotel.*

[By United States Military Telegraph.]

EXECUTIVE OFFICE,
Washington, D.C., January 17, 1867.

To Hon. LEWIS E. PARSONS, *Montgomery, Ala.:*

What possible good can be attained by reconsidering the constitutional amendment? I know of none in the present posture of affairs; I do not believe that the people of the whole country will sustain any set of individuals in attempts to change the whole character of our Government by enabling acts or otherwise. I believe, on the contrary, that they will eventually uphold all who have patriotism and courage to stand by the Constitution and who place their confidence in the people. There should be no faltering on the part of those who are honest in their determination to sustain the several coordinate departments of the Government in accordance with its original design.

ANDREW JOHNSON.

Mr. Howard submitted the following question to the managers:

What amendment of the Constitution is referred to in Mr. Parson's dispatch?

To which Mr. Butler answered:

The amendment commonly known as the fourteenth article of the Constitution.

The Chief Justice then submitted the question to the Senate,

Shall the evidence proposed to be offered on the part of the managers be admitted?

It was determined in the affirmative.....{Nays 17
{Yeas 27

On motion by Mr. Drake,

The yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are,

Messrs. Anthony, Cameron, Cattell, Chandler, Cole, Conkling, Conness, Corbett, Cragin, Drake, Henderson, Howard, Morgan, Morrill of Vermont, Nye, Patterson of New Hampshire, Pomeroy, Ramsey, Ross, Sherman, Sprague, Stewart, Sumner, Thayer, Tipton, Willey, Wilson.

Those who voted in the negative are,

Messrs. Buckalew, Davis, Dixon, Doolittle, Edmunds, Ferry, Fessenden, Fowler, Frelinghuysen, McCreery, Morrill of Maine, Norton, Patterson of Tennessee, Trumbull, Van Winkle, Vickers, Williams.

So the Senate decided that the evidence proposed to be offered by the managers be admitted.

On motion by Mr. Doolittle, at 5 o'clock p.m., that the Senate, sitting on the trial of the President upon articles of impeachment, adjourn,

The yeas were 22 and the nays were 22.

On motion by Mr. Conness,

The yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are,

Messrs. Anthony, Buckalew, Cameron, Corbett, Cragin, Davis, Dixon, Doolittle, Fowler, Frelinghuysen, Henderson, McCreery, Morrill of Vermont, Norton, Patterson of Tennessee, Ramsey, Sprague, Tipton, Trumbull, Van Winkle, Vickers, Willey.

Those who voted in the negative are,

Messrs. Cattell, Chandler, Cole, Conkling, Conness, Drake, Edmunds, Fessenden, Howard, Howe, Morgan, Morrill of Maine, Nye, Patterson of New Hampshire, Pomeroy, Ross, Sherman, Stewart, Sumner, Thayer, Williams, Wilson.

The Senate being equally divided,

The Chief Justice voted in the affirmative,

So the motion of Mr. Doolittle was agreed to; and

The Senate, sitting for the trial of the President upon articles of impeachment, adjourned until 12 o'clock m. to-morrow.

FRIDAY, APRIL 3, 1868.

The United States *v.* Andrew Johnson, President.

At 12 o'clock m. the Chief Justice of the United States entered the Senate Chamber and resumed the chair; and

The Sergeant at Arms having made proclamation,

The managers appointed to conduct the trial of the President of the United States upon articles of impeachment exhibited against him by the House of Representatives, to wit, Mr. Bingham, Mr. Boutwell, Mr. James F. Wilson, Mr. Butler, Mr. Thomas Williams, Mr. Logan, and Mr. Thaddeus Stevens, entered the Senate Chamber and took the seats assigned them.

The Sergeant at Arms announced the presence at the door of the Senate Chamber of the House of Representatives; and

The House of Representatives, as in Committee of the Whole House, preceded by its chairman, Mr. Elihu B. Washburne, and accompanied by its Speaker and Clerk, entered the Senate Chamber and took the seats provided for them.

The counsel for the President, to wit, Mr. Stanberry, Mr. Curtis, Mr. Evarts, Mr. Nelson, and Mr. Groesbeck, appeared at the bar of the Senate and took the seats assigned them.

The Journal of proceedings of the Senate, sitting for the trial of the President upon articles of impeachment, of yesterday was read.

On motion by Mr. Drake,

The Senate proceeded to consider the amendment submitted by him yesterday to the rules of the Senate sitting for the trial of impeachment; and

The amendment, having been modified by Mr. Drake, was agreed to, as follows, viz:

Insert at the end of rule 7 the following: "Upon all such questions the vote shall be without a division, unless the yeas and nays be demanded by one-fifth of the members present, when the same shall be taken."

On motion by Mr. Drake,

Ordered, That the rules, as amended, be printed.

The Chief Justice requested the managers on the part of the House of Representatives to proceed with their evidence.

Mr. Manager Butler submitted, as further evidence in support of the articles of impeachment, a copy of a message from the President of the United States, dated June 22, 1866, communicating to the Senate a report of the Secretary of State showing the proceedings under a concurrent resolution of the two Houses of Congress of the 13th instant, requesting the President to submit to the legislatures of the States an additional article to the Constitution of the United States, known as the 14th article; which was read.

Charles A. Tinker, a witness on the part of the United States, was recalled and permitted to correct the testimony yesterday given by him.

James B. Sheridan, a witness on the part of the United States, was called, and being duly sworn, was examined by the managers and cross-examined by the counsel for the President.

James O. Clephane, a witness on the part of the United States, was called, and being duly sworn, was examined by the managers and cross-examined by the counsel for the President.

Charles A. Tinker was again recalled and further examined by the managers.

James B. Sheridan, a witness on the part of the United States, was then recalled and further examined by the managers.

Francis H. Smith, a witness on the part of the United States, was called, and being duly sworn, was examined by the managers and cross-examined by the counsel for the President.

James O. Clephane was here recalled and further examined by the managers and cross-examined by the counsel for the President.

William G. Moore, a witness on the part of the United States, was called, and being duly sworn, was examined by the managers.

On motion by Mr. Tipton, the Senate took a recess for 15 minutes, at the expiration of which,

On motion by Mr. Grimes, that when the Senate, sitting for the trial of the impeachment, adjourn, it be to Monday next at 12 o'clock m.,

It was determined in the negative ..... { Yeas ---- 19 / Nays ---- 28

On motion by Mr. Drake,

The yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are,

Messrs. Buckalew, Corbett, Davis, Dixon, Fessenden, Fowler, Grimes, Henderson, Hendricks, Johnson, McCreery, Norton, Patterson of Tennessee, Ramsey, Saulsbury, Trumbull, Van Winkle, Vickers, Wilson.

Those who voted in the negative are,

Messrs. Anthony, Cameron, Cattell, Chandler, Cole, Conkling, Conness, Cragin, Drake, Edmunds, Ferry, Frelinghuysen, Howard, Howe, Morgan, Morrill of Maine, Morrill of Vermont, Nye, Patterson of New Hampshire, Pomeroy, Ross, Sprague, Stewart, Sumner, Thayer, Tipton, Willey, Williams.

So the motion was not agreed to.

Mr. Manager Butler submitted, as further evidence in support of the articles of impeachment:

1. A report of the speech of the President of the United States on the 18th of August, 1866, at the Executive Mansion, in Washington, as reported by Francis H. Smith;

2. A report of the same speech, as reported by James B. Sheridan and corrected by William G. Moore, private secretary of the President;

Which papers were admitted in evidence.

William N. Hudson, a witness on the part of the United States, was called, and being duly sworn, was examined by the managers and cross-examined by the counsel for the President.

Mr. Grimes proposed the following question to the witness:

I desire the witness to specify the particular part of the report as published which was supplied by the reporter, Johnson.

The witness having made answer.

Daniel C. McEwen, a witness on the part of the United States, was called, and being duly sworn, was examined by the managers and cross-examined by the counsel for the President.

Everett D. Stark, a witness on the part of the United States, was called, and being duly sworn, was examined by the managers and cross-examined by the counsel for the President.

Mr. Manager Butler offered in evidence a newspaper called the Cleveland Leader, published on the 4th of September, 1866, containing a report of a speech made by the President at Cleveland, Ohio, on the 3d of September, 1866.

Mr. Evarts, on the part of the counsel for the President, objected to the admission of the evidence offered by the managers.

After argument by the counsel for the President in support of the objection, and by the managers against it.

The Chief Justice stated that it appeared from the testimony of the witness that the report of the speech testified to by him had been made by him in part from the notes of another person, which notes were not produced, nor is the person who made them produced as a witness. Under the circumstances the Chief Justice is of the opinion that the paper is inadmissible as evidence.

Mr. Drake asked that the question of the admissibility of the evidence be submitted to the Senate.

It was so submitted by the Chief Justice; and

On the question, Shall the newspaper report offered by the managers and objected to by the counsel for the President be admitted in evidence?

It was determined in the affirmative.....{Yeas ..... 35 / Nays 11

On motion by Mr. Drake,

The yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are,

Messrs. Anthony, Cameron, Cattell, Chandler, Cole, Conkling, Conness, Corbett, Cragin, Drake, Edmunds, Ferry, Fessenden, Frelinghuysen, Henderson, Howard, Johnson, Morgan, Morrill of Maine, Morrill of Vermont, Norton, Nye, Patterson of New Hampshire, Pomeroy, Ramsey, Ross, Sherman, Sprague, Stewart, Sumner, Thayer, Tipton, Van Winkle, Willey, Williams.

Those who voted in the negative are,

Messrs. Buckalew, Davis, Dixon, Doolittle, Fowler, Hendricks, Howe, McCreery, Patterson of Tennessee, Trumbull, Vickers.

So the Senate decided that the paper offered by the managers be admitted in evidence.

Mr. Manager Butler offered in further evidence a report of the speech made by the President at Cleveland, Ohio, on the 3d of September, 1866, as reported by Daniel C. McEwen.

Mr. Manager Butler offered in further evidence a newspaper called the Cleveland Herald, published on the 4th of September, 1866, containing a report of a speech made by the President at Cleveland, Ohio, on the 3d of September, 1866.

On motion by Mr. Fessenden that when the Senate, sitting for the trial of the impeachment, adjourn, it to be Monday next at 12 o'clock m.,

It was determined in the affirmative ..... {Yeas ---- 16 / Nays ---- 29}

On motion by Mr. Drake,

The yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are,

Messrs. Buckalew, Corbett, Davis, Dixon, Doolittle, Fessenden, Fowler, Henderson, Johnson, McCreery, Norton, Nye, Patterson of Tennessee, Trumbull, Van Winkle, Vickers.

Those who voted in the negative are,

Messrs. Anthony, Cameron, Cattell, Chandler, Cole, Conkling, Conness, Cragin, Drake, Edmunds, Ferry, Frelinghuysen, Hendricks, Howard, Howe, Morgan, Morrill of Maine, Morrill of Vermont, Patterson of New Hampshire, Pomeroy, Ross, Sherman, Sprague, Stewart, Sumner, Thayer, Tipton, Willey, Williams.

So the motion was not agreed to; and.

On motion by Mr. Edmunds, at 5 o'clock p.m., the Senate, sitting for the trial of the President upon articles of impeachment, adjourned until tomorrow at 12 o'clock m.

SATURDAY, APRIL 4, 1868.

The United States *v.* Andrew Johnson, President.

At 12 o'clock m. the Chief Justice of the United States entered the Senate Chamber and resumed the chair; and

The Sergeant at Arms having made proclamation,

The managers appointed to conduct the trial of the President of the United States upon articles of impeachment exhibited against him by the House of Representatives, to wit, Mr. Bingham, Mr. Boutwell, Mr. James F. Wilson, Mr. Butler, Mr. Thomas Williams, Mr. Logan, and Mr. Thaddeus Stevens, entered the Senate Chamber and took the seat assigned them.

The Sergeant at Arms announced the presence at the door of the Senate Chamber of the House of Representatives; and

The House of Representatives, as in Committee of the Whole House, preceded by its Chairman, Mr. Elihu B. Washburne, and

accompanied by its Speaker and Clerk, entered the Senate Chamber, and took the seats provided for them.

The counsel for the President, to wit: Mr. Stanbery, Mr. Curtis, Mr. Evarts, Mr. Nelson, and Mr. Groesbeck, appeared at the bar of the Senate and took the seats assigned them.

The Journal of the proceedings of the Senate, sitting for the trial of the President upon articles of impeachment, of yesterday was read.

The Chief Justice then requested the managers on the part of the House of Representatives to proceed with their evidence.

L. L. Walbridge, a witness on the part of the United States, was called, and, being duly sworn, was examined by the managers and cross-examined by the counsel for the President.

Mr. Manager Butler offered in further evidence a newspaper called the Missouri Democrat, published at the city of St. Louis, September 9, 1866, containing a report of a speech made by the President at St. Louis, Mo., September 8, 1866; which was read and admitted.

Joseph A. Dare, a witness on the part of the United States, was called, and, being duly sworn, was examined by the managers and cross-examined by the counsel for the President.

Mr. Manager Butler offered in further evidence a manuscript report of a speech made by the President at the city of St. Louis, Mo., September 8, 1866, as reported and written out by Joseph A. Dare for the St. Louis Times; which was read and admitted.

Robert S. Chew, a witness on the part of the United States, was called, and being duly sworn, and while under examination by the managers, a question was propounded to him by Mr. Manager Butler, to which the counsel for the President objected; and

The Chief Justice directed the managers to reduce their question to writing; and

The question being reduced to writing, was read as follows:

Whether any of the letters of authority which you have mentioned came from the Secretary of State, or from what other officer.

The Chief Justice overruled the objection of the counsel; but directed the witness, in answering the question, not to state who signed the letters; and

The witness having made answer, was then cross-examined by the counsel for the President.

Mr. Manager Butler then offered in further evidence various blank forms of commissions used by the Department of State, antecedent and subsequent to the passage of the act of March 2, 1867, regulating the tenure of certain civil offices, in issuing commissions to certain public officers;

Also, a letter of the Secretary of State to the Hon. John A. Bingham, chairman of the managers of the impeachment on the part of the House of Representatives, inclosing schedules of removals and appointments of heads of departments by the President without the advice and consent of the Senate during the sessions of the Senate; which papers were admitted in evidence.

On motion of Mr. Conness, at 2 o'clock and 50 minutes, the Senate took a recess for 15 minutes; at the expiration of which,

Charles E. Creecy, a witness on the part of the United States, was recalled and examined by the managers.

Mr. Manager Bingham offered in further evidence a certified copy of the message of the President of the United States of December 17, 1867, communicating to the Senate, in executive session, copies of correspondence in relation to the suspension of Charles Lee Moses from the duties of consul at Brunai, Borneo, with the evidence and reasons for such suspension, from which the injunction of secrecy had been removed.

Also a certified copy of the message of the President of the United States of December 16, 1867, communicating a letter from the Secretary of the Treasury in relation to the suspension of John H. Patterson from the office of assessor of internal revenue for the fourth district of Virginia, with the evidence and reasons for such suspension, from which the injunction of secrecy had been removed;

Also, a certified copy of the message of the President of the United States of December 16, 1867, communicating correspondence from the Secretary of the Treasury in relation to the suspension of John H. Anderson from the office of collector of internal revenue for the fourth district of Virginia, with the evidence and reasons for such suspension, from which the injunction of secrecy had been removed;

Also, a certified copy of the message of the President of the United States of January 13, 1868, communicating correspondence from the Secretary of the Treasury in relation to the suspension of Charles H. Hopkins from the office of assessor of internal revenue for the first district of Georgia, with the evidence and reasons for such suspension, from which the injunction of secrecy had been removed;

Also, a certified copy of the message of the President of the United States of December 19, 1867, communicating correspondence from the Postmaster General in relation to the suspension of John B. Lowry from the office of Postmaster at Danville, Va., with evidence and reasons for such suspension, from which the injunction of secrecy had been removed;

Also, a certified copy from the Executive Journal of the Senate, showing the action of the Senate on the message of the President of the United States in relation to the removal of Edwin M. Stanton from the office of Secretary of War, and the appointment of the Adjutant General of the Army to act as Secretary of War ad interim.

Mr. Manager Butler offered in further evidence a letter from the President to the Secretary of the Treasury, dated August 14, 1867, notifying him of the suspension Edwin M. Stanton from the office of Secretary of War, and the appointment of Gen. Ulysses S. Grant Secretary of War ad interim; and

The managers announced that they had for the present concluded their testimony, and that the case on the part of the House of Representatives was substantially closed.

Mr. Curtis, on behalf of the counsel for the President, requested that the counsel be allowed three days for the purpose of preparing and arranging the evidence which they proposed to offer on behalf of the President.

Whereupon,

A motion was made by Mr. Conness that the Senate, sitting for the trial of impeachment, adjourn to Wednesday next.

On motion by Mr. Johnson to amend the motion of Mr. Conness by striking out "Wednesday" and inserting "Thursday";

It was determined in the affirmative; and

On the question to agree to the motion of Mr. Conness as amended,

It was determined in the affirmative ..... {Yeas ____ 37 / Nays ____ 10

On motion by Mr. Sumner,

The yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are,

Messrs. Anthony, Bayard, Buckalew, Cattell, Conness, Corbet, Cragin, Davis, Dixon, Edmunds, Ferry, Fowler, Frelinghuysen, Grimes, Henderson, Hendricks, Howard, Howe, Johnson, McCreery, Morrill of Maine, Morrill of Vermont, Norton, Nye, Patterson of New Hampshire, Patterson of Tennessee, Ramsey, Ross, Saulsbury, Sherman, Sprague, Tipton, Trumbull, Van Winkle, Vickers, Wiley, Williams.

Those who voted in the negative are,

Messrs. Cameron, Chandler, Cole, Conkling, Drake, Morgan, Pomeroy, Stewart, Sumner, Thayer.

So the motion was agreed to; and

The Senate, sitting for the trial of the impeachment of the President, adjourned to Thursday next at 12 o'clock m.

THURSDAY, APRIL 9, 1868.

The United States *v.* Andrew Johnson, President.

At 12 o'clock m. the Chief Justice of the United States entered the Senate Chamber and resumed the chair; and

The Sergeant at Arms having made proclamation,

The managers appointed to conduct the trial of the President of the United States upon articles of impeachment exhibited against him by the House of Representatives, to wit, Mr. Bingham, Mr. Boutwell, Mr. James F. Wilson, Mr. Butler, Mr. Thomas Williams, Mr. Logan, and Mr. Thaddeus Stevens, entered the Senate Chamber and took the seats assigned them.

The Sergeant at Arms announced the presence at the door of the Senate Chamber of the House of Representatives; and

The House of Representatives, as in Committee of the Whole House, preceded by its Chairman, Mr. Elihu B. Washburne, and accompanied by its Speaker and Clerk, entered the Senate Chamber and took the seats provided for them.

The counsel for the President, to wit, Mr. Stanbery, Mr. Curtis, Mr. Evarts, Mr. Nelson, and Mr. Groesbeck, appeared at the bar of the Senate and took the seats assigned them.

The reading of the Journal of the proceedings of the Senate, sitting for the trial of the President upon articles of impeachment, of April 4 having been commenced by the Secretary,

On motion by Mr. Johnson, the further reading of the Journal was dispensed with.

The Chief Justice inquired of the managers if they had further evidence to produce; and

The managers replying that they had,

M. H. Wood, a witness on the part of the United States, was called; and being duly sworn, was examined by the managers and cross-examined by the counsel for the President, and further examined by the managers.

Foster Blodgett, a witness on the part of the United States, was called; and being duly sworn, was examined by the managers.

Mr. Manager Butler offered in further evidence:

First. The commission signed by the President, and dated the 25th day of July, 1865, issued to Foster Blodgett, appointing him deputy postmaster at Augusta, in the State of Georgia, during the pleasure of the President, for the time being and until the end of the next session of the Senate.

Second. The commission signed by the President, and dated the 27th day of July, 1866, issued to Foster Blodgett, appointing him deputy postmaster at Augusta, in the State of Georgia, for the term of four years from the date of the commission, unless the President should sooner revoke the commission.

Third. The letter of Lorenzo Thomas, Adjutant General of the Army, to the President of the United States stating that he had delivered the communication of the President to Hon. Edwin M. Stanton, removing him from the office of Secretary of War, and acknowledging the letter of the President authorizing and empowering him to act as Secretary of War ad interim and accepting said office.

Mr. Manager Butler than stated that the managers proposed to offer in evidence a certified extract from the records of the Senate, showing that no evidence exists therein of the suspension of Foster Blodgett from the office of deputy postmaster at Augusta, Ga.

The Chief Justice informed the managers that certificates to that effect, when obtained from the Senate, could be offered at any time.

Mr. Manager Butler here stated that the managers had now closed their evidence.

The Chief Justice then informed the counsel for the President that they could now proceed with the defense.

Whereupon

Mr. Curtis, of counsel for the President, rose and proceeded to address the Senate, setting forth the grounds of the defense of the President to the articles of impeachment exhibited against him by the House of Representatives, until 25 minutes past 2 o'clock p.m.; when,

On motion by Mr. Edmunds, the Senate took a recess for 15 minutes, at the expiration of which

The Chief Justice resumed the chair.

On motion by Mr. Morrill of Vermont, that the Senate, sitting for the trial of impeachment of the President, adjourn,

It was determined in the negative ---------- {Yeas ---- 2 / Nays ---- 35

On motion by Mr. Morrill of Vermont,

The yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are:

Messrs. McCreery, Patterson of Tennessee.

Those who voted in the negative are:

Messrs. Buckalew, Cattell, Chandler, Cole, Conkling, Corbett, Cragin, Davis, Dixon, Doolittle, Drake, Ferry, Fessenden, Frelinghuysen, Grimes, Henderson, Hendricks, Howard, Howe, Johnson, Morgan, Morrill of Maine, Morrill of Vermont, Morton, Pomeroy, Ross, Sherman, Stewart, Sumner, Thayer, Tipton, Van Wingle, Vickers, Willey, Yates.

So the Senate refused to adjourn; and

Thereupon

Mr. Curtis resumed his argument, and before concluding,

On motion by Mr. Johnson, at 17 minutes to 4 o'clock p.m., the Senate, sitting for the trial of the President upon articles of impeachment, adjourned to to-morrow at 12 o'clock m.

FRIDAY, APRIL 10, 1868.

The United States *v.* Andrew Johnson, President.

At 12 o'clock m. the Chief Justice of the United States entered the Senate Chamber and resumed the chair; and,

The Sergeant at Arms having made proclamation,

The managers appointed to conduct the trial of the President of the United States upon articles of impeachment exhibited against him by the House of Representatives to wit, Mr. Bingham, Mr. Boutwell, Mr. James F. Wilson, Mr. Butler, Mr. Thomas Williams, Mr. Logan, and Mr. Thaddeus Stevens, entered the Senate Chamber and took the seats assigned them.

The Sergeant at Arms announced the presence at the door of the Senate Chamber of the House of Representatives; and

The House of Representatives, as in Committee of the Whole House, preceded by its Chairman, Mr. Elihu B. Washburne, and accompanied by its Speaker and Clerk, entered the Senate Chamber and took the seats provided for them.

The counsel for the President, to wit, Mr. Stanbery, Mr. Curtis, Mr. Evarts, Mr. Nelson, and Mr. Groesbeck, appeared at the bar of the Senate and took the seats assigned them.

The journal of the proceedings of the Senate, sitting for the trial of the President upon articles of impeachment, for yesterday was read.

Mr. Curtis, of counsel for the President, resumed his argument, and having concluded the same,

On motion by Mr. Conness, at 2 o'clock and 20 minutes p.m., the Senate took a recess for 15 minutes; at the expiration of which

Lorenzo Thomas, a witness on the part of the President, was called and duly sworn; and while under examination by the counsel for the President, a letter signed by Edwin M. Stanton, and dated February 21, 1868, commanding him to abstain from issuing any order other than in his capacity as Adjutant General of the Army, was handed to the witness by Mr. Stanbery, with a request that he read the same; and

The witness having read the letter, a question was propounded to him by Stanbery, of counsel for the President, which was objected to by the managers.

After argument by the managers in support of the objection, and by the counsel for the President against the objection,

Mr. Manager Bingham requested that the question be reduced to writing.

By direction of the Chief Justice the counsel for the President reduced the question to writing, which was read by the Secretary, as follows:

What occurred between the President and yourself at that second interview on the 21st? and

After further argument by Mr. Manager Bingham,

The Chief Justice submitted the question to the Senate, to wit, Is the question admissible? and

It was determined in the affirmative { Yeas ---- 42 / Nays ---- 10 }

On motion by Mr. Drake,

The yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are,

Messrs. Anthony, Bayard, Bucklalew, Cattell, Cole, Conkling, Corbett, Davis, Dixon, Doolittle, Edmunds, Ferry, Fessenden, Fowler, Frelinghuysen, Grimes, Henderson, Hendricks, Howe, Johnson, McCreery, Morgan, Morrill of Maine, Morrill of Vermont, Morton, Norton, Patterson of New Hampshire, Patterson of Tennessee, Pomeroy, Ross, Sherman, Sprague, Stewart, Sumner, Tipton, Trumbull, Van Winkle, Vickers, Willey, Williams, Wilson, Yates.

Those who voted in the negative are,

Messrs. Cameron, Chandler, Conness, Cragin, Drake, Harlan, Howard, Nye, Ramsey, Thayer.

So the Senate determined that the question was admissible; and

The question was then put to the witness, who made answer thereto.

During further examination by the counsel for the President, a question was proposed to the witness, which was objected to by the managers; and

After argument by the managers in support of the objection and by counsel against the objection,

The Chief Justice directed counsel for the President to reduce their question to writing; and

The question having been reduced to writing, it was read by the Secretary, as follows:

Did the President at any time prior to or including the 9th of March authorize or direct you to use force, intimidation, or threats to get possession of the War Office?

The Chief Justice submitted the question to the Senate, to wit, Is the question admissible? and

It was determined in the affirmative; and

The witness having made answer to the question,

After further examination by the counsel for the President, and while under cross-examination by the managers,

On motion by Mr. Henderson, at 5 o'clock and 20 minutes p.m., the Senate, sitting for the trial of the President upon articles of impeachment, adjourned to to-morrow at 12 o'clock m.

SATURDAY, APRIL 11, 1868.

The United States *v.* Andrew Johnson, President.

At 12 o'clock m. the Chief Justice of the United States entered the Senate Chamber and resumed the chair; and

The Sergeant at Arms having made proclamation,

The managers appointed to conduct the trial of the President of the United States upon articles of impeachment exhibited against him by the House of Representatives, to wit, Mr. Bingham, Mr. Boutwell, Mr. James F. Wilson, Mr. Butler, Mr. Thomas Williams, Mr. Logan, and Mr. Thaddeus Stevens, entered the Senate Chamber and took the seats assigned them.

The Sergeant at Arms announced the presence at the door of the Senate Chamber of the House of Representatives; and

The House of Representatives, as in Committee of the Whole House, preceded by its Chairman, Mr. Elihu B. Washburne, and accompanied by its Speaker and Clerk, entered the Senate Chamber and took the seats provided for them.

The counsel for the President, to wit, Mr. Stanbery, Mr. Curtis, Mr. Evarts, Mr. Nelson, and Mr. Groesbeck, appeared at the bar of the Senate and took the seats assigned them.

The journal of the proceedings of the Senate, sitting for the trial of the President upon articles of impeachment, of yesterday was read.

Mr. Manager Bingham asked that the twenty-first rule be so amended as to allow such of the managers as may desire to be heard, and also such of the counsel for the President as desire to be heard, to speak on the final argument, subject to the provision of the rule that the final argument shall be opened and closed by the managers on the part of the House.

Whereupon,

Mr. Frelinghuysen submitted the following motion for consideration:

Ordered, That as many of the managers and of the counsel for the President be permitted to speak on the final argument as shall choose to do so.

Objection being made to the consideration of the motion at this time,

The Chief Justice directed the counsel for the President to proceed with their evidence.

The examination of Lorenzo Thomas, a witness on the part of the President, was then resumed; and the witness, having been permitted to explain a portion of his testimony yesterday, was further cross-examined by the managers and further examined by the counsel for the President.

William T. Sherman, a witness on the part of the President, was then called and sworn, and while under examination by the counsel for the President, a question was proposed to the witness by Mr. Stanbery, which was objected to by the managers.

By direction of the Chief Justice the counsel for the President reduced the question to writing, which was read by the Secretary, as follows:

In that interview what conversation took place between the President and you in regard to the removal of Mr. Stanton?

The Chief Justice stated that he thought the question admissible under previous rulings of the Senate, but would submit the question to the Senate if any Senator desired it; and

After argument by the counsel for the President in favor of the admissibility of the question, and by the managers against it,

On motion by Mr. Sprague, at 20 minutes before 3 o'clock p.m., the Senate took a recess for 15 minutes; at the expiration of which,

After further argument by the managers against the admissibility of the question,

The Chief Justice expressed the opinion that the question now proposed was admissible within the vote of the Senate yesterday, and would state, briefly, the grounds of that opinion. The question yesterday had reference to a conversation between the President and Gen. Thomas after the note addressed to Mr. Stanton was written and delivered, and the Senate held it admissible. The question to-day has reference to a conversation relating to the same subject matter, between the President and Gen. Sherman, which occurred before the note of removal was written and delivered. Both questions are asked for the purpose of proving the intent of the President in the attempt to remove Mr. Stanton.

The Chief Justice thinks that proof of a conversation shortly before a transaction is better evidence of the intent of an actor in it than proof of a conversation after the transaction.

The Chief Justice then submitted the question to the Senate, to wit, Is the question admissible?

It was determined in the negative.

Yeas	23
Nays	28

On motion by Mr. Conness,

The yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are,

Messrs. Anthony, Bayard, Buckalew, Cole, Davis, Dixon, Doolittle, Fessenden, Fowler, Grimes, Hendricks, Johnson, McCreery, Morgan, Norton, Patterson of Tennessee, Ross, Sprague, Sumner, Trumbull, Van Winkle, Vickers, Willey.

Those who voted in the negative are,

Messrs. Cameron, Cattell, Chandler, Conkling, Conness, Corbett, Cragin, Drake, Edmunds, Ferry, Frelinghuysen, Harlan, Henderson, Howard, Morrill of Maine, Morrill of Vermont, Morton, Nye, Patterson of New Hampshire, Pomeroy, Ramsey, Sherman, Stewart, Thayer, Tipton, Williams, Wilson, Yates.

So the Senate decided the question to be admissible; and

The counsel for the President then propounded an interrogatory to the witness, which, being objected to by the managers, was, by direction of the Chief Justice, reduced to writing and read as follows:

What do you know about the creation of the Department of the Atlantic?

The Chief Justice submitted the question to the Senate, to wit, Is the question admissible? and

It was determined in the negative.

The counsel for the President then proposed to the witness the following question; to which objection was made by the managers:

Did the President make any application to you respecting your acceptance of the duties of Secretary of War ad interim?

After argument by counsel in favor of the admissibility of the question, and by the managers against it,

The Chief Justice submitted the question to the Senate, to wit, Is the question admissible?

It was determined in the affirmative; and

The witness having made answer to the question, the counsel for the President proposed to the witness the following questions, to which objection was made by the managers:

At the first interview at which the tender of the duties of the Secretary of War ad interim was made to you by the President, did anything further pass between you and the President in reference to the tender or your acceptance of it?

After argument by counsel in favor of the admissibility of the question, and by the managers against it,

The Chief Justice submitted the question to the Senate, to wit, Is the question admissible?

It was determined in the negative ..... {Yeas ____ 23 / Nays ____ 29}

On motion by Mr. Drake,

The yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are,

Messrs. Anthony, Bayard, Buckalew, Cole, Davis, Dixon, Doolittle, Fessenden, Fowler, Grimes, Hendricks, Johnson, McCreery, Morgan, Patterson of Tennessee, Ross, Sprague, Sumner, Trumbull, Van Winkle, Vickers, Willey.

Those who voted in the negative are,

Messrs. Cameron, Cattell, Chandler, Conkling, Conness, Corbett, Cragin, Drake, Edmunds, Ferry, Frelinghuysen, Harlan, Henderson, Howard, Howe, Morrill of Maine, Morrill of Vermont, Morton, Patterson of New Hampshire, Pomeroy, Ramsey, Sherman, Stewart, Thayer, Tipton, Williams, Wilson, Yates.

So the Senate decided the question to be inadmissible.

The counsel for the President then proposed the following question to the witness:

In either of those conversations did the President say to you that his object in appointing you was that he might thus get the question of Mr. Stanton's right to the office before the Supreme Court? and

The managers having objected to the question,

The Chief Justice submitted the question to the Senate, to wit, Is the question admissible? and

It was determined in the negative ..... {Yeas ____ 7 / Nays ____ 44}

On motion by Mr. Howard,

The yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are,

Messrs. Anthony, Bayard, Fowler, McCreery, Patterson of Tennessee, Ross, Vickers.

Those who voted in the negative are,

Messrs. Buckalew, Cameron, Cattell, Chandler, Cole, Conkling, Conness, Corbett, Cragin, Davis, Dixon, Doolittle, Drake, Edmunds, Ferry, Fessenden, Frelinghuysen, Grimes, Harlan, Henderson, Hendricks, Howard, Howe, Johnson, Morgan, Morrill of Maine, Morrill of Vermont, Morton, Norton, Nye, Patterson of New Hampshire, Pomeroy, Ramsey, Sherman, Sprague, Stewart, Thayer, Tipton, Trumbull, Van Winkle, Willey, Williams, Wilson, Yates.

So the Senate decided the question to be inadmissible.

The counsel for the President then proposed the following question to the witness:

Was anything said at either of those interviews by the President as to any purpose of getting the question of Mr. Stanton's right to the office before the courts?

The managers having objected to the question,

After argument by the managers in support of the objection, and by the counsel of the President against it,

The Chief Justice submitted the question to the Senate, to wit, Is the question admissible? and

It was determined in the negative.

Mr. Henderson proposed the following question to the witness:

Did the President in tendering you the office of Secretary of War ad interim express the object or purpose of so doing?

The managers having objected to the question,

The Chief Justice submitted the question to the Senate, to wit, Is the question admissible?

It was determined in the negative ..... {Yeas ____ 25 / Nays ____ 27}

On motion by Mr. Thayer,

The yeas and nays being desired by one-fifth of the Senators present.

Those who voted in the affirmative are,

Messrs. Anthony, Bayard, Buckalew, Davis, Dixon, Doolittle, Fessenden, Fowler, Grimes, Henderson, Hendricks, Johnson, McCreery, Morrill of Maine, Morton, Norton, Patterson of Tennessee, Ross, Sherman, Sprague, Sumner, Trumbull, Van Winkle, Vickers, Willey.

Those who voted in the negative are,

Messrs. Cameron, Cattell, Chandler, Cole, Conkling, Conness, Corbett, Cragin, Drake, Edmunds, Ferry, Frelinghuysen, Harlan, Howard, Howe, Morgan, Morrill of Vermont, Nye, Patterson of New Hampshire Pomeroy, Ramsey, Stewart, Thayer, Tipton, Williams, Wilson, Yates.

So the Senate decided the question to be inadmissible.

On motion by Mr. Trumbull, at 4 o'clock and 30 minutes p.m., that the Senate sitting for the trial of the President upon articles of impeachment, adjourn,

It was determined in the negative ..... {Yeas ____ 25 / Nays ____ 27}

On motion of Mr. Stewart,

The yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are,

Messrs. Bayard, Buckalew, Cameron, Cattell, Corbett, Davis, Dixon, Doolittle, Fessenden, Fowler, Frelinghuysen, Grimes, Henderson, Hendricks, Howe, Johnson, McCreery, Morton, Norton, Patterson of Tennessee, Ramsey, Sprague, Trumbull, Van Winkle, Vickers.

Those who voted in the negative are,

Messrs. Anthony, Chandler, Cole, Conkling, Conness, Cragin, Drake, Edmunds, Ferry, Harlan, Howard, Morgan, Morrill of Maine,

Morrill of Vermont, Nye, Patterson of New Hampshire, Pomeroy, Ross, Sherman, Stewart, Sumner, Thayer, Tipton, Willey, Williams, Wilson, Yates.

So the Senate refused to adjourn.

The counsel for the President then proposed the following question to the witness:

At either of those interviews was anything said in reference to the use of threats, intimidation, or force to get possession of the War Office, or the contrary?

The managers having objected to the question,

The Chief Justice submitted the question to the Senate, to wit: Is the question admissible?

It was determined in the negative,

On motion by Mr. Anthony, at 4 o'clock and 40 minutes p.m., that the Senate adjourn,

It was determined in the negative ..... {Yeas ..... 20 / Nays ..... 32}

On motion by Mr. Drake,

The yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are,

Messrs. Anthony, Bayard, Buckalew, Davis, Dixon, Doolittle, Edmunds, Fowler, Grimes, Henderson, Hendricks, Howe, Johnson, McCreery, Morton, Norton, Patterson of Tennessee, Trumbull, Van Winkle, Vickers.

Those who voted in the negative are,

Messrs. Cameron, Cattell, Chandler, Cole, Conkling, Conness, Corbett, Cragin, Drake, Ferry, Fessenden, Frelinghuysen, Harlan, Howard, Morgan, Morrill of Maine, Morrill of Vermont, Nye, Patterson of New Hampshire, Pomeroy, Ramsey, Ross, Sherman, Sprague, Stewart, Sumner, Thayer, Tipton, Willey, Williams, Wilson, Yates.

So the Senate refused to adjourn.

The Chief Justice inquired of the counsel for the President if they had any further question to propose to the witness.

Mr. Stanbery, of counsel, replied that they had no further question to propose at the present time, but desired to have the witness recalled on Monday next; and

On motion by Mr. Stewart, at 15 minutes before 5 o'clock p.m.,

The Senate, sitting for the trial of the President upon articles of impeachment, adjourned.

MONDAY, APRIL 13, 1868.

The United States *v.* Andrew Johnson, President.

At 12 o'clock m. the Chief Justice of the United States entered the Senate Chamber and resumed the chair; and

The Sergeant at Arms having made proclamation,

The managers appointed to conduct the trial of the President of the United States upon articles of impeachment exhibited against him by the House of Representatives, to wit, Mr. Bingham, Mr. Boutwell, Mr. James F. Wilson, Mr. Butler, Mr. Thomas Williams, Mr. Logan, and Mr. Thaddeus Stevens, entered the Senate Chamber and took the seats assigned them.

The Sergeant at Arms announced the presence, at the door of the Senate Chamber, of the House of Representatives; and

The House of Representatives, as in Committee of the Whole House, preceded by its Chairman, Mr. Elihu B. Washburne, and accompanied by its Speaker and Clerk, entered the Senate Chamber and took the seats provided for them.

The counsel for the President, to wit: Mr. Stanbery, Mr. Curtis, Mr. Evarts, Mr. Nelson, and Mr. Groesbeck, appeared at the bar of the Senate and took the seats assigned them.

The reading of the journal of the proceedings of the Senate sitting for the trial of the President upon articles of impeachment of Saturday having been commenced by the Secretary,

On motion of Mr. Stewart,

The further reading thereof was dispensed with.

The Chief Justice stated that the motion submitted by Mr. Frelinghuysen, on Saturday, to remove the limit fixed by the 21st rule as to the number of persons who may participate in the final argument of the cause, would now be considered unless objected to; and

The Senate proceeded to consider the said motion.

On motion by Mr. Sumner to amend the motion by inserting at the end thereof the following proviso:

Provided, That the trial shall proceed without any further delay or postponement of this account.

Mr. Frelinghuysen accepted the amendment proposed by Mr. Sumner, and further modified his motion to read as follows:

Ordered, That as many of the managers and of the counsel for the President be permitted to speak on the final argument as shall choose to do so: *Provided*, That the trial shall proceed without any further delay or postponement on this account: *And provided further*, That only one manager shall be heard in the close.

On motion by Mr. Sumner to amend the motion of Mr. Frelinghuysen by striking out the last clause of the proviso and inserting in lieu thereof:

That according to the practice in cases of impeachment the several managers who speak shall close.

After argument,

On motion by Mr. Williams that the motion of Mr. Frelinghuysen lie on the table.

It was determined in the affirmative.

Yeas	38
Nays	10

On motion by Mr. Williams,

The yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are,

Messrs. Buckalew, Cameron, Cattell, Chandler, Cole, Conkling, Conness, Corbett, Cragin, Drake, Edmunds, Ferry, Fessenden, Harlan, Henderson, Hendricks, Howard, Howe, Johnson, Morgan, Morrill of Maine, Morrill of Vermont, Morton, Norton, Patterson of New Hampshire, Pomeroy, Ramsey, Ross, Sherman, Stewart, Sumner, Thayer, Tipton, Van Winkle, Vickers, Williams, Wilson, Yates.

Those who voted in the negative are,

Messrs. Anthony, Davis, Dixon, Doolittle, Fowler, Grimes, McCreery, Patterson of Tennessee, Trumbull, Willey.

So it was

Ordered, That the motion of Mr. Frelinghuysen lie on the table.

The examination of William T. Sherman, a witness on the part of the President, was then resumed; and

The counsel for the President proposed to the witness the following question, to which objection was made by the managers:

After the restoration of Mr. Stanton to office, did you form an opinion whether the good of the service required a Secretary of War other than Mr. Stanton; and if so, did you communicate that opinion to the President?

After argument by the managers and by the counsel for the President,

Mr. Conkling submitted the following question to the counsel for the President:

Do the counsel for the respondent offer at this point to show by the witness that he advised the President to remove Mr. Stanton in the manner adopted by the President, or merely that he advised the President to nominate, for the action of the Senate, some person other than Mr. Stanton?

The counsel for the President stated, in answer, that they proposed to show by the testimony that the removal was for the good of the service, and that some other person ought to be there.

After further argument by the counsel for the President in favor of the admissibility of the question they had proposed to the witness, and by the managers against it,

The Chief Justice submitted the question to the Senate, to wit, Is the question admissible? and

It was determined in the negative— {Yeas ---------- 15
{Nays ---------- 35

On motion by Mr. Conness,

The yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are:

Messrs. Anthony, Bayard, Buckalew, Dixon, Doolittle, Fowler, Grimes, Hendricks, Johnson, McCreery, Patterson of Tennessee, Ross, Trumbull, Van Winkle, Vickers.

Those who voted in the negative are:

Messrs. Cameron, Cattell, Chandler, Cole, Conkling, Conness, Corbett, Cragin, Davis, Drake, Edmunds, Ferry, Fessenden, Frelinghuysen, Harlan, Henderson, Howard, Howe, Morgan, Morrill of Maine, Morrill of Vermont, Morton, Norton, Nye, Patterson of New Hampshire, Pomeroy, Ramsey, Sherman, Stewart, Thayer, Tipton, Willey, Williams, Wilson, Yates.

So the Senate decided the question to be inadmissible.

Mr. Johnson proposed to the witness the following question:

Did you at any time, and when, before the President gave the order for the removal of Mr. Stanton as Secretary of War, advise the President to appoint some other person than Mr. Stanton?

The Chief Justice submitted the question to the Senate, to wit, Is the question admissible? and

It was determined in the negative— {Yeas ---------- 18
{Nays ---------- 32

On motion by Mr. Drake,

The yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are:

Messrs. Anthony, Bayard, Buckalew, Dixon, Doolittle, Edmunds, Fessenden, Fowler, Grimes, Henderson, Hendricks, Johnson, McCreery, Patterson of Tennessee, Ross, Trumbull, Van Winkle, Vickers.

Those who voted in the negative are:

Messrs. Cameron, Cattell, Chandler, Cole, Conkling, Conness, Corbett, Cragin, Davis, Drake, Ferry, Frelinghuysen, Harlan, Howard, Howe, Morgan, Morrill of Maine, Morrill of Vermont, Morton, Norton, Nye, Patterson of New Hampshire, Pomeroy, Ramsey, Sherman, Stewart, Thayer, Tipton, Willey, Williams, Wilson, Yates.

So the question was decided to be inadmissible.

No further questions being proposed to the witness,

On motion by Mr. Cole, at 10 minutes after 2 o'clock p.m.,

The Senate took a recess for 15 minutes; at the expiration of which

R. J. Meigs, a witness on the part of the President, was called, and being sworn, was examined by the counsel for the President.

The counsel for the President proposed to offer in evidence the warrant for the arrest of Gen. Lorenzo Thomas and the affidavit on which the warrant was issued.

Objection being made thereto by the managers.

The Chief Justice stated that, in his opinion, the warrant for the arrest of Gen. Thomas and the affidavit upon which the same was issued was competent testimony, but would submit the question to the Senate if any Senator desired it; and

Mr. Conness having desired the question of the admissibility of the evidence proposed to be offered to be submitted to the Senate.

The Chief Justice directed the counsel for the President to state in writing what evidence they proposed to put in:

Whereupon,

The counsel for the President submitted the following statement:

We offer a warrant of arrest of Gen. Thomas, dated February 22, 1868, and the affidavit on which the warrant issued.

The Chief Justice then submitted the question to the Senate, to wit: Shall the evidence offered by the counsel for the President be admitted?

On motion by Mr. Grimes,

It was determined in the affirmative ..... {Yeas ____ 34 / Nays ____ 17

The yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are,

Messrs. Anthony, Bayard, Buckalew, Cattell, Cole, Corbett, Cragin, Davis, Dixon, Doolittle, Fessenden, Fowler, Frelinghuysen, Grimes, Henderson, Hendricks, Johnson, McCreery, Morrill of Maine, Morrill of Vermont, Morton, Norton, Patterson of New Hampshire, Patterson of Tennessee, Pomeroy, Ross, Sherman, Sumner, Trumbull, Van Winkle, Vickers, Willey, Williams, Yates.

Those who voted in the negative are,

Messrs. Cameron, Chandler, Conkling, Conness, Drake, Edmunds, Ferry, Harlan, Howard, Howe, Morgan, Nye, Ramsey Stewart, Thayer, Tipton, Wilson.

So the Senate decided that the evidence should be admitted;

Whereupon,

Mr. Evarts, of counsel for the President, having read the warrant of arrest of Gen. Lorenzo Thomas and the affidavit on which the warrant was issued, offered them in evidence and handed them in at the Secretary's desk.

After further examination of the witness by the counsel for the President,

William T. Sherman, a witness on the part of the President, was recalled; when

Mr. Johnson proposed the following question to the witness:

When the President tendered to you the office of Secretary of War ad interim on the 27th of January, 1868, and on the 30th of the same month and year, did he, at the very time of making such tender, state to you what his purpose in so doing was?

Objection to the question having been made by the managers,

The Chief Justice submitted the question to the Senate, to wit: Is the question admissible? and

It was determined in the affirmative ..... {Yeas ____ 26 / Nays ____ 22

On motion by Mr. Drake,

The yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are,

Messrs. Anthony, Bayard, Buckalew, Cole, Davis, Dixon, Doolittle, Fessenden, Fowler, Frelinghuysen, Grimes, Henderson, Johnson, McCreery, Morrill of Maine, Morrill of Vermont, Morton, Norton, Patterson of Tennessee, Rose, Sherman, Sumner, Trumbull, Van Winkle, Vickers, Willey.

Those who voted in the negative are,

Messrs. Cattell, Chandler, Conkling, Conness, Corbett, Cragin, Drake, Edmunds, Ferry, Harlan, Howard, Howe, Morgan, Nye, Pomeroy, Ramsey, Stewart, Thayer, Tipton, Williams, Wilson, Yates.

So the Senate decided the question to be admissible; and

The witness having made answer thereto,

Mr. Johnson proposed the following question to the witness:

Will witness state what he said his purpose was?

The question being objected to by the managers; and

Mr. Manager Bingham having commenced an argument in support of the objection,

Mr. Davis raised the question of order that it was not in order for the managers to object to a question propounded by a Member of the Senate.

The Chief Justice ruled that neither the managers nor the counsel had a right to object to a question being put by a Member of the Senate, but might discuss the admissibility of the evidence to be given in answer to such a question.

He then submitted the question to the Senate, Is the question proposed by Mr. Johnson admissible? and

It was determined in the affirmative ..... {Yeas ____ 26 / Nays ____ 25

On motion by Mr. Drake,

The yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are,

Messrs. Anothony, Bayard, Buckalew, Cole, Corbett, Davis, Dixon, Doolittle, Fessenden, Fowler, Frelinghuysen, Grimes, Henderson, Hendricks, Johnson, McCreery, Morton, Norton, Patterson of Tennessee, Ross, Sherman, Sumner, Trumbull, Van Winkle, Vickers, Willey.

Those who voted in the negative are,

Messrs. Cameron, Cattell, Chandler, Conkling, Conness, Cragin, Drake, Edmunds, Ferry, Harlan, Howard, Howe, Morgan, Morrill of Maine, Morrill of Vermont, Nye, Patterson of New Hampshire, Pomeroy, Ramsey, Stewart, Thayer, Tipton, Williams, Wilson, Yates.

So the Senate decided the question to be admissible; and

The witness having made answer thereto,

The counsel for the President proposed the following question to the witness:

Have you answered as to both occasions?

The managers objected to the question on the ground that the counsel having closed their examination of the witness, and the witness having been recalled to answer a question proposed by a Member of the Senate, it was not competent for the counsel of the President to make any further examination of him.

The Chief Justice ruled that the question proposed by the counsel for the President was a matter entirely within the discretion of the court, but that it was usual, under such circumstances, to allow counsel to continue the inquiry relating to the same subject matter.

The Chief Justice then submitted the question to the Senate, to wit, Is the question admissible?

It was determined in the affirmative; and

The witness having made answer to the question,

Mr. Henderson proposed the following question to the witness:

Did the President, on either of the occasions alluded to, express to you a fixed resolution or determination to remove Stanton from his office?

And

The witness having made answer thereto,

Mr. Howard proposed the following question to the witness:

You say the President spoke of force. What did he say about force?

And

The witness have made answer thereto,

Mr. Henderson proposed the following question to the witness:

Did you give any opinion or advice to the President on either of these occasions in regard to the legality or propriety of an ad interim appointment; and, if so, what advice did you give, or what opinion did you express to him?

The Chief Justice submitted the question to the Senate, to wit, Is the question admissible?

It was determined in the negative.

So the Senate decided the question to be inadmissible; and

The examination of the witness having been concluded for the present,

R. J. Meigs, a witness on the part of the President, was recalled; and

The following question was proposed to him by the counsel for the President:

Have you got the docket entries as to the disposition of the case of the United States *v.* Lorenzo Thomas; and if so, will you produce and read them?

Objection by the managers being raised to the question,

The Chief Justice stated that, in his opinion, the evidence sought to be introduced being a part of, or having in connection with, that already testified to by the witness was admissible; and

The question having been answered by the witness,

On motion by Mr. Johnson, at 15 minutes before 5 o'clock p.m.,

The Senate, sitting for the trial of the President upon articles of impeachment, adjourned to 12 o'clock m. tomorrow.

TUESDAY, APRIL 14, 1868.

The United States *v.* Andrew Johnson, President.

At 12 o'clock m. the Chief Justice of the United States entered the Senate Chamber and resumed the chair; and,

The Sergeant at Arms having made proclamation,

The managers appointed to conduct the trial of the President of the United States upon articles of impeachment exhibited against him by the House of Representatives, to wit, Mr. Bingham, Mr. Boutwell, Mr. James F. Wilson, Mr. Butler, Mr. Thomas Williams, Mr. Logan, and Mr. Thaddeus Stevens, entered the Senate Chamber and took the seats assigned them.

The Sergeant at Arms announced the presence at the door of the Senate Chamber of the House of Representatives; and

The House of Representatives, as in Committee of the Whole House, preceded by its Chairman, Mr. Elihu B. Washburne, and accompanied by its Speaker and Clerk, entered the Senate Chamber and took the seats provided for them.

The counsel for the President, to wit, Mr. Curtis, Mr. Evarts, Mr. Nelson, and Mr. Groesbeck, appeared at the bar of the Senate and took the seats assigned them.

The Chief Justice having directed the Secretary to read the Journal of the proceedings of the Senate, sitting for the trial of the President upon articles of impeachment, of yesterday,

On motion by Mr. Stewart,

The reading of the Journal of the proceedings of the Senate of yesterday was dispensed with.

Mr. Sumner submitted the following motion for consideration:

Ordered, That in answer to the motion of the managers under the rule limiting the arguments to two on a side, unless otherwise ordered, such other managers and counsel as choose may print and file arguments at any time before the argument of the closing manager.

Objection being made to the consideration of the motion at this time,

The Chief Justice directed the counsel for the President to proceed with their evidence.

Mr. Evarts, of counsel, stated that Mr. Stanbery, the senior counsel of the President, was prevented by illness from attending the Senate to-day, and asked that further proceedings in the trial be postponed to to-morrow.

Mr. Drake submitted the following question to the counsel for the President:

Can not this day be occupied by the Counsel for respondent in giving in documentary evidence?

And,

The counsel for the President answered that in consequence of the absence of Mr. Stanbery they could not.

On motion by Mr. Howe,

The Senate, sitting for the trial of the President upon articles of impeachment, adjourned to 12 o'clock m. to-morrow.

WEDNESDAY, APRIL 15, 1868.

The United States *v.* Andrew Johnson, President.

At 12 o'clock m. the Chief Justice of the United States entered the Senate Chamber and resumed the chair; and

The Sergeant at Arms having made proclamation,

The managers appointed to conduct the trial of the President of the United States upon articles of impeachment exhibited against him by the House of Representatives, to wit, Mr. Bingham, Mr. Boutwell, Mr. James F. Wilson, Mr. Butler, Mr. Thomas Williams, Mr. Logan, and Mr. Thaddeus Stevens, entered the Senate Chamber and took the seats assigned them.

The Sergeant at Arms announced the presence at the door of the Senate Chamber of the House of Representatives; and

The House of Representatives, as in Committee of the Whole House, preceded by its Chairman, Mr. Elihu B. Washburne, and accompanied by its Speaker and Clerk, entered the Senate Chamber and took the seats provided for them.

The counsel for the President, to wit, Mr. Curtis, Mr. Evarts, Mr. Nelson, and Mr. Groesbeck, appeared at the bar of the Senate and took the seats assigned them.

The Journal of the proceedings of the Senate, sitting for the trial of the President upon articles of impeachment, of yesterday was read.

The Senate proceeded to consider the motion submitted by Mr. Sumner yesterday, to wit:

Ordered, That in answer to the motion of the managers under the rule limiting the arguments to two on a side, unless otherwise ordered, such other managers and counsel as choose may print and file arguments at any time before the argument of the closing manager,

On motion by Mr. Emunds, to amend the motion of Mr. Sumner by striking out at the end thereof the words "closing manager" and inserting the words "opening manager shall be concluded,"

Mr. Sumner accepted the amendment proposed by Mr. Edmunds, and modified his motion accordingly.

On motion by Mr. Conness, to further amend the motion by striking out all after the word "ordered" and inserting in lieu there the following:

That the twenty-first rule shall be so amended as to allow as many of the managers and of the counsel of the President to speak on the final argument as shall choose to do so: *Provided*, That not more than four days on each side shall be allowed. But the managers shall make the opening and the closing argument,

It was determined in the negative—{Yeas—19 / Nays—27}

On motion by Mr. Drake,

The yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are,

Messrs. Cameron, Conness, Cragin, Dixon, Doolittle, Fowler, Harlan, Henderson, Hendricks, McCreery, Patterson of Tennessee, Ramsey, Sherman, Stewart, Trumbull, Van Winkle, Willey, Wilson, Yates.

Those who voted in the negative are.

Messrs. Anthony, Buckalew, Cattell, Chandler, Cole, Conkling, Davis, Drake, Edmunds, Ferry, Frelinghuysen, Howard, Howe, Johnson, Morgan, Morrill of Maine, Morrill of Vermont, Morton, Patterson of New Hampshire, Pomeroy, Ross, Saulsbury, Sumner, Thayer, Tipton, Vickers, Williams.

So the amendment was not agreed to.

On motion by Mr. Doolittle, to amend the motion by Mr. Sumner by striking out all after the word "ordered" and inserting in lieu thereof the following:

That upon the final argument two managers of the House open, two counsel for the respondent reply; that two other managers rejoin, to be followed by two other counsel for the respondent, and they in turn to be followed by two other managers of the House, who shall conclude the argument,

On motion by Mr. Drake, that the motion of Mr. Sumner be postponed indefinitely,

It was determined in the affirmative—{Yeas—34 / Nays—15}

On motion by Mr. Sumner,

The yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are,

Messrs. Anthony, Buckalew, Chandler, Cole, Conkling, Conness, Corbett, Davis, Dixon, Drake, Edmunds, Ferry, Fessenden, Grimes, Harlan, Henderson, Hendricks, Howard, Howe, Johnson, Morgan, Morrill of Maine, Morrill of Vermont, Morton, Patterson of New Hampshire, Pomeroy, Ross, Saulsbury, Sherman, Stewart, Thayer, Tipton, Williams, Yates.

Those who voted in the negative are,

Messrs. Cameron, Cattell, Cragin, Doolittle, Fowler, Frelinghuysen, McCreery, Patterson of Tennessee, Ramsey, Sumner, Trumbull, Van Winkle, Vickers, Willey, Wilson.

So the motion was postponed indefinitely.

Mr. Ferry submitted the following motion for consideration:

Ordered, That the twelfth rule be so modified as that the hour of the day at which the Senate shall sit upon the trial now pending shall be (unless otherwise ordered) at 11 o'clock forenoon, and that there shall be a recess of 30 minutes each day, commencing at 2 o'clock p.m.

The Senate proceeded, by unanimous consent to consider the said motion; and

On the question to agree thereto,

It was determined in the negative—{Yeas—24 / Nays—26}

On motion by Mr. Conkling,

The yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are,

Messrs. Cameron, Cattell, Chandler, Cole, Conkling, Conness, Corbett, Cragin, Drake, Ferry, Frelinghuysen, Harlan, Howard, Howe, Morgan, Morrill of Maine, Morrill of Vermont, Ramsey, Sherman, Stewart, Sumner, Thayer, Williams, Wilson.

Those who voted in the negative are,

Messrs. Anthony, Bayard, Buckalew, Davis, Dixon, Doolittle, Edmunds, Fessenden, Fowler, Grimes, Henderson, Hendricks, Johnson, McCreery, Morton, Patterson of New Hampshire, Patterson of Tennessee, Pomeroy, Ross, Saulsbury, Tipton, Trumbull, Van Winkle, Vickers, Willey, Yates.

So the motion was not agreed to.

Mr. Evarts, of counsel for the President, stated that in the absence of their associate, Mr. Stanbery, who was still detained by indisposition, they would now proceed to submit documentary evidence for the defense.

Mr. Curtis, of counsel, asked to have the message of the President, dated February 22, 1868, nominating Thomas Ewing, of Ohio, to be Secretary for the Department of War, produced in the Senate, to be used in the trial as evidence for the defense.

De Witt C. Clarke, the executive clerk of the Senate, was called, and being sworn, testified as to the time when the said message was received by the Senate.

The counsel for the President proposed to submit as evidence the message of the President of the United States, dated February 22, 1868, and sent in to the Senate on the 24th of that month, relating to the removal of Edwin M. Stanton as Secretary of the Department of War.

The managers objecting to the reception of the message as evidence,

After argument by the counsel for the President in favor of admitting the evidence, and by the managers against it,

The Chief Justice stated that it did not appear that the resolution of the Senate of the 21st of February called for an answer, and the message could only be regarded as a vindication of the act of the President addressed to the Senate, which, in the opinion of the Chief Justice, did not come within any of the rules of evidence which would justify its being admitted as evidence in this trial; he therefore ruled the evidence inadmissible.

The counsel for the President proposed to submit in evidence a tabular statement, prepared at the office of the Attorney General, containing a list of all executive and territorial offices of the United States, excluding all military, naval, and judicial offices, showing their statutory designation and their respective statutory tenures.

The document proposed to be submitted as evidence being objected to by the managers,

After argument by counsel in favor of receiving it, and by the managers against it,

On motion by Mr. Trumbull,

Ordered, That the document be printed as a part of the proceedings on the trial.

De Witt C. Clarke, the executive clerk of the Senate, by unanimous consent of the Senate, was permitted to correct his testimony given today.

William G. Moore, a witness on the part of the United States, was recalled and further examined by the counsel for the President, and cross-examined by the managers.

The counsel for the President then submitted the following documentary evidence on the part of the defense, which was received:

I. A certified copy of the resolution of the Senate of the 13th of May, 1800, advising and consenting to the appointment of John Marshall to be Secretary of State, in the place of Timothy Pickering, removed; and of Samuel Dexter to be Secretary of War, in place of John Marshall, nominated to be Secretary of State.

II. The message of the President of February 22, 1868, nominating Thomas Ewing, sr., of Ohio, to be Secretary of War.

III. A certified copy of the appointment of John Nelson, dated February 29, 1844, to act as Secretary ad interim until a successor to the Hon. A. P. Upshur shall be appointed; and a certified copy of the resolution of the Senate of March 6, 1844, advising and consenting to the appointment of John C. Calhoun to be Secretary of State in the place of A. P. Upshur, deceased.

IV. A certified copy of the appointment of Winfield Scott, dated July 23, 1850, to act as Secretary of War ad interim during the vacancy occasioned by the resignation of George W. Crawford; and a certified copy of the resolution of the Senate of August 15, 1850, advising and consenting to the appointment of Charles M. Conrad as Secretary of War.

V. The certificate of William H. Seward, Secretary of State, that volumes 12 and 13 of Domestic Letters, containing the letters addressed by the Secretary of State to various persons between the 29th of June, 1799, and the 1st of May, 1802, are now and have been for many years missing from the files of the State Department, and also the certificate of the Secretary of State as to the beginning and termination of the first session of the Sixth Congress.

On motion by Mr. Stewart,

Then Senate, at 15 minutes past 2 o'clock p.m., took a recess for 15 minutes; at the expiration of which,

The counsel for the President proposed to submit in further evidence—

Certified copies of two letters addressed by McClintock Young, Acting Secretary of the Treasury, dated 17th August, 1842, one to Richard Coe, appraiser of merchandise at Philadelphia, removing him from office, and one to the collector of customs at Philadelphia, requesting him to deliver an enclosed letter to Richard Coe, appraiser, and also certified copies of the commission issued to Richard Coe and Charles Francis Breuil as appraisers of merchandise at the port of Philadelphia.

The evidence being objected to by the managers.

After argument by the managers.

The Chief Justice ruled the evidence to be admissible, and it was received and read.

The counsel for the President proposed to submit in further evidence—

I. A certified list of civil officers of the Navy appointed under the act of May 15, 1820, and removed before their terms of office had expired.

II. Memoranda of removals of certain Navy agents by the President, with the reasons for such removals, and designations of other persons to act in their stead, certified by the chief clerk of the Navy Department.

The managers objected to the admission of the evidence.

After argument by the managers against the admission of the evidence proposed to be offered.

Mr. Hendricks inquired of the managers whether they objected on the ground that the papers should be given in full so far as they relate to any particular question.

To which question Mr. Manager Butler answer that they did.

Mr. Conkling submitted the following question to the counsel of the President:

Do the counsel for the respondent rely upon any statute other than that referred to?

And

Mr. Curtis, of counsel, replied, I am not aware of any other statute than that referred to.

Mr. Edmunds inquired of the counsel for the President whether the evidence was offered as touching any question or final conclusion of fact, or merely as giving the Senate the history of the practice under consideration.

To which question the counsel for the President answered that it was entirely for the latter purpose.

Mr. Howard proposed the following question to the counsel for the President:

Do the counsel regard these memoranda as legal evidence of the practice of the Government, and are they offered as such?

Mr. Curtis, of counsel, replied that they were not full copies of any record, and they were therefore technically not legal evidence.

Mr. Sherman inquired of the counsel for the President whether the papers now offered in evidence contain the date of the appointment and the character of the office.

The counsel having made answer thereto,

The Chief Justice directed the counsel of the President to reduce to writing what they proposed to offer in evidence; and

The counsel for the President then submitted the following:

We offer in evidence two documents from the Navy Department exhibiting the practice which has existed in that department in respect to removals from office.

The Chief Justice submitted the question to the Senate, to wit, Is the evidence admissible? and

It was determined in the affirmative.....{Yeas.... 36 / Nays.... 15}

On motion by Mr. Sherman,

The yeas and nays being desired by one-fifth of the Senators present,

The who voted in the affirmative are,

Messrs. Anthony, Bayard, Buckalew, Cole, Conkling, Corbett, Davis, Dixon, Doolittle, Edmunds, Ferry, Fessenden, Fowler, Frelinghuysen, Grimes, Henderson, Hendricks, Howe, Johnson, McCreery, Morrill of Maine, Morrill of Vermont, Morton, Patterson of New Hampshire, Patterson of Tennessee, Ross, Saulsbury, Sherman, Stewart, Sumner, Trumbull, Van Winkle, Vickers, Willey, Wilson, Yates.

Those who voted in the negative are,

Messrs. Cameron, Cattell, Chandler, Conness, Cragin, Drake, Harlan, Howard, Morgan, Nye, Pomeroy, Ramsey, Thayer, Tipton, Williams.

So the Senate decided the evidence to be admissible; and

It was received and read.

The counsel for the President submitted in further evidence copies from the records of the Navy Department of letters of removal of certain Navy agents during the session of the Senate.

The counsel for the President submitted in further evidence a copy of the appointment of Moses Kelly to be Acting Secretary of the Interior, dated January 10, 1861; and a copy of the commission of Caleb B. Smith, as Secretary of the Interior, dated March 5, 1861, signed by Abraham Lincoln, President of the United States.

The counsel for the President proposed to submit in further evidence certified copies of appointment of various persons to be Secretaries of the several Executive departments ad interim, by Presidents James Monroe, John Quincy Adams, Andrew Jackson, Martin Van Buren, William H. Harrison, John Tyler, James K. Polk, Zachary Taylor, and Millard Filmore.

The managers having objected to the admission of the evidence,

After argument by the managers in support of their objection,

The Chief Justice overruled the objection, and ruled the evidence admissible; and

The evidence was received.

The counsel for the President submitted in further evidence,

I. The appointment of St. John B. L. Skinner by James Buchanan, dated February 8, 1861, to be Acting First Assistant Postmaster General ad interim in place of Horatio King, Acting Postmaster General.

II. The appointment by Abraham Lincoln of St. John B. L. Skinner, Acting First Assistant Postmaster General, to be Acting Postmaster General ad interim in place of Montgomery Blair, temporarily absent, dated September 26, 1862.

III. A copy of the order of the President directing the Postmaster General to place the post office at the city of New York in charge of a special agent of the Post Office Department, in place of Isaac V. Fowler, removed.

IV. A copy of the order of the President directing the Postmaster General to place the post office at the city of New Orleans in charge of a special agent of the Post Office Department, in place of Samuel F. Marks, removed.

V. A copy of the order of the President directing the Postmaster General to place the post office at the city of Milwaukee in charge of a special agent of the Post Office Department.

The counsel for the President proposed to submit in further evidence the message of the President of the United States of January 16, 1861, in answer to a resolution of the Senate respecting the vacancy in the office of Secretary of War, being Executive Document No. 2, Thirty-sixth Congress, second session, and contained in volume 4, Senate Documents, of said Congress and session.

The managers having objected to the admissibility of the evidence,

After argument by the managers,

The Chief Justice submitted the question to the Senate, to wit, Is the evidence admissible?

It was determined in the affirmative; and

The evidence was received and read.

Mr. Curtis, of counsel for the President, asked that the Secretary of the Senate be directed to make out a statement showing the time of the commencement and termination of each legislative and executive session of the Senate from ———, 1789, to the present time.

The counsel for the President then informed the Senate that they had for the present concluded their documentary evidence.

On motion by Mr. Johnson,

The Senate, sitting for the trial of the President upon articles of impeachment, adjourned to 12 o'clock m. to-morrow.

THURSDAY, APRIL 16, 1868.

The United States *v.* Andrew Johnson, President.

At 12 o'clock m. the Chief Justice of the United States entered the Senate Chamber and resumed the chair; and

The Sergeant at Arms having made proclamation,

The managers appointed to conduct the trial of the President of the United States upon articles of impeachment exhibited against him by the House of Representatives, to wit, Mr. Bingham, Mr. Boutwell, Mr. James F. Wilson, Mr. Butler, Mr. Thomas Williams, Mr. Logan, and Mr. Thaddeus Stevens, entered the Senate Chamber and took the seats provided for them.

The Sergeant at Arms announced the presence, at the door of the Senate Chamber, of the House of Representatives; and

The House of Representatives, as in Committee of the Whole House, preceded by its Chairman, Mr. Elihu B. Washburne, and accompanied by its Speaker and Clerk, entered the Senate Chamber and took the seats provided for them.

The counsel for the President, to wit, Mr. Curtis, Mr. Evarts, Mr. Nelson, and Mr. Groesbeck, appeared at the bar of the Senate and took the seats assigned to them.

The reading of the Journal of the proceedings of the Senate sitting for the trial of the President upon articles of impeachment of yesterday having been commenced by the Secretary,

On motion by Mr. Sherman,

The further reading of the Journal was dispensed with.

Mr. Sumner submitted the following motion for consideration:

Considering the character of this proceeding, that it is a trial of impeachment before the Senate of the United States, and not a proceeding by indictment in an inferior court; considering that Senators are from beginning to end judges of law as well as fact, and that they are judges from whom there is no appeal; considering that the reasons for the exclusion of evidence on an ordinary trial, where the judge responds to the law and the jury, to the fact, are not applicable to such a proceeding; considering that according to parliamentary usage, which is the guide in all such cases, there is on trials of impeachment a certain latitude of inquiry and a freedom from technicality; and considering, finally, that already in the course of this trial there have been differences of opinion as to the admissibility of evidence, therefore, in order to remove all such differences and to hasten the dispatch of business, it is deemed advisable that all evidence offered on either side, not trivial or obviously irrelevant in nature, shall be received without objection, it being understood that the same, when admitted, shall be open to question and comparison at the bar in order to determine its competency and value, and shall be carefully sifted and weighed by Senators in the final judgment.

On motion by Mr. Conness that the motion of Mr. Sumner lie on the table,

It was determined in the affirmative ..... { Yeas ..... 33 / Nays 11

On motion by Mr. Conness,

The yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are,

Messrs. Buckalew, Cameron, Cattell, Chandler, Cole, Conkling, Conness, Corbett, Cragin, Davis, Dixon, Doolittle, Drake, Edmunds, Ferry, Fessenden, Frelinghuysen, Harlan, Howard, Howe, Johnson, Morgan, Morrill of Maine, Morrill of Vermont, Patterson of New Hampshire, Pomeroy, Ramsey, Saulsbury, Stewart, Thayer, Tipton, Williams, Yates.

Those who voted in the negative are,

Messrs. Anthony, Fowler, Grimes, Morton, Patterson of Tennessee, Sherman, Sumner, Van Winkle, Vickers, Willey, Wilson.

So the motion of Mr. Sumner was ordered to lie on the table.

The Chief Justice then directed the counsel for the President to proceed with the defense.

Mr. Evarts, of counsel, stated that their associate counsel, Mr. Stanbery, would not be present today to take part in the trial, but that the counsel present would proceed with the evidence; and

The counsel for the President then submitted in further evidence, certified copies of appointments of various persons to be Secretaries of the several executive departments ad interim by Presidents Pierce, Buchanan, Lincoln, and Johnson; which were admitted.

The counsel for the President submitted, in further evidence, a statement prepared by the Secretary of the Senate showing the beginning and ending of each executive and legislative session of the Senate from 1789 to 1868.

Walter S. Cox, a witness on the part of the President, was called and sworn, and while under examination

The counsel for the President proposed the following question to him:

When, by whom, and under what circumstances were you employed as counsel in the case of Gen. Thomas?

The question having been objected to by the managers.

The Chief Justice overruled the objection of the managers and directed the witness to proceed.

While the witness was proceeding in his answer to the question he was interrupted by Mr. Manager Butler, who objected to his further answering.

The Chief Justice requested the counsel to state what they proposed to prove by the testimony.

Mr. Edmunds asked that the counsel for the President be directed to reduce to writing what they proposed to prove by the question.

Thereupon,

The counsel submitted the following written statement:

We offer to prove that Mr. Cox was employed, professionally, by the President in the presence of Gen. Thomas to take such legal proceedings in the case that had been commenced against Gen. Thomas as would be effectual to raise, judicially, the question of Mr. Stanton's legal right to hold the office of Secretary for the Department of War against the authority of the President; and also in reference to obtaining a writ of quo warranto for the same purpose, and we shall expect to follow up this proof by evidence of what was done by the witness in pursuance of the above employment.

Mr. Edmunds inquired of the counsel for the President to what date does the proposed evidence relate?

To which the counsel answered that it related to the 22d of February.

The managers objected to the admission of the evidence proposed to be offered.

After argument by the managers in favor of the objection and by the counsel of the President against it,

Mr. Ferry submitted the following question to the counsel of the President:

Do the counsel of the President propose to contradict or vary the statement of the docket entries produced by them to the effect that Gen. Thomas was discharged by Chief Justice Carter on a motion of the defendant's counsel?

To which

Mr. Curtis answered that the counsel for the President do not expect or desire to contradict anything on the docket entries.

After further argument,

The Chief Justice stated that the evidence now offered by the counsel for the President, in his opinion, came within the principles of a previous decision of the Senate, which decision was, in his judgment, correct, and ruled the proposed evidence admissible.

Mr. Drake desired that a vote of the Senate be had on the question of the competency of the evidence; and

The Chief Justice submitted the question to the Senate, to wit, Shall the proof offered be admitted? and

It was determined in the affirmative—Yeas 29, Nays 21

On motion by Mr. Drake,

The yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are,

Messrs. Anthony, Bayard, Buckalew, Corbett, Davis, Dixon, Doolittle, Fessenden, Fowler, Frelinghuysen, Grimes, Hendricks, Howe, Johnson, McCreery, Morrill of Maine, Morton, Norton, Patterson of New Hampshire, Patterson of Tennessee, Ross, Saulsbury, Sherman, Sprague, Sumner, Trumbull, Van Winkle, Vickers, Willey.

Those who voted in the negative are,

Messrs. Cameron, Cattell, Chandler, Conkling, Cragin, Drake, Edmunds, Ferry, Harlan, Howard, Morgan, Morrill of Vermont, Nye, Pomeroy, Ramsey, Stewart, Thayer, Tipton, Williams, Wilson, Yates.

So the Senate determined that the proposed testimony be admitted; and

The witness having made answer,

The counsel for the President proposed a further question to the witness; which being objected to by the managers,

Mr. Howard asked that the counsel for the President be directed to reduce their question to writing;

Whereupon

The question was reduced to writing, as follows:

State what conclusions you arrived at as to the proper course to be taken to accomplish the instructions given you by the President.

The Chief Justice ruled the question to be admissible and directed the witness to answer; and

The witness having made answer thereto,

The counsel for the President proposed the following question to the witness:

What did you do toward getting out a writ of habeas corpus under the employment of the President?

The Chief Justice submitted the question to the Senate, to wit, Is the question admissible? and

It was determined in the affirmative—Yeas 27, Nays 23

The yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are,

Messrs. Anthony, Bayard, Buckalew, Davis, Dixon, Doolittle, Fessenden, Fowler, Frelinghuysen, Grimes, Hendricks, Johnson, McCreery, Morrill of Maine, Morton, Norton, Patterson of New Hampshire, Patterson of Tennessee, Ross, Saulsbury, Sherman, Sprague, Sumner, Trumbull, Van Winkle, Vickers, Willey.

Those who voted in the negative are,

Messrs, Cameron, Cattell, Chandler, Conkling, Conness, Cragin, Drake, Edmunds, Ferry, Harlan, Howard, Howe, Morgan, Morrill of Vermont, Nye, Pomeroy, Ramsey, Stewart, Thayer, Tipton, Williams, Wilson, Yates.

So the Senate decided the question to be admissible.

The witness proceeded to answer the question, and while so doing alluded to an interview with the President on the 26th of February last.

Mr. Manager Butler raised the objection that what transpired between the President and the witness on the 26th of February at the Executive Mansion could not be received as evidence.

The Chief Justice submitted the question to the Senate, to wit, Is the evidence admissible? and

It was determined in the negative.

The counsel for the President then proposed the following question to the witness:

After you had reported to the President the result of your efforts to obtain a writ of habeas corpus, did you do any other act in pursuance of the original instructions you had received from the President on Saturday to test the right of Mr. Stanton to continue in the office? If so, state what the acts were.

Mr. Sherman asked that the fifth article of impeachment be read, and

The Secretary having read the fifth article of impeachment,

The Chief Justice asked the counsel for the President if the question had relation to that article;

To which the counsel replied, that it certainly had reference to the fifth article.

Whereupon,

The Chief Justice ruled the question to be admissible.

Mr. Howard asked that the question be submitted to the Senate; and

The Chief Justice submitted the question to the Senate, to wit, Is the question admissible? and

It was determined in the affirmative—Yeas 27, Nays 23

On motion by Mr. Johnson,

The yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are,

Messrs. Anthony Bayard, Buckalew, Davis, Dixon, Doolittle, Fessenden, Fowler, Grimes, Hendricks, Howe, Johnson, McCreery, Morrill of Maine, Morton, Norton, Patterson of New Hampshire, Patterson of Tennessee, Ross, Saulsbury, Sherman, Sprague, Sumner, Trumbull, Van Winkle, Vickers, Willey.

Those who voted in the negative are,

Messrs. Cameron, Cattell, Chandler, Conkling, Conness, Cragin, Drake, Edmunds, Ferry, Frelinghuysen, Harlan, Howard, Morgan, Morrill of Vermont, Nye, Pomeroy, Ramsey, Stewart, Thayer, Tipton, Williams, Wilson, Yates.

So the Senate decided the question to be admissible; and

The witness having made answer thereto,

On motion by Mr. Conness, at 15 minutes past 2 o'clock p.m.,

The Senate took a recess for 15 minutes; at the expiration of which

The witness was cross-examined by the managers.

Richard T. Merrick, a witness on the part of the President, was called and sworn, and while under examination.

The counsel for the President proposed to the witness a question which was objected to by the managers; and

The question having been reduced to writing was read by the Secretary, as follows:

We offer to prove that about the hour of noon, on the 22d day of February, upon the first communication to the President of the situation of Gen. Thomas's case, the President or the Attorney General, in his presence, gave the witness certain directions as to obtaining a writ of habeas corpus for the purpose of testing, judicially, the right of Mr. Stanton to continue to hold the office of Secretary of War against the authority of the President.

The Chief Justice ruled the question to be admissible; and

The witness having made answer thereto.

The counsel for the President proposed the following question to the witness:

What, if anything, did you and Mr. Cox do in reference to accomplishing the result you have spoken of?

The managers having raised objection to the question,

The Chief Justice ruled the question to be admissible; and

The witness having made answer thereto,

He was cross-examined by the managers and dismissed.

Ewin O. Perrin, a witness on the part of the President, was called and sworn, and while under examination a question was proposed to him, by the counsel for the President, to which objection was made by the managers.

The counsel for the President being required to reduce their question to writing, it was read by the Secretary, as follows:

We offer to prove that the President then stated that he had issued an order for the removal of Mr. Stanton and the employment of Gen. Thomas to perform the duties ad interim; that thereupon Mr. Perrin said, Supposing Mr. Stanton should oppose the order? The President replied. There is no danger of that for Gen. Thomas is already in the office. He then added. It is only a temporary arrangement; I shall send in to the Senate at once a good name for the office.

After argument by the managers against the admissibility of the question, and by the counsel for the President in favor of it,

The Chief Justice submitted the question to the Senate, viz: Is the question admissible? And

It was determined in the negative { Yeas---- 9 / Nays---- 37

On motion by Mr. Conness,

The yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are,

Messrs. Bayard, Buckalew, Davis, Dixon, Doolittle, Hendricks, McCreery, Patterson of Tennessee, Vickers.

Those who voted in the negative are,

Messrs. Cameron, Cattell, Chandler, Conkling, Conness, Corbett, Cragin, Drake, Ferry, Fessenden, Fowler, Frelinghuysen, Grimes, Harlan, Howard, Howe, Johnson, Morgan, Morrill of Maine, Morrill of Vermont, Morton, Nye, Patterson of New Hampshire, Pomeroy, Ramsey, Ross, Sherman, Sprague, Stewart, Thayer, Tipton, Trumbull, Van Winkle, Wiley, Williams, Wilson, Yates.

So the Senate decided the question to be inadmissible; and

The examination of the witness being closed, and no cross-examination proposed, he was permitted to retire.

Mr. Evarts, of counsel, stated that counsel had now reached a point in their defense where they would desire not to be required to proceed further with their evidence in the absence of their associate counsel, Mr. Stanbery.

After argument by Mr. Manager Butler in favor of proceeding with the trial at once, and a reply by Mr. Evarts, of counsel,

Mr. Conness submitted the following order for consideration:

Ordered, That on each day hereafter the Senate, sitting as a court of impeachment, shall sit at 11 o'clock a.m.;

And

An amendment having been proposed by Mr. Sumner,

Mr. Trumbull objected to the present consideration of the order.

On motion by Mr. Ferry,

The Senate, sitting for the trial of the President upon articles of impeachment, adjourned to 12 o'clock m. tomorrow.

FRIDAY, APRIL 17, 1868.

The United States *v.* Andrew Johnson, President.

At 12 o'clock m. the Chief Justice of the United States entered the Senate Chamber and resumed the chair; and,

The Sergeant at Arms having made proclamation,

The managers appointed to conduct the trial of the President of the United States upon articles of impeachment exhibited against him by the House of Representatives, to wit, Mr. Bingham, Mr. Boutwell, Mr. James F. Wilson, Mr. Butler, Mr. Thomas Williams, Mr. Logan, and Mr. Thaddeus Stevens, entered the Senate Chamber and took the seats assigned them.

The Sergeant at Arms announced the presence at the door of the Senate Chamber of the House of Representatives; and

The House of Representatives, as in Committee of the Whole House, preceded by its Chairman, Mr. Elihu B. Washburne, and

accompanied by its Speaker and Clerk, entered the Senate Chamber and took the seats provided for them.

The counsel of the President, to wit, Mr. Curtis, Mr. Evarts, Mr. Nelson, and Mr. Groesbeck, appeared at the bar of the Senate and took the seats assigned them.

The Chief Justice having directed the Secretary to read the Journal of the proceedings of the Senate sitting for the trial of the President upon articles of impeachment of yesterday,

On motion by Mr. Stewart,

The reading of the Journal was dispensed with.

The Senate proceeded to consider the motion submitted by Mr. Conness yesterday fixing the hour of the daily meeting of the Senate sitting on the trial of the President upon articles of impeachment hereafter at 11 o'clock a.m.; and

The question being on the amendment proposed by Mr. Sumner, to wit, strike out all after the word "*Ordered*," and insert:

That considering the public interest which suffer from the delay of this trial, and in pursuance of the order already adopted to proceed with all convenient dispatch, the Senate will sit from 10 o'clock in the forenoon to 6 o'clock in the afternoon, with such brief recess as may be ordered;

It was determined in the affirmative { Yeas---- 13 / Nays---- 30 }

On motion by Mr. Sumner,

The yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are,

Messrs. Cameron, Chandler, Cole, Harlan, Morrill of Maine, Pomeroy, Ramsey, Stewart, Sumner, Thayer, Tipton, Yates.

Those who voted in the negative are,

Messrs. Anthony, Cattell, Conness, Davis, Dixon, Doolittle, Drake, Ferry, Fessenden, Fowler, Frelinghuysen, Grimes, Hendricks, Howard, Howe, Johnson, Morgan, Morrill of Vermont, Morton, Patterson of New Hampshire, Patterson of Tennessee, Ross, Saulsbury, Sherman, Trumbull, Van Winkle, Vickers, Wiley, Williams, Wilson.

So the amendment was not agreed to; and

On the question to agree to the motion of Mr. Conness,

It was determined in the negative { Yeas---- 29 / Nays---- 14 }

On motion by Mr. Conness,

The yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are,

Messrs. Cameron, Cattell, Chandler, Cole, Conkling, Conness, Corbett, Cragin, Drake, Ferry, Frelinghuysen, Harlan, Howard, Howe, Morgan, Morrill of Maine, Morrill of Vermont, Patterson of New Hampshire, Pomeroy, Ramsey, Sherman, Stewart, Sumner, Thayer, Tipton, Willey, Williams, Wilson, Yates.

Those who voted in the negative area,

Messrs. Anthony, Davis, Dixon, Doolittle, Fowler, Grimes, Hendricks, Johnson, Patterson of Tennessee, Ross, Saulsbury, Trumbull, Van Winkle, Vickers.

So it was

Ordered, That on each day hereafter the Senate, sitting as a court of impeachment, shall sit at 11 o'clock a. m.

Mr. Ferry submitted the following resolution for consideration:

Whereas there appear in the proceedings of the Senate of yesterday, as published in the Globe of this morning, certain tabular statements incorporated in the remarks of Mr. Manager Butler upon the question of adjournment, which tabular statements were neither spoken in the discussion nor offered or received in evidence: Therefore.

Ordered, That said tabular statement be omitted from the proceedings of the trial as published by rule of the Senate.

The Senate proceeded, by unanimous consent, to consider the resolution; and

The resolution was agreed to.

The Chief Justice directed the counsel for the President to proceed with the defense; and

William W. Armstrong, a witness on the part of the President, was called; and having been sworn, was examined by counsel for the President and cross-examined by the managers.

Barton Able, a witness on the part of the President, was called; and having been sworn, was examined by the counsel for the President and cross-examined by the managers.

George Knapp, a witness on the part of the President, was called; and being sworn, was examined by the counsel for the President and cross-examined by the managers.

Henry F. Zeider, a witness on the part of the President, was called; and being sworn, was examined by the counsel for the President and cross-examined by the managers.

The counsel for the President submitted in further evidence a statement prepared by Henry F. Zeider, showing the differences in the language used by the President in the speech he made at St. Louis, September 8, 1866, as published in newspapers, the Missouri Republican and the St. Louis Democrat; which was admitted.

The counsel for the President submitted in further evidence a copy of the commission issued by John Adams, President of the United States, to George Washington, appointing him Lieutenant General of the Armies of the United States, in the year 1798; which was read and admitted.

The counsel for the President submitted in further evidence a statement prepared at the Department of the Interior, showing the names and dates of removals of superintendents of Indian affairs and Indian agents from the year 1849 to 1866, inclusive; also the names and dates of removals of registers of land offices and receivers of public moneys; also of surveyors general of the public lands; and also miscellaneous removals for the same period, made during the session as well as during the recess of the Senate.

Frederick W. Seward, a witness on the part of the President, was called; and having been sworn, was examined by the counsel for the President and cross-examined by the managers.

The counsel for the President submitted in further evidence a schedule of appointments of vice consuls during the sessions of the Senate from the year 1838 to the year 1865, inclusive; which was admitted.

Gideon Welles, a witness on the part of the President, was called and sworn; and while being examined a question was proposed by the counsel for the President which was objected to by the managers.

By direction of the Chief Justice the counsel reduced their question to writing, which was read by the Secretary, as follows:

What passed between you and the President after you made that communication and in reference to that communication?

The Chief Justice ruled the question admissible; and

The witness having made answer thereto,

On motion by Mr. Conness, at 20 minutes past 2 o'clock p. m., the Senate took a recess for 15 minutes; at the expiration of which

The examination of Gideon Welles was resumed; and a question being put to the witness by the counsel for the President, which was objected to by the managers, the counsel for the President, by direction of the Chief Justice, submitted in writing a statement of what they offered to prove by the testimony, which was read by the Secretary as follows:

We offer to prove that on this occasion the President communicated to Mr. Welles and the other members of his Cabinet, before the meeting broke up, that he had removed Mr. Stanton and appointed Gen. Thomas Secretary of War ad interim, and that upon the inquiry by Mr. Welles, whether Gen. Thomas was in possession of the office, the President replied that he was; and upon further question of Mr. Welles, whether Mr. Stanton acquiesced, the President replied that he did; all that he required was time to remove his papers.

After argument by the managers against the admissibility of the proposed evidence, and by the counsel in favor of it,

Mr. Howard submitted the following question to counsel,

In what way does the evidence the counsel for the accused now offer meet any of the allegations contained in the impeachment? How does it affect the gravamen of any one of the charges?

And

The counsel for the President having made answer thereto,

The Chief Justice ruled the evidence proposed to be offered by the counsel admissible.

Mr. Cragin requested that the question be submitted to the Senate; and it was accordingly submitted.

Shall the evidence offered by the counsel for the President be admitted?

It was determined in the affirmative—— {Yeas—— 26 / Nays—— 23}

On motion of Mr. Cragin,

The years and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are,

Messrs. Anthony, Bayard, Buckalew, Cole, Conkling, Corbett, Davis, Dixon, Doolittle, Fessenden, Fowler, Grimes, Hendricks, Johnson, McCreery, Morton, Patterson of Tennessee, Ross, Saulsbury, Sherman, Sprague, Sumner, Trumbull, Van Winkle, Vickers, Willey.

Those who voted in the negative are,

Messrs. Cameron, Cattell, Conness, Cragin, Drake, Edmunds, Ferry, Frelinghuysen, Harlan, Howard, Howe, Morgan, Morrill of Maine, Morrill of Vermont, Patterson of New Hampshire, Pomeroy, Ramsey, Stewart, Thayer, Tipton, Williams, Wilson, Yates.

So the Senate decided the proposed evidence admissible; and

The witness having given in his evidence in response to questions implied in the offer of proof submitted by the counsel for the President, and while being further examined, a question was proposed by the counsel for the President, and objected to by the managers; when,

By direction of the Chief Justice, the counsel for the President submitted a statement in writing of what they proposed to prove by witness, which is as follows:

We offer to prove that the President, at a meeting of the Cabinet, while the bill was before the President for his approval, laid before the Cabinet the tenure of civil office bill for their consideration and advice to the President respecting his approval of the bill; and thereupon the members of the Cabinet then present gave their advice to the President that the bill was unconstitutional and should be returned to Congress with his objections; and that the duty of preparing a message setting forth the objections to the constitutionality of the bill was devolved on Mr. Seward and Mr. Stanton, to be followed by proof as to what was done by the President and Cabinet up to the time of sending in the message.

After argument by the managers against the admissibility of the evidence proposed to be offered, and by the counsel for the President in favor of it,

On motion by Mr. Conness, at 18 minutes to 5 o'clock p.m.,

The Senate sitting for the trial of the President upon articles of impeachment adjourned to 11 o'clock a.m. tomorrow.

SATURDAY, APRIL 18, 1868.

The United States *v.* Andrew Johnson, President.

At 11 o'clock a.m. the Chief Justice of the United States entered the Senate Chamber and resumed the chair; and

The Sergeant at Arms having made proclamation,

The managers appointed to conduct the trial of the President of the United States upon articles of impeachment exhibited against him by the House of Representatives, to wit, Mr. Bingham, Mr. Boutwell, Mr. James F. Wilson, Mr. Butler, Mr. Thomas Williams, Mr. Logan, and Mr. Thaddeus Stevens, entered the Senate Chamber and took the seats assigned them.

The Sergeant at Arms announced the presence, at the door of the Senate Chamber, of the House of Representatives; and

The House of Representatives, as in Committee of the Whole House, preceded by its chairman, Mr. Elihu B. Washburne, and accompanied by its Speaker and Clerk, entered the Senate Chamber and took the seats provided for them.

The counsel for the President, to wit, Mr. Curtis, Mr. Evarts, Mr. Nelson, and Mr. Groesbeck, appeared at the bar of the Senate and took the seats assigned them.

The journal of the proceedings of the Senate sitting for the trial of the President upon articles of impeachment of yesterday was read by the Secretary.

The Chief Justice announced that the Senate, at its adjournment yesterday, had under consideration a statement of what the counsel for the President proposed to prove by the witness on the stand; and that the admissibility of the evidence which was therein proposed to be offered was the question now before the Senate.

The statement was read by the Secretary, as follows:

We offer to prove that the President, at a meeting of the Cabinet, while the bill was before the President for his approval, laid before the Cabinet the tenure of civil office bill for their consideration and advice to the President respecting his approval of the bill; and thereupon the members of the Cabinet then present gave their advice to the President that the bill was unconstitutional and should be returned to Congress with his objections; and that the duty of preparing a message setting forth the objections to the constitutionality of the bill was devolved on Mr. Seward and Mr. Stanton, to be followed by proof as to what was done by the President and Cabinet up to the time of sending in the message.

Mr. Johnson submitted the following question to the counsel for the President:

Do the counsel for the President understand that the managers deny the statement made by the President in his message of December 12, 1867, in evidence as given by the managers on page 45 of the official report of the trial, that the members of the Cabinet gave him the opinion there stated as to the tenure of office act? And is this evidence offered to corroborate that statement, or for what other object is it offered?

Mr. Howard submitted the following question to the counsel for the President:

Do not the counsel for the accused consider that the validity of the tenure of office bill was purely a question of law to be determined on this trial by the Senate; and if so, do they claim that the opinion of Cabinet officers touching that question is competent evidence by which the judgment of the Senate ought to be influenced?

The argument upon the admissibility of the proof proposed to be offered was resumed by the counsel for the President, in the course of which the counsel for the President made answer to the questions proposed by Mr. Johnson and Mr. Howard.

Mr. Williams submitted the following question to the counsel for the President:

Is the advice given to the President by his Cabinet with a view of preparing a veto message pertinent to prove the right of the President to disregard the law after it was passed over his veto?

The counsel for the President having made answer to the question,

The Chief Justice expressed the opinion that the intent being the subject to which much of the evidence on both sides had been directed, this testimony was admissible for the purpose of showing the intent with which the President has acted in this transaction; but that if desired by any Senator he would submit the question to the Senate.

Mr. Howard having asked that the question be submitted to the Senate, it was accordingly submitted, viz:

Shall the evidence offered by the counsel for the President be admitted? and

It was determined in the negative---{Yeas---------- 20
{Nays---------- 29

On motion by Mr. Howard,

The yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the negative are,

Messrs. Anthony, Bayard, Buckalew, Davis, Dixon, Doolittle, Fessenden, Fowler, Grimes, Henderson, Hendricks, Johnson, McCreery,

Patterson of Tennessee, Ross, Saulsbury, Trumbull, Van Winkle, Vickers, Willey.

Those who voted in the negative are,

Messrs. Cameron, Cattell, Chandler, Cole, Conkling, Conness, Corbett, Cragin, Drake, Edmunds, Ferry, Frelinghuysen, Harlan, Howard, Howe, Morgan, Morrill of Maine, Morrill of Vermont, Patterson of New Hampshire, Pomeroy, Ramsey, Sherman, Sprague, Stewart, Thayer, Tipton, Williams, Wilson, Yates.

So the offer of proof by the counsel for the President was decided not to be admissible.

The examination of Gideon Welles, a witness on the part of the President, was resumed, and the counsel for the President having proposed a question which was objected to by the managers,

The counsel for the President submitted the following statement of what they proposed to prove by the witness:

> We offer to prove that at the meetings of the Cabinet at which Mr. Stanton was present, held while the tenure of civil office bill was before the President for approval, the advice of the Cabinet in regard to the same was asked by the President and given by the Cabinet; and thereupon the question whether Mr. Stanton and the other Secretaries who had received their appointments from Mr. Lincoln were within the restrictions upon the President's power of removal from office created by that act was considered, and the opinion expressed that the Secretaries appointed by Mr. Lincoln were not within such restrictions.

After argument by the managers against the admissibility of the proof proposed by the counsel of the President, and by the counsel in favor of it,

The Chief Justice stated that he was of the opinion that this testimony was proper to be taken into consideration by the Senate, but was unable to determine what extent the Senate would give to its previous ruling, or how far it considered that ruling applicable to the present question, and that he would therefore submit the question to the Senate; and

The question being put, Shall the proof proposed by the counsel for the President be admitted?

It was determined in the negative—{Yeas ..... 22 / {Nays 26

On motion by Mr. Drake,

The yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are,

Messrs. Anthony, Bayard, Buckalew, Davis, Dixon, Doolittle, Fessenden, Fowler, Grimes, Henderson, Hendricks, Johnson, McCreery, Patterson of Tennessee, Ross, Saulsbury, Sherman, Sprague, Trumbull, Van Winkle, Willey.

Those who voted in the negative are,

Messrs. Cameron, Cattell, Chandler, Cole, Conness, Corbett, Cragin, Drake, Edmunds, Ferry, Frelinghuysen, Harlan, Howard, Howe, Morgan, Morrill of Maine, Morrill of Vermont, Patterson of New Hampshire, Pomeroy, Ramsey, Stewart, Thayer, Tipton, Williams, Wilson, Yates.

So the Senate decided the proof proposed to be offered by the counsel for the President to be inadmissible; and

In the further examination of the witness, the counsel for the President having proposed a question which was objected to by the managers,

The counsel for the President submitted the following statement of what they proposed to prove by the witness:

We offer to prove that at the Cabinet meetings between the passage of the tenure of civil office bill and the order of the 21st of February, 1868, for the removal of Mr. Stanton, upon occasions when the condition of the public service as affected by the operation of that bill came up for the consideration and advice of the Cabinet, it was considered by the President and Cabinet that a proper regard to the public service made it desirable that upon some proper case a judicial determination on the constitutionality of the law should be obtained.

After argument by the managers against the admissibility of the proof proposed to be offered by the counsel for the President, and by the counsel for the President in favor of it,

Mr. Henderson submitted the following question to the managers:

If the President shall be convicted, he must be removed from office. If his guilt should be so great as to demand such punishment, he may be disqualified to hold and enjoy any office under the United States. Is not the evidence now offered competent to go before the court in mitigation?

And Mr. Manager Butler having replied thereto,

The Chief Justice submitted the question to the Senate, to wit, Shall the proof proposed to be offered by the counsel for the President be admitted? and

It was determined in the negative—

Yeas	19
Nays	30

On motion by Mr. Conness,

The yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are,

Messrs. Anthony, Bayard, Buckalew, Davis, Dixon, Doolittle, Fessenden, Fowler, Grimes, Henderson, Hendricks, Johnson, McCreery, Patterson of Tennessee, Ross, Saulsbury, Trumbull, Van Winkle, Vickers.

Those who voted in the negative are,

Messrs. Cameron, Cattell, Chandler, Cole, Conkling, Conness, Corbett, Cragin, Drake, Edmunds, Ferry, Frelinghuysen, Harlan, Howard, Howe, Morgan, Morrill of Maine, Morrill of Vermont, Patterson of New Hampshire, Pomeroy, Ramsey, Sherman, Sprague, Stewart, Thayer, Tipton, Willey, Wiliams, Wilson, Yates.

So the Senate decided the proof proposed to be offered by the counsel for the President not admissible.

On motion by Mr. Anthony, at 10 minutes before 2 o'clock p.m.,

The Senate took a recess for 15 minutes, at the expiration of which,

The examination of Mr. Welles was resumed by the counsel for the President, during which a question was proposed by counsel and objected to by managers; and

The counsel having reduced their question to writing it was read by the Secretary, as follows:

Was there within the period embraced in the inquiry in the last question and at any discussions or deliberation of the Cabinet concerning the operation of the tenure of civil office act and the requirements of the public service

in regard to the same any suggestion or intimation whatever touching or looking to the vacation of any office by force or getting possession of the same by force?

The Chief Justice submitted the question to the Senate, to wit: Is the question admissible? and

It was determined in the negative—{Yeas—18 / Nays—26}

On motion by Mr. Grimes,

The yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are,

Messrs. Anthony, Bayard, Buckalew, Davis, Dixon, Doolittle, Fessenden, Fowler, Grimes, Hendricks, Johnson, McCreery, Patterson of Tennessee, Ross, Saulsbury, Trumbull, Van Winkle, Vickers.

Those who voted in the negative are,

Messrs. Cattell, Chandler, Cole, Conkling, Conness, Corbett, Cragin, Ferry, Frelinghuysen, Harlan, Howard, Howe, Morgan, Morrill of Maine, Morrill of Vermont, Patterson of New Hampshire, Pomeroy, Ramsey, Sherman, Stewart, Thayer, Tipton, Willey, Williams, Wilson, Yates.

So the Senate decided the question to be inadmissible; and

The examination of the witness having been concluded by the counsel for the President, he was cross-examined by the managers.

Edgar T. Welles, a witness on the part of the President, was called, and being sworn, was examined by the counsel for the President and cross-examined by the managers.

The counsel for the President submitted, in further evidence, a blank form of appointment heretofore used in the appointment of Navy agents by the Navy Department, which was admitted.

Alexander W. Randall, a witness on the part of the President, was called; and being sworn, was examined by the counsel for the President.

The counsel for the President submitted, in further evidence, certified papers relative to the suspension of Foster Blodgett, postmaster at Augusta, Ga., which were read and admitted. and

The witness having been cross-examined by the managers,

Mr. Sherman submitted the following question to the witness:

State if after the 2d of March, 1867, the date of the passage of the tenure-of-office act, the question whether the Secretaries appointed by President Lincoln were included within the provisions of that act came before the Cabinet for discussion, and if so, what opinion was given on this question by members of the Cabinet to the President?

The question being objected to by the managers,

The Chief Justice submitted the question to the Senate: Is the question admissible? and

It was determined in the negative—{Yeas—20 / Nays—26}

On motion by Mr. Ferry,

The yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are,

Messrs. Anthony, Bayard, Buckalew, Davis, Dixon, Doolittle, Fessenden, Fowler, Grimes, Hendricks, Johnson, McCreery, Patterson

of Tennessee, Ross, Saulsbury, Sherman, Trumbull, Van Winkle, Vickers, Willey.

Those who voted in the negative are,

Messrs. Cameron, Cattell, Chandler, Cole, Conkling, Conness, Corbett, Cragin, Edmunds, Ferry, Frelinghuysen, Harlan, Howard, Howe, Morgan, Morrill of Maine, Morrill of Vermont, Patterson of New Hampshire, Pomeroy, Ramsey, Stewart, Thayer, Tipton, Williams, Wilson, Yates.

So the Senate decided the question to be inadmissible.

Mr. Evarts, of counsel, stated that the evidence on the part of the President was now closed, unless upon Mr. Stanbery's recovery, to whom was intrusted the examination of witnesses, it should be deemed necessary to adduce further testimony, which he hoped would be permitted if required.

On motion by Mr. Johnson,

The Senate, sitting for the trial of the President upon articles of impeachment, adjourned to Monday next, at 11 o'clock a.m.

MONDAY, APRIL 20, 1868.

The United States *v.* Andrew Johnson, President.

At 11 o'clock a.m. the Chief Justice of the United States entered the Senate Chamber and resumed the chair; and

The Sergeant at Arms having made proclamation,

The managers appointed to conduct the trial of the President of the United States upon articles of impeachment exhibited against him by the House of Representatives, to wit, Mr. Bingham, Mr. Boutwell, Mr. James F. Wilson, Mr. Butler, Mr. Thomas Williams, Mr. Logan, and Mr. Thaddeus Stevens, entered the Senate Chamber and took the seats assigned them.

The Sergeant at Arms announced the presence, at the door of the Senate Chamber, of the House of Representatives; and

The House of Representatives, as in Committee of the Whole House, preceded by its chairman. Mr. Elihu B. Washburne, and accompanied by its Speaker and Clerk, entered the Senate Chamber and took the seats provided for them.

The counsel for the President, to wit, Mr. Curtis, Mr. Evarts, Mr. Nelson, and Mr. Groesbeck, appeared at the bar of the Senate and took the seats assigned them.

The Journal of the proceedings of the Senate, sitting for the trial of the President upon articles of impeachment, of Saturday having been read in part.

On motion by Mr. Stewart,

The further reading of the Journal was dispensed with.

The Chief Justice inquired of the counsel for the President if they proposed to offer any further evidence on the part of the defense.

The counsel for the President replied that they considered the evidence on the part of the defense as closed.

The Chief Justice inquired of the managers if they proposed to offer any rebutting evidence.

After oral questions proposed by Mr. Johnson and Mr. Yates to the managers and answers thereto by the managers,

The managers offered in further evidence the Journal of Congress of 1774–75, volume 1, pages 121 and 122, showing the proceedings of Congress appointing George Washington General and Commander in Chief of the Army of the United Colonies; also a letter of James Guthrie, Secretary of the Treasury, dated August 23, 1855, to J. H. Smith, of Charleston, declining to appoint William Irving Crandall surveyor of the customs at Chattanooga, Tenn., until the next session of the Senate: which were admitted.

Alexander W. Randall, a witness on the part of the President, was recalled and cross-examined by the managers in reference to the indictment for perjury found by the grand jury of Richmond County, Ga., against Foster Blodgett, postmaster at Augusta, Ga.

Mr. Butler offered, in further evidence, a copy of the indictment found by the grant jury of Richmond County, Ga., against Foster Blodgett, postmaster at Augusta, Ga., for perjury; which was admitted.

The managers offered, in further evidence, a letter from Foster Blodgett in answer to the letter of the Postmaster General dated January 3, 1868, suspending him from the office of postmaster at Augusta, Ga.

The counsel for the President having objected to the evidence,

The Chief Justice directed the managers to reduce to writing what they proposed to show by the evidence;

Whereupon,

The managers submitted the following statement in writing, which was read by the Secretary:

The defendant's counsel having produced from the files of the Post Office Department a part of the record, showing the alleged causes for the suspension of Foster Blodgett as deputy postmaster at Augusta, Ga., we now propose to give in evidence the residue of the soil record, including the papers on file in the said case, for the purpose of showing the whole of the case as the same was presented to the Postmaster General before and at the time of the suspension of the said Blodgett.

After argument by the counsel against the admissibility of the evidence and by the managers in favor of it,

The Chief Justice submitted the question to the Senate, to wit: Shall the evidence offered by the managers be admitted? and

It was determined in the negative.

The witness was then permitted to explain certain portions of the testimony given by him on Saturday last.

Mr. Conness proposed the following question to witness:

Have you ever taken any step since your act suspending Foster Blodgett in the further investigation of his case?

The witness having made answer thereto, and no further questions being proposed to him, his examination was closed.

The managers submitted a paper containing a list of all the officers of the United States in the several executive departments of the Government and of the Army and Navy of the United States, and the salary of each as shown by the Official Register for the year 1865; which was ordered to be printed with the proceedings of the Senate.

The managers offered in further evidence the message of the President of the United States of February 13, 1868, appointing Lieut. Gen. William T. Sherman, of the Army of the United States, general

by brevet; also the message of the President of the 21st February, 1868, appointing Maj. Gen. George H. Thomas, of the Army of the United States, lieutenant general by brevet and also general by brevet.

The counsel for the President having objected to the proposed evidence.

The Chief Justice submitted the question to the Senate, to wit: Is the evidence admissible? and

It was determined in the negative——{Yeas ——— 14
Nays ——— 35

On motion by Mr. Anthony,

The yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are,

Messrs. Anthony, Cole, Fessenden, Fowler, Grimes, Henderson, Morton, Ross, Sumner, Tipton, Trumbull, Van Winkle, Willey, Yates.

Those who voted in the negative are,

Messrs. Buckalew, Cameron, Cattell, Chandler, Conkling, Conness, Corbett, Cragin, Davis, Dixon, Doolittle, Drake, Edmunds, Ferry, Frelinghuysen, Harlan, Hendricks, Howard, Howe, Johnson, McCreery, Morgan, Morrill of Maine, Morrill of Vermont, Patterson of New Hampshire, Patterson of Tennessee, Pomeroy, Ramsey, Sherman, Sprague, Stewart, Thayer, Vickers, Williams, Wilson.

So the Senate decided the evidence to be inadmissible.

Mr. Butler then announced that the evidence on the part of the managers was closed, and that all witnesses attending the trial on subpoenas issued at the instance of the managers might be discharged; and

Mr. Evarts, of counsel for the President, having made a similar announcement on the part of the defense,

The Chief Justice inquired of the managers if they were now ready to proceed in the final argument of the cause.

Mr. Boutwell stated that the duty of opening the argument on the part of the managers had been assigned to him, and as his argument would consume the larger portion of the day, he asked the Senate to permit him to commence his argument to-morrow.

Mr. Evarts stated that in consequence of the illness of Mr. Stanbery, who had been relied upon by the counsel for the President to make the final argument in the defense, he would require an interval of two days to put him in a fitting condition to perform that duty, and requested that two days be allowed for that purpose.

Mr. Logan, one of the managers, stated that he had prepared an argument in the case, which he had had printed, and asked the Senate to permit him to file the same with the case, in order that the counsel for the President might examine it and reply thereto if they should think proper.

Mr. Stewart submitted the following motion for consideration:

Ordered, That the Hon. Manager Logan have leave to file his written argument to-day and furnish a copy to each of the counsel for the respondent.

On motion by Mr. Sherman to amend the motion submitted by Mr. Stewart by striking out all after the word "*Ordered*," and insert-

ing the following: That the managers on the part of the House of Representatives, and the counsel for the respondent, have leave to file written or printed arguments before the final argument commences.

Mr. Stewart accepted the amendment proposed by Mr. Sherman as a modification of his own proposition; and

Objection being made to its present consideration,

On motion by Mr. Johnson,

Ordered, That when the Senate sitting for the trial of the President upon articles of impeachment adjourn, it be to Wednesday next, at 11 o'clock a.m.; and,

On motion by Mr. Edmunds,

The Senate sitting for the trial of the President on articles of impeachment adjourned.

WEDNESDAY, APRIL 22, 1868.

The United States *v.* Andrew Johnson, President.

At 11 o'clock a.m. the Chief Justice of the United States entered the Senate Chamber and resumed the chair; and

The Sergeant at Arms having made proclamation,

The managers appointed to conduct the trial of the President of the United States upon articles of impeachment exhibited against him by the House of Representatives, to wit, Mr. Bingham, Mr. Boutwell, Mr. James F. Wilson, Mr. Butler, Mr. Thomas Williams, Mr. Logan, and Mr. Thaddeus Stevens, entered the Senate Chamber and took the seats assigned them.

The Sergeant at Arms announced the presence at the door of the Senate Chamber, of the House of Representatives; and

The House of Representatives, as in Committee of the Whole House, preceded by its chairman, Mr. Elihu B. Washburne, and accompanied by its Speaker and Clerk, entered the Senate Chamber and took the seats provided for them.

The counsel for the President, to wit, Mr. Curtis, Mr. Evarts, Mr. Nelson, and Mr. Groesbeck, appeared at the bar of the Senate and took the seats assigned them.

The Secretary having commenced the reading of the Journal of proceedings of the Senate, sitting for the trial of the President upon articles of impeachment, of Monday.

On motion by Mr. Edmunds.

The further reading of the Journal was dispensed with.

The Chief Justice stated that the business first in order was the following motion, submitted by Mr. Stewart on Monday last:

Ordered, That the managers on the part of the House of Representatives and counsel of the respondent have leave to file written or printed arguments before the oral argument commences; and

The Senate proceeded to consider the said motion.

On motion by Mr. Vickers to amend the motion of Mr. Stewart by striking out all after the word "Ordered," and inserting:

As the counsel for the President has signified to the Senate, sitting as a court for the trial of the impeachment, that they did not desire to file written or printed arguments, but preferred to argue orally, if allowed to do so, therefore:

Resolved, That any two of the managers other than those who, under the present rule are to open and close the discussion and who have not already addressed the Senate, be permitted to file written or printed arguments at or before the adjournment of to-day, or to make oral addresses after the opening by one of the managers and the first reply of the President's counsel, and that other two of the counsel for the President who have not spoken may have the privilege of reply alternating with the said two managers, and leaving the closing argument for the President, and the managers the final reply, to be made under the original rule.

It was determined in the affirmative ..... {Yeas.... 26 / Nays.... 20}

On motion by Mr. Conness.

The yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are,

Messrs. Buckalew, Cragin, Davis, Doolittle, Edmunds, Fessenden, Fowler, Frelinghuysen, Grimes, Hendricks, Johnson, McCreery, Morrill of Maine, Morton, Norton, Patterson of New Hampshire, Patterson of Tennessee, Saulsbury, Sprague, Tipton Trumbull Van Winkle, Vickers, Willey, Wilson, Yates.

Those who voted in the negative are,

Messrs. Cameron, Cattell, Chandler, Conness, Corbett, Drake, Ferry, Henderson, Howard, Howe, Morgan, Morrill of Vermont, Pomeroy, Ramsey, Ross, Sherman, Stewart, Sumner, Thayer, Williams.

So the amendment was agreed to; and

On the question to agree to the motion of Mr. Stewart as amended on the motion of Mr. Vickers,

It was determined in the negative ..... {Yeas.... 20 / Nays.... 26}

On motion by Mr. Conness.

The yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are,

Messrs. Buckalew, Cragin, Davis, Doolittle, Fowler, Hendricks, Johnson, McCreery, Morton, Norton, Patterson of New Hampshire, Patterson of Tennessee, Saulsbury, Sumner, Tipton, Trumbull, Vickers, Wiley, Wilson, Yates.

Those who voted in the negative are.

Messrs. Cameron, Cattell, Chandler, Conness, Corbett, Drake, Edmunds, Ferry, Fessenden, Frelinghuysen, Grimes, Henderson, Howard, Howe, Morgan, Morrill of Maine, Morrill of Vermont, Pomeroy, Ramsey, Ross, Sherman, Sprague, Stewart, Thayer, Van Winkle, Williams.

So the motion as amended was not agreed to.

Mr. Vickers submitted the following motion for consideration:

Ordered, That one of the managers on the part of the House be permitted to file his printed argument before the adjournment of to-day, and that after an oral opening by a manager and the reply of one of the President's counsel, another of the President's counsel shall have the privilege of filing a written or making an oral address, to be followed by the closing speech of one of the President's counsel and the final reply of a manager, under the existing rule.

The Senate proceeded, by unanimous consent, to consider the said motion.

On motion by Mr. Conness to amend the motion of Mr. Vickers, by striking out all after the word "Ordered," and inserting,

That such of the managers and counsel for the President as may choose to do so have leave to file arguments on or before Friday, April 24.

On motion by Mr. Buckalew that the motion of Mr. Vickers lie on the table,

It was determined in the negative; and

On the question to agree to the amendment proposed by Mr. Conness,

It was determined in the negative { Yeas 24 / Nays 25 }

On motion by Mr. Conness,

The yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are,

Messrs. Cameron, Cattell, Chandler, Conkling, Conness, Corbett, Cragin, Drake, Ferry, Henderson, Howard, Morrill of Vermont, Patterson of New Hampshire, Pomeroy, Ramsey, Sherman, Stewart, Sumner, Thayer, Tipton, Willey, Williams, Wilson, Yates.

Those who voted in the negative are,

Messrs. Anthony, Bayard, Buckalew, Davis, Dixon, Doolittle, Edmunds, Fessenden, Fowler, Frelinghuysen, Grimes, Hendricks, Howe, Johnson, McCreery, Morgan, Morton, Norton, Patterson of Tennessee, Ross, Saulsbury, Sprague, Trumbull, Van Winkle, Vickers.

So the amendment was not agreed to.

On motion by Mr. Johnson to amend the motion submitted by Mr. Vickers by striking out in the first line the word "one" and inserting the word "two," and in the second line by striking out the word "his" and inserting the word "their."

It was determined in the affirmative.

On motion by Mr. Sherman to further amend the motion of Mr. Vickers by inserting in the second line, after the word "printed," the words "or written,"

It was determined in the affirmative.

On motion by Mr. Conness to further amend the motion of Mr. Vickers by striking out the words "before the adjournment of today," and inserting in lieu thereof the words "on or before 11 o'clock a.m. to-morrow."

It was determined in the affirmative.

On motion by Mr. Henderson to further amend the motion of Mr. Vickers by striking out all after the word "Ordered," and inserting—

That all the managers not delivering oral arguments may be permitted to file written arguments at any time before the 24th instant, and the counsel for the President not making oral arguments may file written arguments at any time before 11 o'clock Monday, the 27th instant;

On motion by Mr. Thayer that the motion of Mr. Vickers lie on the table,

It was determined in the negative { Yeas 13 / Nays 37 }

On motion by Mr. Sprague,

The yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are,

Messrs. Buckalew, Conkling, Dixon, Doolittle, Edmunds, Grimes, Henderson, McCreery, Norton, Ross, Sprague, Thayer, Williams.

Those who voted in the negative are,

Messrs. Anthony, Cameron, Cattell, Chandler, Conness, Corbett, Cragin, Davis, Drake, Ferry, Fessenden, Fowler, Frelinghuysen, Harlan, Hendricks, Howard, Howe, Johnson, Morgan, Morrill of Maine, Morrill of Vermont, Morton, Patterson of New Hampshire, Patterson of Tennessee, Pomeroy, Ramsey, Saulsbury, Sherman, Stewart, Sumner, Tipton, Trumbull, Van Winkle, Vickers, Willey, Wilson, Yates.

So the motion to lie on the table was not agreed to.

The question recurring on the amendment proposed by Mr. Henderson,

On motion by Mr. Conness to amend the amendment in the first line by inserting after the word "That" the words "subject to the 21st rule,"

It was determined in the affirmative.

On motion by Mr. Trumbull to further amend the amendment proposed by Mr. Henderson by striking out all after the word "That," in line 1, and inserting "as many of the managers and of the counsel for the President as desire to do so be permitted to file arguments or to address the Senate orally,"

It was determined in the affirmative ..... {Yeas---- 29 / Nays---- 20

On motion by Mr. Stewart,

The yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are,

Messrs. Anthony, Buckalew, Conkling, Cragin, Davis, Doolittle, Edmunds, Ferry, Fessenden, Fowler, Grimes, Henderson, Hendricks, Johnson, McCreery, Morrill of Maine, Norton, Patterson of New Hampshire, Patterson of Tennessee, Ramsey, Saulsbury, Sherman, Sprague, Tipton, Trumbull, Van Winkle, Vickers, Willey, Yates.

Those who voted in the negative are,

Messrs. Cameron, Cattell, Chandler, Conness, Corbett, Dixon, Drake, Frelinghuysen, Harlan, Howard, Howe, Morgan, Morrill of Vermont, Morton, Pomeroy, Ross, Stewart, Sumner, Thayer, Williams.

So the amendment of Mr. Trumbull to the amendment proposed by Mr. Henderson was agreed to; and

On the question to agree to the amendment as amended,

On motion by Mr. Buckalew to further amend the amendment by inserting at the end thereof the following: "but the conclusion of the oral argument shall be by one manager, as provided in the 21st rule,"

It was determined in the affirmative.

On motion by Mr. Cameron to further amend the amendment, as amended, by striking out all after the word "That," in the first line, and inserting "all the managers and all the counsel for the President be permitted to file written or printed arguments by 11 o'clock a.m. to-morrow,"

It was determined in the negative.

On motion by Mr. Howe that the motion of Mr. Vickers and the proposed amendment lie on the table,

It was determined in the negative.

On motion by Mr. Yates to further amend the amendment, as amended, by striking out all after the word "That," in the first line,

and inserting "four of the managers and four of the counsel for the respondent be permitted to make printed or written or oral argument, the managers to have the opening and closing, subject to the limitations of the 21st rule,"

It was determined in the negative {Yeas 18 / Nays 31}

On motion by Mr. Yates,

The yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are,

Messrs. Buckalew, Conkling, Corbett, Cragin, Davis, Doolittle, Fowler, Hendricks, Howard, McCreery, Morgan, Morton, Norton, Saulsbury, Sprague, Van Winkle, Vickers, Yates.

Those who voted in the negative are,

Messrs. Anthony, Bayard, Cameron, Cattell, Chandler, Dixon, Drake, Edmunds, Ferry, Fessenden, Frelinghuysen, Grimes, Harlan, Henderson, Howe, Johnson, Morrill of Maine, Morrill of Vermont, Patterson of Tennessee, Pomeroy, Ramsey, Ross, Sherman, Stewart, Sumner, Thayer, Tipton, Trumbull, Willey, Williams, Wilson.

So the amendment to the amendment was not agreed to.

On motion by Mr. Hendricks that the further consideration of the subject be postponed until Mr. Manager Boutwell shall have made his argument,

It was determined in the negative; and

The question recurring on the amendment of Mr. Henderson, as amended,

It was determined in the affirmative {Yeas 28 / Nays 22}

On motion by Mr. Howard,

The yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are,

Messrs. Anthony, Conkling, Cragin, Davis, Dixon, Doolittle, Edmunds, Ferry, Fessenden, Fowler, Grimes, Henderson, Hendricks, Johnson, McCreery, Morrill of Maine, Morton, Norton, Patterson of Tennessee, Saulsbury, Sherman, Sprague, Tipton, Trumbull, Van Winkle, Vickers, Willey, Yates.

Those who voted in the negative are,

Messrs. Bayard, Buckalew, Cameron, Cattell, Chandler, Corbett, Drake, Frelinghuysen, Harlan, Howard, Howe, Morgan, Morrill of Vermont, Patterson of New Hampshire, Pomeroy, Ramsey, Ross, Stewart, Sumner, Thayer, Williams, Wilson.

So the amendment proposed by Mr. Henderson to the motion of Mr. Vickers, as amended on the motion of Mr. Trumbull and the motion of Mr. Buckalew, was agreed to.

The question now recurring on the motion of Mr. Vickers, as amended,

On the question to agree thereto,

It was determined in the affirmative {Yeas 28 / Nays 22}

On motion by Mr. Edmunds,

The yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are,

Messrs. Anthony, Cragin, Davis, Doolittle, Ferry, Fessenden, Fowler, Grimes, Henderson, Hendricks, Johnson, McCreery, Morgan, Mor-

rill of Maine, Morton, Norton, Patterson of Tennessee, Ramsey, Saulsbury, Sherman, Sumner, Tipton, Trumbull, Van Winkle, Vickers, Willey, Wilson, Yates.

Those who voted in the negative are,

Messrs. Bayard, Buckalew, Cameron, Cattell, Chandler, Conkling, Corbett, Dixon, Drake, Edmunds, Frelinghuysen, Harlan, Howard, Howe, Morrill of Vermont, Patterson of New Hampshire, Pomeroy, Ross, Sprague, Stewart, Thayer, Williams.

So it was

Ordered, That as many of the managers and of the counsel for the President as desire to do so be permitted to file arguments or to address the Senate orally; but the conclusion of the oral argument shall be by one manager, as provided in the 21st rule.

Mr. Manager Logan, under the authority of the foregoing order, filed a printed argument.

Mr. Manager Boutwell then commenced his argument in support of the articles of impeachment; and while addressing the Senate yielded for a motion to take a recess for 15 minutes; when,

On motion by Mr. Sprague,

The Senate took a recess for 15 minutes; at the expiration of which,

Mr. Sherman moved that there be a call of the Senate; and

The role being called,

It appeared that 44 Senators were present and answered to their names.

Mr. Boutwell resumed his argument, and, without concluding, yielded to Mr. Conkling, upon whose motion, at 4 o'clock p.m.,

The Senate, sitting for the trial of the President upon articles of impeachment, adjourned to 11 o'clock a.m. tomorrow.

Thursday, April 23, 1868.

The United States *v.* Andrew Johnson, President.

At 11 o'clock a.m. the Chief Justice of the United States entered the Senate Chamber and resumed the chair: and

The Sergeant at Arms having made proclamation,

The managers appointed to conduct the trial of the President of the United States upon articles of impeachment exhibited against him by the House of Representatives, to wit, Mr. Bingham, Mr. Boutwell, Mr. James F. Wilson, Mr. Butler, Mr. Thomas Williams, Mr. Logan, and Mr. Thaddeus Stevens entered the Senate Chamber and took seats assigned them.

The Sergeant at Arms announced the presence, at the door of the Senate Chamber, of the House of Representatives; and

The House of Representatives, as in Committee of the Whole House, preceded by its Chairman, Mr. Elihu B. Washburne, and accompanied by its Speaker and Clerk, entered the Senate Chamber and took the seats provided them.

The counsel for the President, to wit, Mr. Curtis, Mr. Evarts, Mr. Nelson, and Mr. Groesbeck, appeared at the bar of the Senate and took the seats assigned them.

The Journal of the proceedings of the Senate, sitting for the trial of the President upon articles of impeachment, of yesterday was read.

Mr. Grimes submitted the following motion for consideration:

Ordered, That hereafter the hour for the meeting of the Senate sitting for the trial of the impeachment of Andrew Johnson, President of the United States, shall be 12 o'clock m. of each day, except Sunday.

Mr. Manager Boutwell resumed his argument in support of the articles of impeachment; and having concluded the same,

On motion by Mr. Johnson,

The Senate took a recess for 15 minutes; at the expiration of which,

Mr. Nelson, of counsel for the President, commenced the argument for the defense; and, without concluding, yielded to Mr. Yates, upon whose motion, at 4 o'clock p.m.,

The Senate, sitting for the trial of the President upon articles of impeachment, adjourned to tomorrow at 11 o'clock a.m.

FRIDAY, APRIL 24, 1868.

The United States *v.* Andrew Johnson, President.

At 11 o'clock a.m. the Chief Justice of the United States entered the Senate Chamber and resumed the chair; and,

The Sergeant at Arms having made proclamation,

The managers appointed to conduct the trial of the President of the United States upon articles of impeachment exhibited against him by the House of Representatives, to wit, Mr. Bingham, Mr. Boutwell, Mr. James F. Wilson, Mr. Butler, Mr. Thomas Williams, Mr. Logan, and Mr. Thaddeus Stevens, entered the Senate Chamber and took the seats assigned them.

The Sergeant at Arms announced the presence, at the door of the Senate Chamber, of the House of Representatives; and

The House of Representatives, as in Committee of the Whole House, preceded by its Chairman, Mr. Elihu B. Washburne, and accompanied by its Speaker and Clerk, entered the Senate Chamber and took the seats provided for them.

The counsel for the President, to wit, Mr. Curtis, Mr. Evarts, Mr. Nelson, and Mr. Groesbeck, appeared at the bar of the Senate and took the seats assigned them.

The Journal of the proceedings of the Senate, sitting for the trial of the President upon articles of impeachment, of yesterday was read.

The Chief Justice stated that the business first in order was the motion submitted by Mr. Grimes yesterday, to fix the hour of the daily meeting of the Senate, sitting for the trial of the impeachment, at 12 o'clock m.; and

The Senate proceeded to consider the said motion.

It was determined in the affirmative ..... {Yeas ... 21 / Nays ... 13}

On motion by Mr. Wilson,

The yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are,

Messrs. Anthony, Davis, Doolittle, Ferry, Fessenden, Fowler, Grimes, Hendricks, Johnson, McCreery, Morgan, Morrill of Vermont, Norton, Patterson of Tennessee, Ramsey, Saulsbury, Trumbull, Van Winkle, Vickers, Willey, Yates.

Those who voted in the negative are,

Messrs. Conkling, Conness, Cragin, Edmunds, Harlan, Howe, Pomeroy, Sprague, Stewart, Sumner, Thayer, Tipton, Wilson.

So it was

Ordered, That hereafter the hour for the meeting of the Senate, sitting for the trial of the impeachment of Andrew Johnson, President of the United States, shall be 12 o'clock m. of each day, except Sunday.

Mr. Edmunds submitted the following motion for consideration:

Ordered, That after the arguments shall be concluded, and when the doors shall be closed for deliberation upon the final question, the official reporters of the Senate shall take down the debates upon the final question, to be reported in the proceedings.

Mr. Nelson, of counsel for the President, resumed his argument for the defense, and continued therein until 15 minutes to 2 o'clock, when he yielded to Mr. Johnson, upon whose motion the Senate took a recess for 15 minutes; at the expiration of which

Mr. Nelson resumed his argument; and having concluded the same,

On motion by Mr. Tipton, at 15 minutes past 4 o'clock p.m.,

The Senate, sitting for the trial of the President upon articles of impeachment, adjourned to to-morrow at 12 o'clock m.

SATURDAY, APRIL 25, 1868.

The United States *v.* Andrew Johnson, President.

At 12 o'clock m. the Chief Justice of the United States entered the Senate Chamber and resumed the chair; and

The Sergeant at Arms having made proclamation,

The managers appointed to conduct the trial of the President of the United States upon articles of impeachment exhibited against him by the House of Representatives, to wit: Mr. Bingham, Mr. Boutwell, Mr. James F. Wilson, Mr. Butler, Mr. Thomas Williams, Mr. Logan, and Mr. Thaddeus Stevens, entered the Senate Chamber and took the seats assigned them.

The Sergeant at Arms announced the presence, at the door of the Senate Chamber, of the House of Representatives; and

The House of Representatives, as in Committee of the Whole House, preceded by its chairman, Mr. Elihu B. Washburne, and accompanied by its Speaker and Clerk, entered the Senate Chamber and took the seats provided for them.

The counsel for the President, to wit, Mr. Curtis, Mr. Evarts, Mr. Nelson, and Mr. Groesbeck, appeared at the bar of the Senate and took the seats assigned them.

The Journal of the proceedings of the Senate, sitting for the trial of the President upon articles of impeachment, of yesterday was read.

The Chief Justice stated that the business first in order was the motion submitted by Mr. Edmunds yesterday, that after the conclu-

sion of the arguments, when the doors of the Senate shall be closed for deliberation upon the final question, the official reporters of the Senate shall take down the debates to be published in the proceedings.

On motion by Mr. Edmunds that the further consideration of the motion be postponed to Monday next;

On motion by Mr. Drake that the consideration of the motion be postponed indefinitely.

It was determined in the negative ..... {Yeas.... 20 / Nays.... 27

The yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are,

Messrs. Cameron, Chandler, Conkling, Corbett, Drake, Ferry, Harlan, Howard, Morrill of Maine, Morrill of Vermont, Morton, Nye, Pomeroy, Ramsey, Ross, Stewart, Sumner, Thayer, Tipton, Yates.

Those who voted in the negative are,

Messrs. Anthony, Buckalew, Cragin, Davis, Dixon, Doolittle, Edmunds, Fessenden, Fowler, Frelinghuysen, Grimes, Henderson, Hendricks, Howe, Johnson, McCreery, Morgan, Norton, Patterson of Tennessee, Saulsbury, Sherman, Trumbull, Van Winkle, Vickers, Willey, Williams, Wilson.

So the motion to postpone indefinitely was not agreed to.

The question recurring on the motion of Mr. Edmunds.

It was determined in the affirmative.

So it was

Ordered, That the further consideration of the question be postponed to Monday next.

Mr. Sumner submitted the following motion for consideration:

Ordered, That the Senate, sitting for the trial of Andrew Johnson, President of the United States, will proceed to vote on the several articles of impeachment at 12 o'clock on the day after the close of the arguments.

Mr. Sumner submitted the following resolution for consideration:

Resolved, That the following be added to the rules of procedure and practice in the Senate when sitting on the trial of impeachments:

"Rule 23. In taking the votes of the Senate on articles of impeachment the presiding officer shall call on each Senator by his name, and upon each article propose the following question, in the manner following: 'Mr. ———, how say you? Is the respondent, ——— ———, guilty or not guilty as charged in the — article of impeachment?' Whereupon each Senator shall rise in his place and answer, 'Guilty,' or 'Not guilty.'

"Rule 24. On a conviction by the Senate, it shall be the duty of the presiding officer forthwith to pronounce the removal from office of the convicted person according to the requirement of the Constitution. Any further judgment shall be on the order of the Senate."

The Chief Justice directed the counsel for the President to proceed with his argument; and

Mr. Groesbeck, of counsel for the President, commenced his argument for the defense; and without concluding, yielded, at 10 minutes past 2 o'clock p.m., to Mr. Sumner, upon whose motion the Senate took a recess for 15 minutes; at the expiration of which,

Mr. Groesbeck resumed his argument; and having concluded the same,

On motion by Mr. Grimes,

The Senate sitting for the trial of the President upon articles of impeachment adjourned to Monday at 12 o'clock m.

MONDAY, APRIL 27, 1868.

The United States *v.* Andrew Johnson, President.

At 12 o'clock m. the Chief Justice of the United States entered the Senate Chamber and resumed the chair; and

The Sergeant at Arms having made proclamation,

The managers appointed to conduct the trial of the President of the United States upon articles of impeachment exhibited against him by the House of Representatives, to wit, Mr. Bingham, Mr. Boutwell, Mr. James F. Wilson, Mr. Butler, Mr. Thomas Williams, Mr. Logan, and Mr. Thaddeus Stevens, entered the Senate Chamber and took the seats assigned to them.

The Sergeant at Arms announced the presence, at the door of the Senate Chamber, of the House of Representatives; and

The House of Representatives, as in Committee of the Whole House, preceded by its chairman, Mr. Elihu B. Washburne, and accompanied by its Speaker and Clerk, entered the Senate Chamber and took the seats provided for them.

The counsel for the President, to wit, Mr. Curtis, Mr. Evarts, Mr. Nelson, and Mr. Groesbeck, appeared at the bar of the Senate and took the seats assigned them.

The journal of the proceedings of the Senate sitting for the trial of the President upon articles of impeachment of Saturday, the 25th instant, was read.

The Chief Justice stated that the business first in order was the motion submitted by Mr. Edmunds, on the 24th instant, that, after the conclusion of the arguments, when the doors of the Senate shall be closed for deliberation upon the final question, the official reporters of the Senate shall take down the debates to be published in the proceedings; and

The Senate resumed the consideration of the said motion.

On motion by Mr. Williams to amend the motion by inserting at the end thereof the following: "But no Senator shall speak more than once nor to exceed fifteen minutes during such deliberation;"

On motion by Mr. Howard, to amend the amendment proposed by Mr. Williams, by inserting, after the word "minutes," the words "on one question,"

It was determined in the negative { Yeas 19 / Nays 30 }

On motion by Mr. Fessenden,

The yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are,

Messrs. Bayard, Buckalew, Davis, Dixon, Doolittle, Fessenden, Fowler, Frelinghuysen, Grimes, Hendricks, Howard, Johnson, McCreery, Norton, Patterson of Tennessee, Saulsbury, Trumbull, Vickers, Willey.

Those who voted in the negative are,

Messrs. Cameron, Cattell, Chandler, Conkling, Corbett, Cragin, Drake, Edmunds, Ferry, Harlan, Henderson, Howe, Morgan, Morrill of Maine, Morrill of Vermont, Morton, Nye, Patterson of New Hampshire, Pomeroy, Ramsey, Ross, Sherman, Stewart, Sumner, Thayer, Tipton, Van Winkle, Williams, Wilson, Yates.

So the amendment of Mr. Howard to the amendment proposed by Mr. Williams was not agreed to.

On motion by Mr. Bayard, to amend the amendment proposed by Mr. Williams, by striking out the word "fifteen" and inserting the word "thirty," so that the amendment would read, "nor to exceed thirty minutes,"

It was determined in the negative {Yeas 16 / Nays 34}

The yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are,

Messrs. Bayard, Buckalew, Corbett, Davis, Dixon, Doolittle, Fessenden, Fowler, Grimes, Hendricks, Johnson, McCreery, Norton, Patterson of Tennessee, Saulsbury, Vickers.

Those who voted in the negative are,

Messrs. Anthony, Cameron, Cattell, Chandler, Conkling, Cragin, Drake, Edmunds, Ferry, Frelinghuysen, Harlan, Henderson, Howard, Howe, Morgan, Morrill of Maine, Morrill of Vermont, Morton, Nye, Patterson of New Hampshire, Pomeroy, Ramsey, Ross, Sherman, Stewart, Sumner, Thayer, Tipton, Trumbull, Van Winkle, Willey, Williams, Wilson, Yates.

So the amendment of Mr. Bayard to the amendment proposed by Mr. Williams was not agreed to.

On motion by Mr. Morton,

Ordered, That the further consideration of the motion of Mr. Edmunds be postponed until after the arguments of counsel and managers shall have been closed.

The Chief Justice stated that the next business in order was the motion submitted by Mr. Sumner on Saturday that the Senate proceed to vote on the several articles of impeachment at 12 o'clock on the day after the close of the arguments.

On motion by Mr. Sumner,

Ordered, That the further consideration of the said motion, and also the resolution submitted by him on the 25th instant, proposing two additional rules of proceeding, be postponed until the final argument in the cause shall have been closed.

The Chief Justice directed the managers to proceed with their arguments; and

Thereupon

Mr. Manager Stevens commenced his argument in support of the articles of impeachment; and having concluded the same,

Mr. Manager Williams commenced his argument in support of the said articles; and without concluding, yielded, at 25 minutes past 2 o'clock p.m., to Mr. Conkling, upon whose motion the Senate took a recess for 15 minutes; at the expiration of which,

Mr. Williams resumed his argument; and, without concluding, yielded to Mr. Morrill of Vermont, upon whose motion

The Senate, sitting for the trial of the President upon articles of impeachment, adjourned to to-morrow at 12 o'clock m.

TUESDAY, APRIL 28, 1868.

The United States *v.* Andrew Johnson, President.

At 12 o'clock m. the Chief Justice of the United States entered the Senate Chamber and resumed the chair; and

The Sergeant at Arms having made proclamation.

The managers appointed to conduct the trial of the President of the United States upon articles of impeachment exhibited against him by the House of Representatives, to wit, Mr. Bingham, Mr. Boutwell, Mr. James F. Wilson, Mr. Butler, Mr. Thomas Williams, Mr. Logan, and Mr. Thaddeus Stevens, entered the Senate Chamber and took the seats assigned them.

The Sergeant at Arms announced the presence, at the door of the Senate Chamber, of the House of Representatives; and

The House of Representatives, as in Committee of the Whole House, preceded by its chairman, Mr. Elihu B. Washburne, and accompanied by its Speaker and Clerk, entered the Senate Chamber and took the seats provided for them.

The counsel for the President, to wit, Mr. Evarts, Mr. Nelson, and Mr. Groesbeck, appeared at the bar of the Senate and took the seats assigned them.

The Journal of the proceedings of the Senate, sitting for the trial of the President upon articles of impeachment, of yesterday was read.

Mr. Sumner submitted the following motion for consideration:

Whereas it is provided in the Constitution of the United States that on trials of impeachment by the Senate "no person shall be convicted without the concurrence of two-thirds of the members present," and the person so convicted "shall be removed from the office"; but this requirement of two-thirds is not extended to any further judgment, which remains subject to the general law that a majority prevails: Therefore, in order to remove any doubt thereupon,

Ordered, That after removal, which necessarily follows conviction, any question which may arise with regard to disqualification or any further judgment shall be determined by a majority of the Members present.

The Chief Justice directed Mr. Manager Williams to proceed with his argument; and

Thereupon

Mr. Manager Williams resumed his argument in support of the articles of impeachment; and, having concluded,

On motion by Mr. Johnson, at 40 minutes past 1 o'clock p. m.,

The Senate took a recess for 15 minutes; at the expiration of which,

Mr. Manager Butler asked and obtained leave to make a brief explanation in regard to a portion of the argument of Mr. Nelson, of counsel for the President; and

After a response thereto by Mr. Nelson,

Mr. Evarts, of counsel for the President, commenced his argument for the defense; and, without concluding, yielded, at 4 o'clock and 25 minutes p.m., to Mr. Conkling, upon whose motion

The Senate, sitting for the trial of the President upon articles of impeachment, adjourned to to-morrow at 12 o'clock m.

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WEDNESDAY, APRIL 29, 1868.

The United States *v.* Andrew Johnson, President.

At 12 o'clock m. the Chief Justice of the United States entered the Senate Chamber and resumed the chair; and

The Sergeant at Arms having made proclamation,

The managers appointed to conduct the trial of the President of the United States upon articles of impeachment exhibited against him by the House of Representatives, to wit, Mr. Bingham, Mr. Boutwell, Mr. James F. Wilson, Mr. Butler, Mr. Thomas Williams, Mr. Logan, and Mr. Thaddeus Stevens, entered the Senate Chamber and took the seats assigned them.

The Sergeant at Arms announced the presence, at the door of the Senate Chamber, of the House of Representatives; and

The House of Representatives, as in Committee of the Whole House, preceded by its Chairman, Mr. Elihu B. Washburne, and accompanied by its Speaker and Clerk, entered the Senate Chamber and took the seats provided for them.

The counsel for the President, to wit, Mr. Evarts, Mr. Nelson, and Mr. Groesbeck, appeared at the bar of the Senate and took the seats assigned them.

The Journal of the proceedings of the Senate sitting for the trial of the President upon articles of impeachment, of yesterday, was read.

Mr. Sumner submitted the following order for consideration:

Whereas Mr. Nelson, one of the counsel for the President, in addressing the Senate has used disorderly words as follows, viz: Beginning with personalities directed to one of the managers he proceeded to say: "So far as any question that the gentleman desires to make of a personal character with me is concerned, this is not the place to make it. Let him make it elsewhere if he desires it."

And whereas such language, besides being discreditable to these proceedings, is apparently intended to provoke a duel, or to signify a willingness to fight a duel, contrary to law and good morals: Therefore

Ordered, That Mr. Nelson, one of the counsel for the President, has justly deserved the disapprobation of the Senate.

Mr. Nelson rose to address the Senate; but objection being made to his proceeding, after some remarks by Mr. Manager Butler,

Mr. Trumbull moved that Mr. Nelson have leave to make an explanation; which motion was agreed to; and

Mr. Nelson having made his explanation, was proceeding to read certain letters, the reading of which was objected to.

On motion by Mr. Hendricks, that Mr. Nelson have leave to read so much of the said letters as would show their dates,

It was determined in the affirmative; and

Mr. Nelson having read so much of the letters as showed their dates, was proceeding to read other portions thereof; which being objected to, he handed the letters to the Secretary.

Mr. Cameron submitted the following motion for consideration:

Ordered, That the Senate, sitting as a court of impeachment, shall hereafter hold night sessions, commencing at 8 o'clck p.m., to-day and continuing until 11 o'clock p.m., until the arguments of the counsel for the President and of the managers on the part of the House of Representatives shall be concluded.

The Chief Justice directed the counsel for the President to proceed with the argument; and

Mr. Evarts, of counsel for the President, resumed his argument for the defense; and, without concluding, yielded, at 2 o'clock p.m., to Mr. Conkling, on whose motion the Senate took a recess for 15 minutes: at the expiration of which

Mr. Evarts resumed his argument for the defense; and, without concluding, yielded, at 4 o'clock p.m., to Mr. Conkling, upon whose motion

The Senate, sitting for the trial of the President upon articles of impeachment, adjourned to to-morrow at 12 o'clock m.

THURSDAY, APRIL 30, 1868.

The United States *v.* Andrew Johnson, President.

At 12 o'clock m. the Chief Justice of the United States entered the Senate Chamber and resumed the chair; and

The Sergeant at Arms having made proclamation,

The managers appointed to conduct the trial of the President upon articles of impeachment exhibited against him by the House of Representatives, to wit, Mr. Bingham, Mr. Boutwell, Mr. James F. Wilson, Mr. Butler, Mr. Thomas Williams, Mr. Logan, and Mr. Thaddeus Stevens, entered the Senate Chamber and took the seats assigned them.

The Sergeant at Arms announced the presence, at the door of the Senate Chamber, of the House of Representatives; and

The House of Representatives, as in Committee of the Whole House, preceded by its chairman, Mr. Elihu B. Washburne, and accompanied by its Speaker and Clerk, entered the Senate Chamber and took the seats provided for them.

The counsel for the President, to wit, Mr. Evarts, Mr. Nelson, and Mr. Groesbeck, appeared at the bar of the Senate and took the seats assigned them.

The Journal of the proceedings of the Senate, sitting for the trial of the President upon articles of impeachment, of yesterday, was read.

The Chief Justice stated that the first business in order was the motion submitted by Mr. Sumner yesterday that Mr. Nelson, of counsel for the President, has, for disorderly language used while addressing the Senate in reply to Mr. Manager Butler, deserved the disapprobation of the Senate.

The Senate proceeded to consider the said motion.

On motion by Mr. Johnson that it lie on the table,

It was determined in the affirmative { Yeas ---- 35 / Nays ---- 10 }

On motion by Mr. Sumner,

The yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are,

Messrs. Anthony, Bayard, Buckalew, Cattell, Chandler, Corbett, Cragin, Davis, Dixon, Doolittle, Drake, Edmunds, Ferry, Fessenden, Fowler, Frelinghuysen, Grimes, Harlan, Hendricks, Howe, Johnson,

Morrill of Maine, Morton, Norton, Patterson of New Hampshire, Patterson of Tennessee, Ramsey, Ross, Saulsbury, Sherman, Tipton, Trumbull, Van Winkle, Vickers, Williams.

Those who voted in the negative are:

Messrs. Cameron Howard, Morgan, Morrill of Vermont, Pomeroy, Stewart, Sumner, Thayer, Wilson, Yates.

So it was ordered that the motion of Mr. Sumner lie on the table,

The Chief Justice stated that the business next in order was the motion submitted by Mr. Cameron yesterday, that the Senate hereafter hold night sessions from 8 o'clock to 11 o'clock p.m., until the arguments by counsel for the President and the managers on the part of the House of Representatives shall have been concluded; and

The Senate proceeded to consider said motion.

On motion by Mr. Sumner to amend the said motion by striking out all after the word "Ordered," and inserting:

That the Senate will sit during the remainder of the trial from 10 o'clock in the forenoon to 6 o'clock in the afternoon, will such brief recess as may be ordered.

On motion by Mr. Trumbull, that the motion of Mr. Cameron lie on the table,

It was determined in the affirmative { Yeas ---- 32 / Nays ---- 17 }

On motion by Mr. Sumner,

The yeas and nays being desired by one-fifth of the Senators present.

Those who voted in the affirmative are,

Messrs. Anthony, Bayard, Buckalew, Cattell, Corbett, Davis, Dixon, Doolittle, Drake, Ferry, Fessenden, Fowler, Frelinghuysen, Grimes, Hendricks, Howe, Johnson, McCreery, Morrill of Maine, Morrill of Vermont, Morton, Norton, Patterson of New Hampshire, Patterson of Tennessee, Ramsey, Ross, Saulsbury, Sprague, Trumbull, Van Winkle, Vickers, Willey.

Those voted in the negative are,

Messrs. Cameron, Chandler, Conkling, Cragin, Edmunds, Harlan, Howard, Morgan, Pomeroy, Sherman, Stewart, Sumner, Thayer, Tipton, Williams, Wilson, Yates.

So it was ordered that the motion lie on the table.

The Chief Justice directed the counsel for the President to proceed with his argument; and

Mr. Evarts, of counsel for the President, resumed his argument; and, without concluding, yielded to Mr. Conkling, at 2 o'clock p.m., upon whose motion the Senate took a recess for 15 minutes; at the expiration of which,

On motion by Mr. Grimes, that there be a call of the Senate,

It was determined in the affirmative; and

The roll being called by the Secretary, and 42 Senators having answered to their names,

Mr. Evarts resumed his argument for the defense; and, without concluding, yielded to Mr. Henderson, at 4 o'clock and 25 minutes, upon whose motion,

The Senate, sitting for the trial of the President upon articles of impeachment, adjourned to to-morrow at 12 o'clock m.

FRIDAY, MAY 1, 1868.

The United States *v.* Andrew Johnson, President

At 12 o'clock m. the Chief Justice of the United States entered the Senate Chamber and resumed the chair; and

The Sergeant at Arms having made proclamation,

The managers appointed to conduct the trial of the President of the United States upon articles of impeachment exhibited against him by the House of Representatives, to wit: Mr. Bingham, Mr. Boutwell, Mr. James F. Wilson, Mr. Butler, Mr. Thomas Williams, Mr. Logan, and Mr. Thaddeus Stevens, entered the Senate Chamber and took the seats assigned them.

The Sergeant at Arms announced the presence, at the door of the Senate Chamber, of the House of Representatives; and

The House of Representatives, as in Committee of the Whole House, preceded by its Chairman, Mr. Elihu B. Washburne, and accompanied by its Speaker and Clerk, entered the Senate Chamber and took the seats provided for them.

The counsel for the President, to wit: Mr. Evarts, Mr. Nelson, and Mr. Grosbeck, appeared at the bar of the Senate and took the seats assigned them.

The Journal of the proceedings of the Senate sitting for the trial of the President upon articles of impeachment, of yesterday, was read.

The Chief Justice directed the counsel for the President to proceed with his argument; and

Mr. Evarts, of counsel for the President, resumed his argument for the defense; and having concluded,

On motion by Mr. Pomeroy,

The Senate took a recess for 15 minutes; at the expiration of which,

On motion by Mr. Sherman that there be a call of the Senate,

It was determined in the affirmative; and

The roll being called by the Secretary, 40 Senators answered to their names.

The Chief Justice directed the counsel of the President to proceed with their argument; and

Mr. Stanbery, of counsel for the President, again appeared at the bar and commenced his argument for the defense, and, without concluding, yielded to Mr. Grimes at 4 o'clock and 5 minutes p.m., on whose motion

The Senate, sitting for the trial of the President upon articles of impeachment, adjourned to to-morrow at 12 o'clock m.

SATURDAY, MAY 2, 1868.

The United States *v.* Andrew Johnson, President.

At 12 o'clock m. the Chief Justice of the United States entered the Senate Chamber and resumed the chair; and

The Sergeant at Arms having made proclamation,

The managers appointed to conduct the trial of the President upon articles of impeachment exhibited against him by the House of Representatives, to wit, Mr. Bingham, Mr. Boutwell, Mr. James F.

Wilson, Mr. Butler, Mr. Thomas Williams, Mr. Logan, and Thaddeus Stevens, entered the Senate Chamber and took the seats assigned them.

The Sergeant at Arms announced the presence, at the door of the Senate Chamber, of the House of Representatives; and

The House of Representatives, as in Committee of the Whole House, preceded by its chairman, Mr. Elihu B. Washburne, and accompanied by its Speaker and Clerk, entered the Senate Chamber and took the seats provided for them.

The counsel for the President, to wit, Mr. Stanbery, Mr. Evarts, Mr. Nelson, and Mr. Groesbeck, appeared at the bar of the Senate and took the seats assigned them.

The Journal of the proceedings of the Senate, sitting for the trial of the President upon articles of impeachment, of yesterday was read.

The Chief Justice directed the counsel for the President to proceed with his argument; and

Mr. Stanbery, of counsel for the President, resumed his argument for the defense; but, without concluding, yielded to Mr. Johnson at 2 o'clock p.m., upon whose motion

The Senate took a recess for 15 minutes; at the expiration of which,

Mr. Stanbery resumed his argument for the defense; and having concluded,

On motion by Mr. Howard,

The Senate, sitting for the trial of the President upon articles of impeachment, adjourned to Monday at 12 o'clock m.

MONDAY, MAY 4, 1868.

The United States *v.* Andrew Johnson, President.

At 12 o'clock m. the Chief Justice of the United States entered the Senate Chamber and resumed the chair; and

The Sergeant at Arms having made proclamation,

The managers appointed to conduct the trial of the President of the United States upon articles of impeachment exhibited against him by the House of Representatives, to wit, Mr. Bingham, Mr. Boutwell, Mr. James F. Wilson, Mr. Butler, Mr. Thomas Williams, Mr. Logan, and Mr. Thaddeus Stevens, entered the Senate Chamber and took the seats assigned them.

The Sergeant at Arms announced the presence, at the door of the Senate Chamber, of the House of Representatives; and

The House of Representatives, as in Committee of the Whole House, preceded by its chairman, Mr. Elihu B. Washburne, and accompanied by its Speaker and Clerk, entered the Senate Chamber and took the seats provided for them.

The counsel for the President, to wit, Mr. Nelson and Mr. Groesbeck, appeared at the bar of the Senate and took the seats assigned them.

The Journal of the proceedings of the Senate, sitting for the trial of the President upon articles of impeachment, of Saturday was read.

The Chief Justice directed the managers to proceed with their argument; and

Mr. Manager Bingham commenced his argument in support of the articles of impeachment, and, without concluding, yielded to Mr. Sherman at 10 minutes to 2 o'clock p.m., upon whose motion the Senate took a recess for 15 minutes; at the expiration of which,

Mr. Bingham resumed his argument, and, without concluding, yielded to Mr. Conness, upon whose motion

The Senate, sitting for the trial of the President upon articles of impeachment, adjourned to to-morrow at 12 o'clock m.

TUESDAY, MAY 5, 1868.

The United States *v.* Andrew Johnson, President.

At 12 o'clock m. the Chief Justice of the United States entered the Senate Chamber and resumed the chair; and

The Sergeant at Arms having made proclamation,

The managers appointed to conduct the trial of the President upon articles of impeachment exhibited against him by the House of Representatives, to wit, Mr. Bingham, Mr. Boutwell, Mr. James F. Wilson, Mr. Butler, Mr. Thomas Williams, Mr. Logan, and Mr. Thaddeus Stevens, entered the Senate Chamber and took the seats assigned them.

The Sergeant at Arms announced the presence, at the door of the Senate Chamber, of the House of Representatives; and

The House of Representatives, as in Committee of the Whole House, preceded by its Chairman, Mr. Elihu B. Washburne, and accompanied by its Speaker and Clerk, entered the Senate Chamber and took the seats provided for them.

The counsel for the President, to wit, Mr. Evarts, Mr. Nelson, and Mr. Groesbeck, appeared at the bar of the Senate and took the seats assigned them.

The Journal of the proceedings of the Senate, sitting for the trial of the President upon articles of impeachment, of yesterday was read.

The Chief Justice directed Mr. Manager Bingham to proceed with his argument; and

Mr. Manager Bingham resumed his argument in support of the articles of impeachment, and, without concluding, yielded to Mr. Wilson, upon whose motion the Senate took a recess for 15 minutes; at the expiration of which,

Mr. Bingham resumed his argument, and, without concluding yielded at 4 o'clock and 10 minutes p.m. to Mr. Howard, upon whose motion

The Senate sitting for the trial of the President upon articles of impeachment adjourned to to-morrow at 12 o'clock m.

WEDNESDAY, MAY 6, 1868.

The United States *v.* Andrew Johnson, President.

At 12 o'clock, the Chief Justice of the United States entered the Senate Chamber and resumed the chair; and

The Sergeant at Arms having made proclamation,

The managers appointed to conduct the trial of the President of the United States upon articles of impeachment exhibited against him by the House of Representatives, to wit: Mr. Bingham, Mr. Boutwell, Mr. James F. Wilson, Mr. Butler, Mr. Thomas Williams, Mr. Logan, and Mr. Thaddeus Stevens, entered the Senate Chamber and took the seats assigned them.

The Sergeant at Arms announced the presence, at the door of the Senate Chamber, of the House of Representatives; and

The House of Representatives, as in Committee of the Whole House, preceded by its chairman, Mr. Elihu B. Washburne, and accompanied by its Speaker and Clerk, entered the Senate Chamber and took the seats provided for them.

The counsel for the President, to wit: Mr. Evarts, Mr. Nelson, and Mr. Groesbeck, appeared at the bar of the Senate and took the seats assigned them.

The Journal of the proceedings of the Senate sitting for the trial of the President upon articles of impeachment of yesterday was read.

The Chief Justice directed Mr. Manager Bingham to proceed with his argument; and

Mr. Manager Bingham resumed his argument in support of the articles of impeachment; and having concluded,

A demonstration of applause took place in the galleries.

On motion by Mr. Grimes,

Ordered, That the Sergeant at Arms be directed to clear the galleries.

The Chief Justice directed the Sergeant at Arms to execute the order of the Senate and clear the galleries; and

Pending the execution of the said order,

On motion by Mr. Conness that the Senate take a recess for 15 minutes,

It was determined in the negative.

The galleries having been partially cleared.

On motion of Mr. Anthony to suspend the further execution of the order to clear the galleries,

It was determined in the negative; and

The galleries having been completely cleared,

On motion by Mr. Morrill of Maine, that when the Senate sitting for the trial of impeachment adjourn this day, it will adjourn to Saturday next at 12 o'clock m.,

It was determined in the negative { Yeas ---- 22 / Nays ---- 29 }

On motion by Mr. Conness,

The yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are,

Messrs. Anthony, Cattell, Cragin, Dixon, Doolittle, Fessenden, Fowler, Frelinghuysen, Grimes, Henderson, Howard, Johnson, Morrill of Maine, Norton, Patterson of New Hampshire, Patterson of Tennessee, Ross, Saulsbury, Sprague, Trumbull, Van Winkle, Willey.

Those who voted in the negative are,

Messrs. Buckalew, Cameron, Chandler, Conkling, Conness, Corbett, Davis, Drake, Edmunds, Ferry, Harlan, Hendricks, Howe, McCreery, Morgan, Morrill of Vermont, Morton, Nye, Pomeroy, Ramsey, Sher-

man, Stewart, Sumner, Thayer, Tipton, Vickers, Williams, Wilson, Yates.

So the motion was not agreed to.

The Chief Justice stated that the argument in behalf of the House of Representatives and in behalf of the President having been closed, the business now in order was the motion submitted by Mr. Edmunds, on the 24th of April, that when the arguments shall have been concluded and the doors closed for deliberation upon the final question, the official reporters of the Senate shall take down the debate upon the final question, to be published in the proceedings.

The Senate resumed the consideration of the said motion; and

On the question to agree to the amendment proposed by Mr. Williams on the 27th of April,

On motion by Mr. Anthony to amend the amendment by inserting at the end thereof the words "except by leave of the Senate, to be had without debate,"

Pending the consideration of the motion,

On motion by Mr. Trumbull,

Ordered, That the doors of the galleries be reopened.

On motion by Mr. Wilson, at 3 o'clock p.m., the Senate took a recess for 15 minutes; at the expiration of which,

On motion by Mr. Edmunds that the doors of the Senate be closed for deliberation,

It was determined in the affirmative; and

The doors having been closed,

The Chief Justice stated the question before the Senate to be on the amendment proposed by Mr. Anthony to the amendment of Mr. Williams to the motion of Mr. Edmunds; and

Pending debate thereon,

The Chief Justice laid before the Senate a letter from the Speaker of the House of Representatives requesting that the House now in session may be informed when the Senate will be ready to receive them at its bar.

On motion by Mr. Edmunds,

Ordered, That the Secretary inform the House of Representatives that the Senate sitting for the trial of the President under articles of impeachment will notify the House when it is ready to receive them again at its bar.

On motion by Mr. Henderson, at 4 o'clock and 20 minutes, that the Senate adjourn,

It was determined in the negative.

The Senate resumed the consideration of the motion of Mr. Edmunds, that when the arguments shall have been concluded and the doors of the Senate closed for deliberation on the final question, the official reporters shall take down the debates, to be published with the proceedings; and

On the question to agree to the amendment proposed by Mr. Anthony to the amendment of Mr. Williams to the said motion,

After debate,

On motion by Mr. Frelinghuysen that the motion of Mr. Edmunds lie on the table,

It was determined in the affirmative ..... {Yeas ---- 28 / Nays ---- 20}

On motion by Mr. Edmunds,

The yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are:

Messrs. Cameron, Cattell, Chandler, Conkling, Conness, Corbett, Cragin, Drake, Ferry, Frelinghuysen, Harlan, Henderson, Howe, Morgan, Morrill of Maine, Morton, Norton, Patterson of New Hampshire, Pomeroy, Ramsey, Ross, Stewart, Sumner, Thayer, Tipton, Trumbull, Williams, Yates.

Those who voted in the negative are:

Messrs. Anthony, Bayard, Buckalew, Davis, Dixon, Doolittle, Edmunds, Fessenden, Fowler, Grimes, Hendricks, Johnson, McCreery, Morrill of Vermont, Patterson of Tennessee, Saulsbury, Sprague, Van Winkle, Vickers, Willey.

So the motion of Mr. Edmunds was ordered to lie on the table.

Mr. Drake submitted the following resolution for consideration:

Resolved, That the 23d rule be amended by adding thereto the following:

"The fifteen minutes herein allowed shall be for the whole deliberation on the final question, and not to the final question on each article of impeachment."

The Chief Justice stated that the business next in order was the motion submitted by Mr. Sumner on the 25th of April, that the Senate will proceed to vote on the several articles of impeachment at 12 o'clock m. on the day after the close of the arguments; and

The Senate resumed the consideration of the said motion.

On motion by Mr. Johnson, at 15 minutes before 5 o'clock p.m.,

The Senate sitting for the trial of the President upon articles of impeachment adjourned to to-morrow at 12 o'clock m.

THURSDAY, MAY 7, 1868.

The United States *v.* Andrew Johnson, President.

At 12 o'clock m. the Chief Justice of the United States entered the Senate Chamber and resumed the chair; and

The Sergeant at Arms having made proclamation,

The Journal of the proceedings of the Senate, sitting for trial of the President upon articles of impeachment, of yesterday was read.

The Chief Justice stated that at the adjournment of the Senate yesterday it was sitting with closed doors, and that before proceeding with the consideration of the business pending at its adjournment yesterday the doors will be closed; and

The doors having been closed,

The Chief Justice stated that the Senate, at its adjournment yesterday, had under consideration the motion submitted by Mr. Sumner on the 25th of April, that the Senate will proceed to vote on the several articles of impeachment at 12 o'clock m. on the day after the close of the arguments, which being the unfinished business was now before the Senate; and

The Senate resumed the consideration of the said motion.

On motion by Mr. Morrill of Maine to amend the motion of Mr. Sumner by striking out all after the word "that," in the first line, and inserting in lieu there of the following:

When the Senate sitting to try impeachment adjourns on to-day it will be to Monday next, at 12 o'clock m., when the Senate will proceed to take the yeas

and nays on the articles of impeachment, without debate; any Senator desiring it to have permission to file a written opinion, to go upon the record of the proceedings;

On motion by Mr. Drake to amend the amendment proposed by Mr. Morrill of Maine by inserting after the word "permission" the words "at the time of giving his vote,"

After debate,

On motion by Mr. Conkling that the further consideration of the motion of Mr. Sumner be postponed to to-morrow,

After further debate,

On motion by Mr. Trumbull that the motion of Mr. Sumner lie on the table,

It was determined in the affirmative.

Mr. Morrill of Vermont submitted the following motion for consideration:

Ordered, That when the Senate adjourns to-day it adjourn to meet on Monday next, at 11 o'clock a.m., for the purpose of deliberation under the rules of the Senate, sitting on the trial of impeachment; and that on Tuesday, at 12 o'clock m., the Senate shall proceed to vote, without debate, on the several articles of impeachment, and each Senator shall be permitted to file within two days after the vote shall have been so taken his written opinion, to go on the record.

The Senate proceeded, by unanimous consent, to consider the said motion.

On motion by Mr. Anthony to amend the motion of Mr. Morrill of Vermont by striking out the word "Tuesday" and inserting the words "on or before Wednesday,"

It was determined in the negative { Yeas ---- 13 / Nays ---- 37 }

On motion by Mr. Conness,

The yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are,

Messrs. Anthony, Buckalew, Davis, Dixon, Doolittle, Fowler, Hendricks, McCreery, Patterson of Tennessee, Ross, Saulsbury, Sprague, Vickers.

Those who voted in the negative are,

Messrs. Cameron, Cattell, Chandler, Cole, Conkling, Conness, Corbett, Cragin, Drake, Edmunds, Ferry, Frelinghuysen, Harlan, Henderson, Howard, Howe, Johnson, Morgan, Morrill of Maine, Morrill of Vermont, Morton, Norton, Nye, Patterson of New Hampshire, Pomeroy, Ramsey, Sherman, Stewart, Sumner, Thayer, Tipton, Trumbull, Van Winkle, Willey, Williams, Wilson, Yates.

So the amendment of Mr. Anthony was not agreed to.

On motion of Mr. Sumner that the further consideration of the motion of Mr. Morrill of Vermont be postponed, and that the Senate proceed to consider the articles of impeachment,

It was decided in the negative { Yeas ---- 15 / Nays ---- 38 }

On motion by Mr. Sumner,

The yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are,

Messrs. Cameron, Conkling, Conness, Drake, Harlan, Morgan, Nye, Pomeroy, Stewart, Sumner, Thayer, Tipton, Williams, Wilson, Yates.

Those who voted in the negative are,

Messrs. Anthony, Bayard, Buckalew, Cattell, Chandler, Cole, Corbett, Cragin, Davis, Dixon, Doolittle, Edmunds, Ferry, Fessenden, Fowler, Frelinghuysen, Grimes, Henderson, Hendricks, Howard, Howe, Johnson, McCreery, Morrill of Maine, Morrill of Vermont, Morton, Norton, Patterson of New Hampshire, Patterson of Tennessee, Ramsey, Ross, Saulsbury, Sherman, Sprague, Trumbull, Van Winkle, Vickers, Willey.

So the motion of Mr. Sumner was not agreed to.

On motion of Mr. Sumner to amend the motion of Mr. Morrill of Vermont by striking out the word "Monday" and inserting the word "Saturday,"

It was determined in the negative.....{Yeas ____ 16 / Nays ____ 36

On motion by Mr. Sumner.

The yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are,

Messrs. Cameron, Chandler, Cole, Conkling, Conness, Drake, Harlan, Howard, Morgan, Pomeroy, Stewart, Sumner, Thayer, Williams, Wilson, Yates.

Those who voted in the negative are,

Messrs. Anthony, Bayard, Buckalew, Cattell, Corbett, Cragin, Davis, Dixon, Doolittle, Edmunds, Ferry, Fessenden, Fowler, Frelinghuysen, Grimes, Henderson, Hendricks, Howe, Johnson, McCreery, Morrill of Maine, Morrill of Vermont, Morton, Norton, Patterson of New Hampshire, Patterson of Tennessee, Ramsey, Ross, Saulsbury, Sherman, Sprague, Tipton, Trumbull, Van Winkle, Vickers, Willey.

So the amendment was not agreed to.

On motion by Mr. Sumner to amend the motion of Mr. Morrill of Vermont by striking out at the end thereof the folowing: "and each Senator shall be permitted to file, within two days after the vote shall have been so taken, his written opinion, to go on the record."

On motion by Mr. Drake to amend the clause proposed to be stricken out by striking out the words "within two days after the vote shall have been so taken," and inserting in lieu thereof the words "at the time of giving his vote,"

After debate,

It was determined in the negative.....{Yeas ____ 12 / Nays ____ 38

On motion by Mr. Drake.

The yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are,

Messrs. Cameron, Chandler, Conkling, Conness, Drake, Harlan, Howard, Morgan, Ramsey, Stewart, Sumner, Thayer.

Those who voted in the negative are,

Messrs. Anthony, Bayard, Buckalew, Cattell, Cole, Corbett, Cragin, Davis, Dixon, Doolittle, Edmunds, Ferry, Fessenden, Fowler, Frelinghuysen, Grimes, Henderson, Hendricks, Johnson, McCreery, Morrill of Maine, Morrill of Vermont, Morton, Norton, Patterson of

New Hampshire, Patterson of Tennessee, Ross, Saulsbury, Sherman, Sprague, Tipton, Trumbull, Van Winkle, Vickers, Willey, Williams, Wilson, Yates.

So the amendment was not agreed to.

The question recurring on the amendment proposed by Mr. Sumner to strike out the last clause of the motion of Mr. Morrill,

It was determined in the negative ..... {Yeas ---- 6 / Nays ---- 42

On motion by Mr. Sumner,

The yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are,

Messrs. Drake, Harlan, Ramsey, Stewart, Sumner, Thayer.

Those who voted in the negative are,

Messrs. Bayard, Buckalew, Cameron, Cattell, Chandler, Cole, Corbett, Davis, Dixon, Doolittle, Edmunds, Ferry, Fessenden, Fowler, Frelinghuysen, Grimes, Henderson, Hendricks, Howard, Howe, Johnson, McCreery, Morgan, Morrill of Maine, Morrill of Vermont, Morton, Norton, Patterson of New Hampshire, Patterson of Tennessee, Pomeroy, Ross, Saulsbury, Sherman, Sprague, Tipton, Trumbull, Van Winkle, Vickers, Willey, Williams, Wilson, Yates.

So the amendment was not agreed to; and

The question recurring on the motion of Mr. Morrill of Vermont, and the same having been modified by the mover, it was agreed to, as follows:

Ordered, That when the Senate adjourns to-day it adjourn to meet on Monday next, at 11 o'clock a.m., for the purpose of deliberation under the rules of the Senate sitting on the trial of impeachment, and that on Tuesday next following, at 12 o'clock m., the Senate shall proceed to vote, without debate, on the several articles of impeachment, and each Senator shall be permitted to file, within two days after the vote shall have been so taken, his written opinion to be printed with the proceedings.

The Senate proceeded to consider the resolution submitted by Mr. Drake yesterday to amend the twenty-third rule by adding thereto the following:

"The 15 minutes herein allowed shall be for the whole deliberation on the final question, and not to the final question on each article of impeachment:" and

The resolution was agreed to.

The Senate proceeded to consider the resolution submitted by Mr. Sumner on the 25th of April, to amend the rules by inserting, as an additional rule, the following:

Rule 23. In taking the votes of the Senate on the articles of impeachment the Presiding Officer shall call each Senator by his name, and upon each article propose the following question in the manner following: Mr. ———, how say you, is the respondent, ——— ———, guilty as charged in the ——— article of impeachment? Whereupon each Senator shall rise in his place and answer "Guilty" or "Not guilty."

A motion was made by Mr. Conkling to amend the resolution by striking out the words "as charged," and inserting after the words "not guilty" the words "of a high crime or misdemeanor, as the case may be within."

After debate,

Mr. Sumner having modified his proposition to read:

In taking the votes of the Senate on the articles of impeachment the Presiding Officer shall call each Senator by his name, and upon each article propose the following question in the manner following: Mr. ———, how say you, is the respondent, ——— ———, guilty or not guilty of a high crime or misdemeanor as charged in the ——— article of impeachment? Whereupon each Senator shall rise in his place and answer "Guilty" or "Not guilty."

On motion by Mr. Buckalew to strike out the words—

Mr. ———, how say you, is the respondent, ——— ———, guilty or not guilty of a high crime or misdemeanor as charged in the —— article of impeachment,

And in lieu thereof insert:

Mr. ——, how say you, is the respondent, Andrew Johnson, President of the United States, guilty or not guilty of a high crime or misdemeanor (as the case may be) as charged in the —— article of impeachment?

Pending which,

The following amendment was proposed by Mr. Conness to the resolution of Mr. Sumner, viz strike out the words—

And upon each article propose the following question in the manner following: Mr. ———, how say you, is the respondent, ——— ———, guilty or not guilty of a high crime or misdemeanor as charged in the —— article of impeachment? Whereupon each Senator shall rise in his place and answer "Guilty" or "Not guilty."

And in lieu thereof insert:

Upon each of the articles numbered one, two, three, five, seven, eight, nine, ten, and eleven propose the following question in the manner following: Mr. Senator ———, how say you, is the respondent, Andrew Johnson, President of the United States, guilty or not guilty of a high misdemeanor as charged in this article? And upon each of the articles numbered four and six he shall propose the following question: Mr. Senator ———, how say you, is the respondent, Andrew Johnson, President of the United States, guilty or not guilty of a high crime as charged in this article? Whereupon each Senator shall rise in his place and answer "guilty" or "not guilty."

And the question being put on the amendment proposed by Mr. Conness,

On motion by Mr. Hendricks to amend the amendment proposed by Mr. Conness, by inserting at the end thereof the following:

But in taking the vote on the eleventh article the question shall be put as to each clause of said article charging a distinct offense.

After debate,

It was determined in the affirmative ..... {Yeas ____ 22 / Nays ____ 15}

On motion of Mr. Conness,

The yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are,

Messrs. Anthony, Davis, Doolittle, Drake, Edmunds, Ferry, Fowler, Frelinghuysen, Harlan, Henderson, Hendricks, Johnson, McCreery, Norton, Patterson of Tennessee, Ross, Sprague, Tipton, Trumbull, Van Winkle, Vickers, Willey.

Those who voted in the negative are,

Messrs. Buckalew, Cole, Conness, Corbett, Cragin, Morton, Patterson of New Hampshire, Pomeroy, Ramsey, Stewart, Sumner, Thayer, Williams, Wilson, Yates.

So the amendment of Mr. Hendricks to the amendment of Mr. Conness was agreed to.

After debate,

On the question to agree to the amendment proposed by Mr. Conness, as amended,

On motion by Mr. Johnson, that the resolution of Mr. Sumner and the proposed amendments lie on the table,

It was determined in the affirmative { Yeas ____ 24 / Nays ____ 11 }

On motion by Mr. Sumner,

The yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are,

Messrs. Bayard, Buckalew, Cameron, Cattell, Conness, Davis, Doolittle, Drake, Harlan, Henderson, Hendricks, Johnson, McCreery, Norton, Patterson of Tennessee, Saulsbury, Sprague, Thayer, Tipton, Trumbull, Van Winkle, Vickers, Willey, Yates.

Those who voted in the negative are,

Messrs. Cole, Corbett, Cragin, Edmunds, Ferry, Pomeroy, Ramsey, Ross, Sumner, Williams, Wilson.

So it was ordered that the resolution lie on the table.

On motion by Mr. Yates,

Ordered, That when the Senate, sitting for the trial of the President upon articles of impeachment, adjourn it be to Monday next at 10 o'clock a.m.; and

On motion by Mr. Cole,

The Senate, sitting for the trial of the President upon articles of impeachment, adjourned.

MONDAY, MAY 11, 1868.

The United States *v.* Andrew Johnson, President.

At 10 o'clock a.m. the Chief Justice of the United States entered the Senate Chamber and resumed the chair; and

The Sergeant at Arms having made proclamation,

The Journal of the proceedings of the Senate, sitting for the trial of the President upon articles of impeachment, of Thursday was read.

The Chief Justice stated that the Senate had met this morning for deliberation, and that, in accordance with the rule, the doors would be closed; and

The doors of the Senate Chamber having been closed,

The Chief Justice stated that, in compliance with what he understood to be the wish of the Senate, he had prepared the question to be addressed to Senators upon each article of impeachment, and that he had reduced his views thereon to writing, which, with permission of the Senate, he would read; and having read the same,

On motion by Mr. Buckalew, and by unanimous consent,

Ordered, That the views of the Chief Justice be entered upon the Journal of the Senate sitting for the trial of impeachment; which are as follows:

SENATORS: In conformity with what seemed to be the general wish of the Senate when it adjourned last Thursday, the Chief Justice, in taking the vote on the articles of impeachment, will adopt the mode

sanctioned by the practice in the cases of Chase, Peck, and Humphreys.

He will direct the Secretary to read the several articles successively, and after the reading of each article will put the question of guilty or not guilty to each Senator, rising in his place, in the form used in the case of Judge Chase:

Mr. Senator ——, how say you? Is the respondent, Andrew Johnson, President of the United States, guilty or not guilty of a high misdemeanor, as charged in this article?

In putting the question on articles 4 and 6, each of which charge a crime, the word "crime" will be substituted for the word "misdemeanor."

The Chief Justice has carefully considered the suggestion of the Senator from Indiana [Mr. Hendricks], which appeared to meet the approval of the Senate, that in taking the vote on the 11th article the question should be put on each clause, and has found himself unable to divide the article as suggested. The article charges several facts, but they are so connected that they make but one allegation, and they are charged as constituting one misdemeanor.

The first fact charged is, in substance, that the President publicly declared in August, 1866, that the Thirty-ninth Congress was a Congress of only part of the States and not a constitutional Congress, intending thereby to deny its constitutional competency to enact laws or propose amendments of the Constitution; and the charge seems to have been made as introductory, and as qualify that which follows, namely, that the President in pursuance of this declaration attempted to prevent the execution of the tenure-of-office act by contriving and attempting to contrive means to prevent Mr. Stanton from resuming the functions of Secretary of War after the refusal of the Senate to concur in his suspension, and also by contriving and attempting to contrive means to prevent the execution of the appropriation act of March 2, 1867, and also to prevent the execution of the rebel States governments act of the same date.

The gravamen of the article seems to be that the President attempted to defeat the execution of the tenure-of-office act, and that he did this in pursuance of a declaration which was intended to deny the constitutional competency of Congress to enact laws or propose constitutional amendments, and by contriving means to prevent Mr. Stanton from resuming his office of Secretary, and also to prevent the execution of the appropriation act and the rebel States governments act.

The single substantive matter charged is the attempt to prevent the execution of the tenure-of-office act; and the other facts are alleged either as introductory and exhibiting this general purpose, or as showing the means contrived in furtherance of that attempt.

This single matter, connected with the other matters previously and subsequently alleged, is charged as the high misdemeanor of which the President is alleged to have been guilty.

The general question, guilty or not guilty of a high misdemeanor as charged, seems fully to cover the whole charge, and will be put as to this article as well as to the others, unless the Senate direct some mode of division.

In the tenth article the division suggested by the Senator from New York [Mr. Conklin] may be more easily made. It contains a general allegation to the effect that on the 18th of August, and on other days, the President, with intent to set aside the rightful authority of Congress and bring it into contempt, delivered certain scandalous harangues, and therein uttered loud threats and bitter menaces against Congress and the laws of the United States, enacted by Congress, thereby bringing the office of President into disgrace, to the great scandal of all good citizens, and sets forth, in three distinct specifications, the harangues, threats, and menaces complained of.

In respect to this article, if the Senate sees fit to direct, the question of guilty or not guilty of the facts charged may be taken in respect to the several specifications, and then the question of guilty or not guilty of a high misdemeanor, as charged in the article, can also be taken.

The Chief Justice, however, sees no objection to putting the general question on this article in the same manner as on the others, for, whether particular questions be put on the specifications or not, the answer to the final question must be determined by the judgment of the Senate, whether or not the facts alleged in the specifications have been sufficiently proved, and whether, if sufficiently proved, they amount to a high misdemeanor within the meaning of the Constitution.

On the whole, therefore, the Chief Justice thinks that the better practice will be to put the general question on each article without attempting to make any subdivision, and will pursue this course if no objection is made. He will, however, be pleased to conform to such directions as the Senate may see fit to give in this respect.

Whereupon,

Mr. Sumner submitted the following order; which was considered by unanimous consent and agreed to:

Ordered, That the questions be put as proposed by the Presiding Officer of the Senate, and each Senator shall rise in his place and answer "guilty," or "not guilty," only.

On motion by Mr. Sumner,

The Senate proceeded to consider the following resolution submitted by him on the 25th of April last:

Resolved, That the following be added to the rules of procedure and practice in the Senate when sitting on the trial of impeachments:

On a conviction by the Senate it shall be the duty of the presiding officer forthwith to pronounce the removal from office of the convicted person, according to the requirements of the Constitution. Any further judgment shall be on the order of the Senate.

And pending debate thereon.

The Chief Justice announced that the hour of 11 o'clock, fixed by the order of the Senate for deliberation, had arrived, and that Senators could now submit their views upon the several articles of impeachment, subject to the limitation of debate fixed by the 23d rule; and

After deliberation,

On motion by Mr. Cameron, at 10 minutes before 2 o'clock p.m.,

The Senate took a recess for 20 minutes; at the expiration of which,

After further deliberation,

On motion by Mr. Conness,

The Senate took a recess from half past 5 o'clock until half past 7 o'clock p.m.

HALF PAST 7 O'CLOCK P.M.

Mr. Edmunds submitted the following motion; which was considered by unanimous consent and agreed to:

Ordered, That the Secretary be directed to inform the House of Representatives that the Senate, sitting for the trial of the President of the United States upon articles of impeachment, will be ready to receive the House of Representatives in the Senate Chamber on Tuesday, the 12th of May, at 12 o'clock m.;

And after further deliberation,

Mr. Edmunds submitted the following motion for consideration:

Ordered, That the standing order of the Senate, that it will proceed at 12 o'clock noon to-morrow to vote on the articles of impeachment, be rescinded.

Mr. Williams submitted the following motion for consideration:

Ordered, That the Chief Justice in directing the Secretary to read the several articles of impeachment shall direct him to read the eleventh article first, and the question shall then be taken upon that article, and thereafter the other ten successively as they stand.

On motion by Mr. Edmunds,

Ordered, That when the Senate, sitting for the trial of the President upon articles of impeachment, adjourn, it be to meet to-morrow at half past 11 o'clock a. m., to sit with open doors.

On motion by Mr. Cameron,

The Senate sitting for the trial of the President upon articles of impeachment adjourned.

TUESDAY, MAY 12, 1868.

The United States *v.* Andrew Johnson, President.

At 11:30 o'clock a. m. the Chief Justice of the United States entered the Senate Chamber and resumed the chair; and

The Sergeant at Arms having made proclamation,

The journal of the proceedings of the Senate sitting for the trial of the President upon articles of impeachment, of yesterday, was read.

On motion by Mr. Edmunds,

The Senate proceeded to consider the motion submitted by him yesterday, to rescind the order of the Senate that it will proceed to vote at 12 o'clock to-day on the articles of impeachment; and

The motion was agreed to, and the order rescinded accordingly.

On motion by Mr. Chandler that when the Senate, sitting for the trial of the President upon articles of impeachment, adjourn, it be to Saturday next at 12 o'clock m.;

On motion by Mr. Hendricks to amend the motion of Mr. Chandler by striking out the word "Saturday" and inserting in lieu thereof the word "Thursday,"

It was determined in the negative.

On motion by Mr. Tipton to amend the motion by Mr. Chandler by striking out the word "Saturday," and in lieu thereof inserting "Friday,"

It was determined in the negative; and

On the question to agree to the motion of Mr. Chandler,

It was determined in the affirmative.

So it was

Ordered, That when the Senate, sitting for the trial of the President upon articles of impeachment, adjourn, it be to Saturday next at 12 o'clock m.

On motion by Mr. Drake,

The Senate sitting for the trial of the President upon articles of impeachment adjourned.

SATURDAY, MAY 16, 1868.

The United States *v.* Andrew Johnson, President.

At 12 o'clock m. the Chief Justice of the United States entered the Senate Chamber and resumed the chair; and

The Sergeant at Arms having made proclamation,

The Journal of the proceedings of the Senate sitting for the trial of the President upon articles of impeachment of Tuesday was read.

Mr. Edmunds submitted the following resolution; which was considered by unanimous consent, and agree to:

Resolved, That the Secretary be directed to inform the House of Representatives that the Senate sitting for the trial of the President upon articles of impeachment is now ready to receive them in the Senate Chamber.

On motion by Mr. Williams that the Senate proceed to consider the motion submitted by him on the 11th instant, directing that the eleventh article of impeachment be read first and the question be then taken upon that article.

It was determined in the affirmative ..... {Yeas ____ 34 / Nays ____ 19}

On motion by Mr. Johnson,

The yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are,

Messrs. Anthony, Cameron, Cattell, Chandler, Cole, Conkling, Conness, Corbett, Cragin, Drake, Edmunds, Ferry, Frelinghuysen, Harlan, Howard, Howe, Morgan, Morrill of Maine, Morrill of Vermont, Morton, Nye, Patterson of New Hampshire, Pomeroy, Ramsey, Sherman, Sprague, Stewart, Sumner, Thayer, Tipton, Wade, Williams, Wilson, Yates.

Those who voted in the negative are,

Messrs. Bayard, Buckalew, Davis, Dixon, Doolittle, Fessenden, Fowler, Henderson, Hendricks, Johnson, McCreery, Norton, Patterson of Tennessee, Ross, Saulsbury, Trumbull, Van Winkle, Vickers, Willey.

So the motion was agreed to; and

The Senate proceeded to consider the said motion; and

On the question to agree thereto,

It was determined in the affirmative ..... {Yeas ____ 34 / Nays ____ 19}

On motion by Mr. Fessenden,

The yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are,

Messrs. Anthony, Cameron, Cattell, Chandler, Cole, Conkling, Conness, Corbett, Cragin, Drake, Edmunds, Ferry, Frelinghuysen, Harlan, Howard, Howe, Morgan, Morrill of Maine, Morrill of Vermont, Morton, Nye, Patterson of New Hampshire, Pomeroy, Ramsey, Sherman, Sprague, Stewart, Sumner, Thayer, Tipton, Wade, Williams, Wilson, Yates.

Those who voted in the negative are,

Messrs. Bayard, Buckalew, Davis, Dixon, Doolittle, Fessenden, Fowler, Henderson, Hendricks, Johnson, McCreery, Norton, Patterson of Tennessee, Ross, Saulsbury, Trumbull, Van Winkle, Vickers, Willey.

So it was

Ordered, That the Chief Justice in directing the Secretary to read the several articles of impeachment shall direct him to read the eleventh article first, and the question shall then be taken on that article, and thereafter on the other ten successively as they stand.

The managers on the part of the House of Representatives, to wit, Mr. Bingham, Mr. Boutwell, Mr. James F. Wilson, Mr. Butler, Mr. Thomas Williams, Mr. Logan, and Mr. Thaddeus Stevens, entered the Senate Chamber and took the seats assigned them.

The Sergeant at Arms announced the presence, at the door of the Senate Chamber, of the House of Representatives; and

The House of Representatives, as in Committee of the Whole House, preceded by its Chairman, Mr. Elihu B. Washburne, and accompanied by its Speaker and Clerk, entered the Senate Chamber and took the seats provide for them.

Mr. Stanbery, Mr. Evarts, Mr. Nelson, and Mr. Groesbeck, of counsel for the President, appeared at the bar of the Senate and took the seats assigned them.

Mr. Edmunds submitted the following motion; which was considered by unanimous consent, and agreed to:

Ordered, That the Senate now proceed to vote upon the articles according to the rules of the Senate

The Chief Justice stated that in pursuance of the order of the Senate he would now proceed to take the judgment of the Senate on the eleventh article; and

The Secretary, by direction of the Chief Justice, read the eleventh article of impeachment, as follows:

ARTICLE XI. That said Andrew Johnson, President of the United States, unmindful of the high duties of his office and of his oath of office, and in disregard of the Constitution and laws of the United States, did, heretofore, to wit, on the eighteenth day of August, A.D. eighteen hundred and sixty-six, at the city of Washington, in the District of Columbia, by public speech, declare and affirm, in substance, that the Thirty-ninth Congress of the United States was not a Congress of the United States authorized by the Constitution to exercise legislative power under the same, but, on the contrary, was a Congress of only part of the States, thereby denying, and intending to deny, that the legislation of said Congress was valid or obligatory upon him, the said Andrew Johnson, except in so far as he saw fit to approve the same, and also thereby denying, and intending to deny, the power of the said Thirty-ninth Congress to propose amendments to the Constitution of the United States; and in pursuance of said declaration the said Andrew Johnson, President of the United States, afterwards, to wit, on the twenty-first day of February, AD. eighteen hundred and sixty-eight, at the city of Washington, in the District of Columbia, did, unlaw-

fully and in disregard of the requirements of the Constitution, that he should take care that the laws be faithfully executed, attempt to prevent the execution of an act entitled "An act regulating the tenure of certain civil offices," passed March second, eighteen hundred and sixty-seven, by unlawfully devising and contriving, and attempting to devise and contrive, means by which he should prevent Edwin M. Stanton from forthwith resuming the functions of the office of Secretary for the Department of War, notwithstanding the refusal of the Senate to concur in the suspension therefore made by said Andrew Johnson of said Edwin M. Stanton from said office of Secretary for the Department of War; and also, by further unlawfully devising and contriving, and attempting to devise and contrive, means, then and there, to prevent the execution of an act entitled "An act making appropriations for the support of the Army for the fiscal year ending June thirtieth, eighteen hundred and sixty-eight, and for other purposes," approved March second, eighteen hundred and sixty-seven; and also to prevent the execution of an act entitled "An act to provide for the more efficient government of the rebel States," passed March second, eighteen hundred and sixty-seven, whereby the said Andrew Johnson, President of the United States, did then, to wit, on the twenty-first day of February, AD. eighteen hundred and sixty-eight, at the city of Washington, commit, and was guilty of, a high misdemeanor in office.

The Chief Justice directed the Secretary to call the names of the Senators.

Each Senator, as his name was called, rose in his place and the Chief Justice proposed to him the following question:

Mr. Senator ———, how say you? Is the respondent, Andrew Johnson, President of the United States, guilty, or not guilty, of a high misdemeanor, as charged in this article of impeachment?

The Senators who answered "guilty" are,

Messrs. Anthony, Cameron, Cattell, Chandler, Cole, Conkling, Conness, Corbett, Cragin, Drake, Edmonds, Ferry, Frelinghuysen, Harlan, Howard, Howe, Morgan, Morrill, of Maine, Morrill of Vermont, Morton, Nye, Patterson of New Hampshire, Pomeroy, Ramsey, Sherman, Sprague, Stewart, Sumner, Thayer, Tipton, Wade, Williams, Willey, Wilson, Yates—35.

The Senators who answered "not guilty" are,

Messrs. Baynard, Buckalew, Davis, Dixon, Doolittle, Fessenden, Fowler, Grimes, Henderson, Hendricks, Johnson, McCreery, Norton, Patterson of Tennessee, Ross, Saulsbury, Trumbull, Van Winkle, Vickers—19.

The Chief Justice announced that upon this article 35 Senators had voted "guilty" and 19 Senators "not guilty," and declared that two-thirds of the Senators present not having pronounced him guilty, Andrew Johnson, President of the United States, stood acquitted of the charges contained in the eleventh article of impeachment.

On motion of Mr. Williams that the Senate take a recess for 15 minutes.

It was determined in the negative.

On motion by Mr. Williams that the Senate, sitting for the trial of the President upon articles of impeachment, adjourn to Tuesday, the 26th instant, at 12 o'clock m.,

Mr. Hendricks raised a question of order, namely: That the Senate is now executing an order already made to proceed now to vote upon the articles of impeachment, and that no motion to adjourn, other than a simple motion to adjourn at once, is in order.

The Chief Justice decided that a motion to adjourn to a day certain is within the principle of a motion that when the Senate adjourns it adjourn to meet on a certain day, and that this motion is not in order

pending the execution of the order already made by the Senate that it proceed now to vote upon the articles of impeachment according to the rules of the Senate.

From this decision Mr. Conness appealed to the Senate; and

The question being put by the Chief Justice, Shall the decision of the Chair stand as the judgment of the Senate?

It was determined in the negative { Yeas ---- 24 / Nays ---- 30 }

On motion by Mr. Conness,

The yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are,

Messrs. Anthony, Bayard, Buckalew, Conkling, Davis, Dixon, Doolittle, Ferry, Fessenden, Fowler, Grimes, Henderson, Hendricks, Johnson, McCreery, Morgan, Norton, Patterson of Tennessee, Saulsbury, Sherman, Trumbull, Van Winkle, Vickers, Willey.

Those who voted in the negative are:

Messrs. Cameron, Cattell, Chandler, Cole, Conness, Corbett, Cragin, Drake, Edmunds, Frelinghuysen, Harlan, Howard, Howe, Morrill of Maine, Morrill of Vermont, Morton, Nye, Patterson of New Hampshire, Pomeroy, Ramsey, Ross, Sprague, Stewart, Summer, Thayer, Tipton, Wade, Williams, Wilson, Yates.

So the decision of the Chair was not sustained; and,

The question recurring on the motion submitted by Mr. Williams,

On motion by Mr. Henderson to amend the motion of Mr. Williams by striking out the words "Tuesday, the 26th instant" and inserting "Wednesday, the first day of July next."

It was determined in the negative { Yeas ---- 20 / Nays ---- 34 }

On motion by Mr. Henderson,

The yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are:

Messrs. Bayard, Buckalew, Davis, Dixon, Doolittle, Fessenden, Fowler, Grimes, Henderson, Hendricks, Johnson, McCreery, Norton, Patterson of Tennessee, Ross, Saulsbury, Trumbull, Van Winkle, Vickers, Willey.

Those who voted in the negative are:

Messrs. Anthony, Cameron, Cattell, Chandler, Cole, Conkling, Conness, Corbett, Cragin, Drake, Edmonds, Ferry, Frelinghuysen, Harlan, Howard, Howe, Morgan, Morrill of Maine, Morrill of Vermont, Morton, Nye, Patterson of New Hampshire, Pomeroy, Ramsey, Sherman, Sprague, Stewart, Sumner, Thayer, Tipton, Wade, Williams, Wilson, Yates.

So the amendment of Mr. Henderson was not agreed to.

On the motion of Mr. McCreery to amend the motion of Mr. Williams by striking out the words "to Tuesday, the 26th instant, at 12 o'clock m.," and in lieu thereof inserting "without day,"

It was determined in the negative { Yeas ---- 6 / Nays ---- 47 }

On motion by Mr. McCreery.

The yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are:

Messrs. Bayard, Davis, Dixon, Doolittle, McCreery, Vickers.

Those who voted in the negative are:

Messrs. Anthony, Buckalew, Cameron, Cattell, Chandler, Cole, Conkling, Conness, Corbett, Cragin, Drake, Edmunds, Ferry, Fessenden, Fowler, Frelinghuysen, Harlan, Henderson, Hendricks, Howard, Howe, Johnson, Morgan, Morrill of Maine, Morrill of Vermont, Morton, Norton, Nye, Patterson of New Hampshire, Patterson of Tennessee, Pomeroy, Ramsey, Ross, Saulsbury, Sherman, Sprague, Stewart, Sumner, Thayer, Tipton, Trumbull, Van Winkle, Wade, Willey, Williams, Wilson, Yates.

So the amendment of Mr. McCreery was not agreed to.

On motion by Mr. Buckalew to amend the motion of Mr. Williams, by striking out the words "Tuesday, the 26th instant," and inserting the words "Monday next."

It was determined in the negative; and

On the question to agree to the motion of Mr. Williams,

It was determined in the affirmative ..... {Yeas ____ 32 / Nays ____ 21}

On motion by Mr. Hendricks,

The yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are,

Messrs. Anthony, Cameron, Cattell, Chandler, Cole, Conness, Corbett, Cragin, Drake, Edmunds, Frelinghuysen, Harlan, Howard, Howe, Morrill of Maine, Morrill of Vermont, Morton, Nye, Patterson of New Hampshire, Pomeroy, Ramsey, Ross, Sprague, Stewart, Sumner, Thayer, Tipton, Van Winkle, Wade, Williams, Wilson, Yates.

Those who voted in the negative are,

Messrs. Bayard, Buckalew, Conkling, Davis, Dixon, Doolittle, Ferry, Fessenden, Fowler, Henderson, Hendricks, Johnson, McCreery, Morgan, Norton, Patterson of Tennessee, Saulsbury, Sherman, Trumbull, Vickers, Willey.

So the motion of Mr. Williams was agreed to; and

The Senate sitting for the trial of the President upon articles of impeachment adjourned to Tuesday, the 26th instant, at 12 o'clock m.

TUESDAY, MAY 26, 1868

The United States *v.* Andrew Johnson, President.

At 12 o'clock m. the Chief Justice of the United States entered the Senate Chamber and resumed the chair; and

The Sergeant at Arms having made proclamation,

Mr. Edmunds submitted the following motion; which was considered, by unanimous consent, and agreed to.

Ordered, That the Secretary inform the House of Representatives that the Senate, sitting for the trial of Andrew Johnson, President of the United States, upon articles of impeachment, is now ready to receive them in the Senate Chamber.

Thereupon,

The managers on the part of the House of Representatives, to wit, Mr. Bingham, Mr. Boutwell, Mr. James F. Wilson, Mr. Butler, Mr. Thomas Williams, Mr. Logan, and Mr. Thaddeus Stevens, entered the Senate Chamber and took the seats assigned them.

The Sergeant at Arms announced the presence at the door of the Senate Chamber of the House of Representatives; and

The House of Representatives, as in Committee of the Whole House, preceded by its Chairman, Mr. Elihu B. Washburne, and accompanied by its Speaker and Clerk, entered the Senate Chamber and took the seats provided for them.

Mr. Stanbery, Mr. Evarts, and Mr. Nelson, of counsel for the President, appeared at the bar of the Senate and took the seats assigned them.

The Journal of the proceedings of the Senate, sitting for the trial of the President upon articles of impeachment, of Saturday, the 16th instant, was read.

Mr. Williams submitted the following resolution for consideration:

Resolved, That the resolution heretofore adopted as to the order of reading and voting upon the articles of impeachment be rescinded.

The present consideration of the resolution being demanded,

Mr. Buckalew objected to its present consideration and raised a question of order, to wit: That the resolution proposed a change of a standing order of the Senate and must lie on the table one day under the twenty-sixth rule.

The Chief Justice stated that the present motion is to change the orders previously adopted by the Senate as to the order of voting upon the articles of impeachment, as well as the twenty-second rule; and that he was of opinion that a single objection would carry the resolution over this day; but that without deciding the question he would submit it directly to the Senate, as it was a matter which related especially to the present order of business; and

The question being submitted to the Senate, Is the present consideration of the resolution submitted by Mr. Williams in order?

It was determined in the affirmative ..... {Yeas ---- 29 / Nays ---- 25}

On motion by Mr. Henderson,

The yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are,

Messrs. Cameron, Cattell, Chandler, Cole, Conkling, Conness, Cragin, Drake, Frelinghuysen, Harlan, Howard, Howe, Morgan, Morrill of Maine, Morton, Nye, Pomeroy, Ramsey, Ross, Sherman, Sprague, Stewart, Sumner, Thayer, Tipton, Wade, Williams, Wilson, Yates.

Those who voted in the negative are,

Messrs. Anthony, Bayard, Buckalew, Corbett, Davis, Dixon, Doolittle, Edmunds, Ferry, Fessenden, Fowler, Grimes, Henderson, Hendricks, Johnson, McCreery, Morrill of Vermont, Norton, Patterson of New Hampshire, Patterson of Tennessee, Saulsbury, Trumbull, Van Winkle, Vickers, Willey.

So the Senate decided that the present consideration of the resolution of Mr. Williams was in order.

On motion by Mr. Conkling to amend the resolution of Mr. Williams by striking out all after the word "Resolved" and inserting,

That the Senate sitting for the trial of Andrew Johnson, President of the United States, will now proceed, in manner prescribed by the rules in that behalf, to vote in their order upon the remaining articles of impeachment.

It was determined in the negative ..... {Yeas ..... 26 / Nays ..... 28}

On motion by Mr. Trumbull,

The yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are,

Messrs. Bayard, Buckalew, Cole, Conkling, Davis, Dixon, Doolittle, Ferry, Fessenden, Fowler, Grimes, Henderson, Hendricks Johnson, McCreery, Morgan, Morrill of Vermont, Morton, Norton, Patterson of New Hampshire, Patterson of Tennessee, Saulsbury, Trumbull, Van Winkle, Vickers, Willey.

Those who voted in the negative are,

Messrs. Anthony, Cameron, Cattell, Chandler, Conness, Corbett, Cragin, Drake, Edmunds, Freylinghuysen, Harlan, Howard, Howe, Morrill of Maine, Nye, Pomeroy, Ramsey, Ross, Sherman, Sprague, Stewart, Sumner, Thayer, Tipton, Wade, Williams Wilson Yates.

So Mr. Conkling's amendment was not agreed to.

Mr. Williams having modified his resolution to read,

Resolved, That the several orders heretofore adopted as to the order of reading and voting upon the articles of impeachment be rescinded.

Mr. Trumbull raised a question of order, viz: That it was not in order, first, because it proposes to rescind an order of the Senate which had already been partly executed; and secondly, that it was a violation of the rule which requires one day's notice to change a standing rule, as it did expressly now propose to change a rule.

Mr. Edmunds moved that the Senate retire to its conference chamber for consultaion; and, on the question to agree thereto,

It was determined in the negative.

The Chief Justice then submitted the question of order raised by Mr. Trumbull to the decision of the Senate, to wit: Will the Senate sustain the question of order raised by Mr. Trumbull? and

It was determined in the negative ..... {Yeas ..... 24 / Nays ..... 30}

On motion of Mr. Trumbull,

The yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are,

Messrs. Anthony, Bayard, Buckalew, Davis, Dixon, Doolittle, Edmunds, Ferry, Fessenden, Fowler, Grimes, Henderson, Hendricks, Johnson, McCreery, Morgan, Morrill of Vermont, Norton, Patterson of Tennessee, Saulsbury, Trumbull, Van Winkle, Vickers, Willey.

Those who voted in the negative are,

Messrs. Cameron, Cattell, Chandler, Cole, Conkling, Conness, Corbett, Cragin, Drake, Frelinghuysen, Harlan, Howard, Howe, Morrill of Maine, Morton, Nye, Patterson of New Hampshire, Pomeroy, Ramsey, Ross, Sherman, Sprague, Stewart, Summer, Thayer, Tipton, Wade, Williams, Wilson, Yates.

So the question of order raised by Mr. Trumbull was not sustained.

On motion by Mr. Morrill of Maine, that the Senate sitting for the trial of the President upon articles of impeachment adjourn to Tuesday, the 23d day of June next,

The Chief Justice stated that he had heretofore ruled that while another question was pending and undetermined, a motion of the character of that now submitted was not in order, but that he would submit the question to the decision of the Senate; and

The question was accordingly submitted to the Senate, Is the motion of Mr. Morrill of Maine in order?

It was determined in the affirmative { Yeas 35 / Nays 18 }

On motion by Mr. Henderson,

The yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are,

Messrs. Anthony, Cameron, Cattell, Chandler, Cole, Conkling, Conness, Corbett, Cragin, Drake, Edmunds, Ferry, Frelinghuysen, Harlan, Howard, Howe, Morrill of Maine, Morrill of Vermont, Morton, Nye, Patterson of New Hampshire, Pomeroy, Ramsey, Ross, Sherman, Sprague, Stewart, Sumner, Thayer, Tipton, Wade, Willey, Williams, Wilson, Yates.

Those who voted in the negative are,

Messrs. Bayard, Buckalew, Davis, Dixon, Doolittle, Fressenden, Fowler, Henderson, Hendricks, Johnson, McCreery, Morgan, Norton, Patterson of Tennessee, Saulsbury, Trumbull, Van Winkle, Vickers.

So the motion of Mr. Morrill of Maine was decided to be in order; and,

On the question to agree thereto,

On motion by Mr. Ross to amend the motion by striking out the words "Tuesday, the 23d day of June," and inserting "Tuesday, the 1st day of September,"

It was determined in the negative { Yeas 15 / Nays 39 }

On motion by Mr. Ross,

The yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are,

Messrs. Bayard, Davis, Dixon, Doolittle, Fessenden, Fowler, Henderson, Johnson, McCreery, Norton, Ross, Saulsbury, Trumbull, Van Winkle, Vickers.

Those who voted in the negative are,

Messrs. Anthony, Buckalew, Cameron, Cattell, Chandler, Cole, Conkling, Conness, Corbett, Cragin, Drake, Edmunds, Ferry, Frelinghuysen, Grimes, Harlan, Hendricks, Howard, Howe, Morgan, Morrill of Maine, Morrill of Vermont, Morton, Nye, Patterson of New Hampshire, Patterson of Tennessee, Pomeroy, Ramsey, Sherman, Sprague, Stewart, Sumner, Thayer, Tipton, Wade, Willey, Williams, Wilson, Yates.

So the amendment of Mr. Ross to the motion of Mr. Morrill of Maine was not agreed to; and

On the question to agree to the motion of Mr. Morrill of Maine,

It was determined in the negative { Yeas---- 27 / Nays---- 27 }

On motion by Mr. Morrill of Maine,

The yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are,

Messrs. Anthony, Cameron, Cattell, Chandler, Conness, Corbett, Cragin, Drake, Harlan, Howard, Howe, Morrill of Maine, Nye, Pomeroy, Ramsey, Ross, Sherman, Sprague, Stewart, Sumner, Thayer, Tipton, Wade, Willey, Williams, Wilson, Yates.

Those who voted in the negative are,

Messrs. Bayard, Buckalew, Cole, Conkling, Davis, Dixon, Doolittle, Edmunds, Ferry, Fessenden, Fowler, Frelinghuysen, Grimes, Henderson, Hendricks, Johnson, McCreery, Morgan, Morrill of Vermont, Morton, Norton, Patterson of New Hampshire, Patterson of Tennessee, Saulsbury, Trumbull, Van Winkle, Vickers.

So the motion of Mr. Morrill of Maine was not agreed to.

The question recurring on the resolution submitted by Mr. Williams,

It was determined in the affirmative; so it was

Resolved, That the several orders heretofore adopted, as to the order of reading and voting upon the articles of impeachment, be rescinded.

On motion by Mr. Williams that the Senate do now proceed to vote on the second article of impeachment,

It was determined in the affirmative; and

The Secretary, by direction of the Chief Justice, read the second article of impeachment, as follows:

ARTICLE II. That on said twenty-first day of February, in the year of our Lord one thousand eight hundred and sixty-eight, at Washington, in the District of Columbia, said Andrew Johnson, President of the United States, unmindful of the high duties of his office, of his oath of office, and in violation of the Constitution of the United States, and contrary to the provisions of an act entitled "An act regulating the tenure of certain civil offices," passed March second, eighteen hundred and sixty-seven, without the advice and consent of the Senate of the United States, said Senate then and there being in session, and without authority of law, did, with intent to violate the Constitution of the United States, and the act aforesaid, issue and deliver to one Lorenzo Thomas a letter of authority in substance as follows, that is to say:

EXECUTIVE MANSION,
Washington, D.C., February 21, 1868.

SIR: The Hon. Edwin M. Stanton having been this day removed from office as Secretary for the Department of War, you are hereby authorized and empowered to act as Secretary of War ad interim, and will immediately enter upon the discharge of the duties pertaining to that office.

Mr. Stanton has been instructed to transfer to you all the records, books, papers, and other public property now in his custody and charge.

Respectively, yours,

ANDREW JOHNSON.

To Brevet Maj. Gen. LORENZO THOMAS,
Adjutant General, U.S. Army, Washington, D.C.

Then and there being no vacancy in said office of Secretary for the Department of War, whereby said Andrew Johnson, President of the United States, did then and there commit and was guilty of a high misdemeanor in office.

The Chief Justice directed the Secretary to call the names of the Senators.

Each Senator as his name was called rose in his place, and the Chief Justice proposed to him the following question:

Mr. Senator ———, how say you? Is the respondent, Andrew Johnson, President of the United States, guilty or not guilty of a high misdemeanor as charged in this article?

The Senators who answered "guilty" are,

Messrs. Anthony, Cameron, Cattell, Chandler, Cole, Conkling, Conness, Corbett, Cragin, Drake, Edmunds, Ferry, Frelinghuysen, Harlan, Howard, Howe, Morgan, Morrill of Maine, Morrill of Vermont, Morton, Nye, Patterson of New Hampshire, Pomeroy, Ramsey, Sherman, Sprague, Stewart, Sumner, Thayer, Tipton, Wade, Willey, Williams, Wilson, Yates.

The Senators who answered "not guilty" are,

Messrs. Bayard, Buckalew, Davis, Dixon, Doolittle, Fessenden, Fowler, Grimes, Henderson, Hendricks, Johnson, McCreery, Norton, Patterson of Tennessee, Ross, Saulsbury, Trumbull, Van Winkle, Vickers.

The Chief Justice announced that upon this article 35 Senators had voted "guilty," and 19 Senators had voted "not guilty," and declared that two-thirds of the Senators present not having pronounced him guilty, Andrew Johnson, President of the United States, stood acquitted of the charges contained in the second article of impeachment.

On motion by Mr. Williams,

That the Senate do now proceed to vote on the third article of impeachment,

It was determined in the affirmative; and

The Secretary, by direction of the Chief Justice, read the third article of impeachment, as follows:

ARTICLE III. That said Andrew Johnson, President of the United States, on the twenty-first day of February, in the year of our Lord one thousand eight hundred and sixty-eight, at Washington, in the District of Columbia, did commit and was guilty of a high misdemeanor in office in this, that, without authority of law, while the Senate of the United States was then and there in session, he did appoint one Lorenzo Thomas to be Secretary for the Department of War *ad interim*, without the advice and consent of the Senate, and with intent to violate the Constitution of the United States, no vacancy having happened in said office of Secretary for the Department of War during the recess of the Senate and no vacancy existing in said office at the time, and which said appointment, so made by said Andrew Johnson, of said Lorenzo Thomas, is in substance as follows—that is to say:

EXECUTIVE MANSION,
Washington, D.C., February 21, 1868.

SIR: The Hon. Edwin M. Stanton having been this day removed from office as Secretary for the Department of War, you are hereby authorized and empowered to act as Secretary of War ad interim, and will immediately enter upon the discharge of the duties pertaining to that office.

Mr. Stanton has been instructed to transfer to you all the records, books, papers, and other public property now in his custody and charge.

Respectfully, yours,

ANDREW JOHNSON.

To Brevet Maj. Gen. LORENZO THOMAS,
Adjutant General, U.S. Army, Washington, D.C.

The Chief Justice directed the Secretary to call the names of the Senators.

Each Senator, as his name was called, rose in his place, and the Chief Justice proposed to him the following question:

Mr. Senator ————, how say you? Is the respondent, Andrew Johnson, President of the United States, guilty or not guilty of a high misdemeanor as charged in this article?

The Senators who answered "guilty" are,

Messrs. Anthony, Cameron, Cattell, Chandler, Cole, Conkling, Conness, Corbett, Cragin, Drake, Edmunds, Ferry, Frelinghuysen, Harlan, Howard, Howe, Morgan, Morrill of Maine, Morrill of Vermont, Morton, Nye, Patterson of New Hampshire, Pomeroy, Ramsey, Sherman, Sprague, Stewart, Sumner, Thayer, Tipton, Wade, Willey, Williams, Wilson, Yates.

The Senators who answered "Not guilty" are,

Messrs. Bayard, Buckalew, Davis, Dixon, Doolittle, Fessenden, Fowler, Grimes, Henderson, Hendricks, Johnson, McCreery, Norton, Patterson of Tennessee, Ross, Saulsbury, Trumbull, Van Winkle, Vickers.

The Chief Justice announced that upon this article 35 Senators had voted "guilty," and 19 Senators had voted "not guilty"; and declared that two-thirds of the Senators present not having pronounced him guilty, Andrew Johnson, President of the United States, stood acquitted of the charges contained in the third article.

Thereupon,

Mr. Williams moved that the Senate sitting for the trial of the President upon articles of impeachment do now adjourn without day.

On the question to agree to the motion, Mr. Williams asked that the question be taken by yeas and nays; and the yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are,

Messrs. Anthony, Cameron, Cattell, Chandler, Cole, Conkling, Corbett, Cragin, Drake, Edmunds, Ferry, Frelinghuysen, Harlan, Howard, Morgan, Morrill of Maine, Morrill of Vermont, Morton, Nye, Patterson of New Hampshire, Pomeroy, Ramsey, Sherman, Sprague, Stewart, Sumner, Thayer, Tipton, Van Winkle, Wade, Willey, Williams, Wilson, Yates.

Those who voted in the negative are,

Messrs. Bayard, Buckalew, Davis, Dixon, Doolittle, Fowler, Henderson, Hendricks, Johnson, McCreery, Norton, Patterson of Tennessee, Ross, Saulsbury, Trumbull, Vickers.

The Chief Justice stated that before announcing the result of the vote just taken he desired to call the attention of the Senate to the twenty-second rule, which provides that "if the impeachment shall not, upon any of the articles presented, be sustained by the votes of two-thirds of the members present," a judgment of acquittal shall be entered; and that if not objected to, he would direct the Secretary to enter a judgment of acquittal according to this rule; and

No objection being made, the Secretary, by direction of the Chief Justice, entered the judgment of the Senate upon the second, third, and eleventh articles, as follows:

The Senate having tried Andrew Johnson, President of the United States, upon articles of impeachment exhibited against him by the House of Representatives, and two-thirds of the Senators present not having found him guilty of the charges contained in the second, third, and eleventh articles of impeachment, it is therefore

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Ordered and adjudged. That the said Andrew Johnson, President of the United States be, and he is, acquitted of the charges in said articles made and set forth.

The Chief Justice then announced the vote on the motion of Mr. Williams to be yeas 34, nays 16;

And, thereupon,

Declared the Senate sitting as a court of impeachment for the trial of Andrew Johnson, President of the United States, upon articles of impeachment exhibited against him by the House of Representatives, adjourned without day.

Report of the Committee Appointed on the 29th Dec. 1826, on a Letter of John C. Calhoun, Vice President of the United States Asking an Investigation of His Conduct While Secretary of War

REPORT

OF THE

COMMITTEE APPOINTED ON THE 29TH DEC. 1826,

ON A LETTER OF

JOHN C. CALHOUN,

VICE PRESIDENT OF THE UNITED STATES,

ASKING

An investigation of his conduct while Secretary of War.

Mr. WRIGHT, from the Select Committee to which was referred the letter of the Vice President, of the 29th December last, made the following

The Select Committee, to whom was referred the Communication of the Vice President, of the 29th December last, respectfully report:

That, immediately after they assembled, they informed the Vice President of their being organized, and of their readiness to receive any communication, which he might see fit to make. On the receipt of his reply, dated the 3d of January, and which accompanies this report, Mr. McDuffie, as the friend and representative of the Vice President, was admitted before the committee, and attended throughout the examination which followed.

The first objects of inquiry in proceeding to business, was, to ascertain whether any charges against the Vice President, had been placed among the public records of the War Department. And after an examination on this point, the committee became satisfied that no charges were, or had been among the records or papers of that department. But as the letter from Elijah Mix, addressed to Major Satterlee Clark, under the name of "Hancock," had been published in the Alexandria Phœnix Gazette, of the 28th December, which publication the Vice President had particularly referred to, in his note to the committee, they felt bound to examine fully and freely into the truth or falsity of the matters contained in that letter.

From the nature of the duties imposed upon a committee of inquiry, especially when connected with the distinct wish, as expressed by the Vice President in the present instance, for the "freest investigation," it has been impossible for the committee to give to their proceedings the connexion and conciseness incident to trials, where the testimony is ascertained and arranged, before it is presented. They have, however, diligently applied themselves to the subject referred to them; and, after a long and laborious examination, they are unanimously of the opinion, that there are no facts which will authorize the belief, or even suspicion, that the Vice President was ever interested, or that he participated, directly or indirectly, in the profits of any contract formed with the Government through the Department of War, while he was entrusted with the discharge of its duties, or at any other time. They are also of opinion, that the conduct of Mr. Barbour, the present Secretary of War, in regard to the letter of E. Mix, is not in the slightest degree deserving of censure. The accusation contained in the letter was regarded by him as a base calumny upon the Vice President, penned by a man wholly unworthy of notice; and the committee have no reason to believe that the supposed truth of that accusation was at any time the basis of any act of the War Department. The publication of the letter appears to have been produced as follows: In the month of December last, Howes Goldsborough and Elijah Mix were competitors for a contract with the War Department. Goldsborough, soon after his arrival in Washington, obtained from Major S. Clark a copy of the letter with a view to use the same against Mix, should he find it necessary. From this copy a transcript was obtained by Wm. F. Thornton, the junior Editor of the Phoenix Gazette, on the 27th of December, which he published the next morning in that Paper, accompanied by his editorial remarks. In this publication, Mr. Barbour had no agency, either direct or indirect. When he heard that the letter had been made public, he requested Col. R. M. Johnson, of the Senate, to call upon the Vice President, as a mutual friend, and inform him of the manner in which the letter had come to his (Mr. Barbour's) hands, and that the same had been subsequently transmitted through the Post Office, in an envelope to Major Clark, to whom it belonged. This information was given by Col. Johnson to the Vice President, in the morning of the 29th of December, just before he transmitted his communication to the House.

The letter to "Hancock," as published, and to which the Vice President had referred, contained, among other things, the following assertion: "and I have written letters of Vandeventer's, which most positively mention, that he, (meaning Mr. Calhoun,) was engaged, and received some portion of the contract." As such letters, if they existed, might lead to further evidence, and be important to aid the committee in their inquiries, they thought proper, in the early stage of their proceedings, to issue a subpœna both for Mix and Vandeventer, with a clause therein contained, commanding them to produce any papers in their possession tending to prove the accusation which Mix had made, in the letter to "Hancock." In obedience to this summons, the witnesses appeared, and Mix having been first called upon to testify, produced, during his examination, the letters from

Major Vandeventer, dated August 7th, 1818, September 10th, 1818, July 8th, 1820, March 24th, 1821, and the letter from Colonel W. K. Armistead, dated March 24th, 1821. On his second examination he produced the letters from Major Vandeventer, dated August 3d, 1818, September 19th, 1818, and October 17th, 1820. When it was perceived, that in one of the letters of Major Vandeventer, to wit, in the one dated the 7th of August, 1818, and to which they here particularly refer, allusion was made to a partner in the contract, whose name was to have been kept secret, the committee felt it to be their duty to discover, if they could, who this secret partner was, or at any rate to push the inquiry so far as to leave no room for suspicion that the Vice President was the person alluded to. This branch of the subject has been the principal cause of their consuming so much time in the investigation. They found that they were here led into a wider field than could have been at first anticipated, and that it was necessary, in order to get a view of the whole ground, to go thoroughly into the origin and history of what is commonly called the Mix contract. The letters of Major Vandeventer, above referred to, appear to relate; principally, to the private and confidential transactions between him and E. Mix, in regard to the contract, and there is no reason to believe, or presume, that the Vice President was ever made acquainted with their contents. The letter from Colonel Armistead, written while he was at the head of the Engineer Department, although it wears the appearance of an official paper, and was improperly intended, as the committee believe, to bring the weight of official influence to bear upon the private transactions between Vandeventer and Mix, was not written with the sanction or knowledge of the Vice President, and no copy of it was ever entered in the letter book of the Department.

The committee will here remark, that they place no reliance whatever on the testimony of Elijah Mix. From the self-contradictions apparent on the face of his testimony, and which it is unnecessary here to recapitulate, aside from the infamy attached to his character, the committee were satisfied that he ought not to be believed on his oath. The letters, however, just referred to, and produced by him, during his examination, do not rest for their authenticity on his testimony. Those from Major Vandeventer, excepting such parts as had been defaced or obliterated, were acknowledged by Major Vandeventer himself to be genuine; and he was requested, in every instance, to state, with the letters before him, what names or words had occupied the obliterated places, when the letters were written. The letter from Colonel Armistead was also acknowledged by that officer to be genuine. But the three papers purporting to be copies or the substance of a letter from Major Vandeventer to Mr. Calhoun, rest for their authenticity on the unsupported testimony of E. Mix, and are regarded by the committee as having been fabricated by him. They are also of opinion that the words or names defaced from the letters of Major Vendeventer, were so defaced by E. Mix; and the committee have been unable to ascertain, with certainty, either from Vandeventer, the admitted author of the letters, or from any other source, what the words or names were, which have been thus obliterated.

The offer for the contract appears to have been made by E. Mix, on the 23d of July, 1818, and proposes to deliver at Old Point Comfort, "from one to one hundred and fifty thousand perches of stone, at three dollars per perch." The contract, as furnished from the War Department, bears date the 25th of July, 1818. It stipulates for the delivery of one hundred and fifty thousand perches of stone, at three dollars per perch; is drawn up in the hand writing of Major Vandeventer, and by him alone witnessed, and is signed by General Joseph G. Swift, then Chief Engineer, and by Elijah Mix. Although Mix here appears to have been the only contractor, yet, from the evidence, there is reason to believe, that, at the time the contract was made, or soon after, and before the execution of any valid bond for the performance thereof, it was divided into shares, and that one-fourth belonged to Major Vandeventer, one-fourth to Elijah Mix, one-fourth to R. C. Jennings, and the remaining fourth to a person whose name was not to have been mentioned. The title of Vandeventer to his fourth, at the time above referred to, appears to have rested on a verbal and confidential agreement between him and Mix, and so remained till the 24th of April, 1819, when he received a written bill of sale, of one-half of the whole contract. Howes Goldsborough & Co. subsequently became the owners of one-fourth, by purchase from Samuel Cooper, who had previously purchased from Major Vandeventer; and they (Goldsborough & Co.) were recognized at the War Department, by the consent of E. Mix, expressed in a letter sent by him to the Secretary of War, and dated the 18th of April, 1821.

The first bond, received at the Engineer Department, on the contract, is dated 5th of August, 1818, and describes the contract as having been made by Elijah Mix and *George Cooper*, for the delivery of but *one hundred thousand* perches of stone, being fifty thousand less than Mix was entitled to deliver. This bond is signed by E. Mix, and George Cooper, as contractors, and by Samuel Cooper and James Oakley, as sureties; the sureties were regularly approved by R. Riker, Recorder of the city of New York, as appears by his certificate following immediately after the signatures, and dated the same as the bond. It will be perceived at once, that there is an obvious and fatal variance between this bond and the contract. In an official letter written from the Engineer Department, on the 11th day of August, 1818, to Lieutenant George Blaney, and copied into the letter book of that Department, the contract is described as for one hundred thousand perches of stone; the language of the letter is as follows: "You will inform the Agent that a contract has been made with Capt. E. Mix to deliver, as soon as practicable, at the Rip Raps, one hundred thousand perch of stone." In a subsequent letter written to James Maurice, also copied into the same letter book, and dated the 21st day of August, 1818, the contract is described as being for two hundred thousand perches; the language of this letter is as follows: "Mr. E. Mix will soon commence to deliver stone at the Rip Raps under contract with this Department for two hundred thousand perch."

Sometime after the delivery at the Engineer Department, of the first bond, but at what precise time does not appear, a new bond was given for the delivery of one hundred and fifty thousand perches, describing the contract as made by E. Mix. This second bond is signed

by E. Mix as contractor, and Samuel Cooper and James Oakley, as sureties, and it is ante dated to 5th of August, 1818, but no certificate in regard to the sufficiency of the sureties was attached to this instrument. The committee have been unable to ascertain when this second bond was received at the Engineer Department; though the impression of General Swift, is, that it was received before he left the office, which was on the 11th of November, 1818. Major Vandeventer also expresses his belief that it was delivered during the Fall of 1818; how far his testimony conflicts, if at all, with his letter to Mix, dated 17th of October, 1820, in which he urges upon the latter to attend to "the bond," the committee will not undertake to determine,

The attention of General Swift was particularly directed, before the committee, to the discrepancies in the bonds, and, also, to the two letters from the Engineer Department, in which the contract is alluded to. The explanation which he gives, will be found in his testimony, to which the committee refer.

During an investigation relative to this contract by a committee of the House of Representatives, in 1822, a copy of the bond was requested by that committee. In answer to which, the Engineer Department furnished a copy of the second bond which had been substituted for the one first given; but as there was no certificate of the Recorder of New York approving the sureties on the second bond, a copy of the certificate annexed to the cancelled bond, was made, and attached to the copy of the bond furnished. Capt. Smith, of the Engineer Department, who attested these copies, has explained the cause of his certifying to this inaccuracy, and to his testimony in that particular, the committee here refer.

The question still remains who was the secret partner? But the committee being entirely satisfied that the secret partner was not the Vice President, which was the main question to be decided, will leave the conflicting testimony on the other point with the House, without attempting to decide upon its relative weight.

On the 27th January, 1827, the committee closed the examination of witnesses on their part, except as to one or two, who had been summoned, but had not attended. On that day the friend and representative of the Vice President was advised that the committee had so closed their examination, and he was also informed by a member of the committee, in its presence, that the committee were unanimously of opinion that the Vice President was innocent of the charge of having participated in any manner in any contract made with the War Department, while he was Secretary of War. The same day, at the instance of Mr. McDuffie, subpoenas were issued for witnesses to appear and testify on behalf of the Vice President. On the 29th of January, the committee received from the friend and representative of the Vice President a paper, protesting against the previous proceedings of the committee. Considering this paper as prepared and presented under the sanction of the high officer in whose behalf it protests, the committee have deemed it their duty to transmit it to the House; but they forbear all comment on its contents.

The committee submit herewith all the testimony they have received during the examination.

No. 1.

Letter from J. C. Calhoun, Vice President, to the House of Representatives—upon which the Committee of Investigation was instituted.

The Speaker of the House of Representatives—

SIR: You will please to lay before the House over which you preside the enclosed communication addressed to that body.

Very respectfully, yours, &c.

J. C. CALHOUN.

To the Honorable the Members of the House of Representatives:

An imperious sense of duty, and a sacred regard to the honor of the station which I occupy, compel me to approach your body in its high character of grand inquest of the nation.

Charges have been made against me of the most serious nature, and which, if true, ought to degrade me from the high station in which I have been placed by the choice of my fellow-citizens, and to consign my name to perpetual infamy.

In claiming the investigation of the House, I am sensible that, under our free and happy institutions, the conduct of public servants is a fair subject of the closed scrutiny and the freest remarks, and that a firm and faithful discharge of duty affords, ordinarily, ample protection against political attacks; but, when such attacks assume the character of impeachable offences, and become, in some degree, official, by being placed among the public records, an officer thus assailed, however base the instruments used, if conscious of innocence, can look for refuge only to the Hall of the immediate Representatives of the People. It is thus I find myself most unexpectedly placed.

On Wednesday morning last it was, for the first time, intimated to me that charges of a very serious nature against me were lodged in one of the Executive Departments. During the day, rumors from several quarters, to the same effect, reached me, but the first certain information of their character was received yesterday morning, through one of the newspapers of the District. It appears, from its statement, that I am accused of the sordid and infamous crime of participating in the profits of a contract formed with the Government, through the Department of War, while I was entrusted with the discharge of its duties, and that the accusation has been officially presented as the basis of an official act of the War Department, and, consequently, to be placed among its records, as a lasting stigma on my character.

Conscious of my entire innocence in this and every other public act, and that I have ever been incapable, in the performance of duty; of being influenced by any other motive than a sacred regard to the public interest, and resolved, as far as human effort can extend, to leave an untarnished reputation to posterity, I challenge the freest investigation of the House, as the only means effectually to repel this premeditated attack to prostrate me, by destroying forver my character.

J. C. CALHOUN,
Vice President of the U. States.

WASHINGTON, *29th Dec. 1826.*

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No. 2.

CONGRESS OF THE UNITED STATES,
In the House of Representatives, December 29, 1826.

Ordered, That the letter from the Vice President of the United States, asking an investigation into his official conduct while Secretary of the Department of War, this day communicated to the House, be referred to a select committee; and that the Committee have power to send for persons and papers.

And Mr. Floyd, Mr. Clarke,
Mr. Wright, Mr. Ingersoll,
Mr. Williams, Mr. Sprague,
Mr. Campbell,

were appointed the said committee.

Attest, MW. ST. CLAIR CLARKE,
Clerk House of Reps. U.S.

No. 3.

The Chairman of the Committee to the Vice President.

CAPITOL, *January 2, 1827.*

SIR: I am directed by the Select Committee of the House of Representatives, to which your communication of the 29th of December last was referred, to inform you that the committee "is organized," and will receive any communication you may think proper to make.

I have the honor to be, Sir,
Your obedient servant,
JOHN FLOYD,
Chairman Select Committee House of Reps.

His Excellency, JOHN C. CALHOUN,
Vice President of the United States.

No. 4.

Answer of the Vice President.

WASHINGTON, *3d Jan., 1827.*

SIR: I have received your communication, of the 2d instant, in which you state, that the committee of investigation is organized, and will receive any communication which I may think proper to make; and, in reply, I have to state, that my communication to the House of the 29th of December last, will make known to the committee my motives in soliciting an inquiry, and that I have nothing farther to add, but to reiterate my desire to have a full investigation.

In order to avoid the inconvenience and delay of communicating by letter, I have requested Mr. McDuffie to act, as my friend, before the committee.

With great respect,
I am, &c. &c.

JOHN C. CALHOUN.

Hon. JOHN FLOYD,
Chairman of the Select Committee of Investigation.

P. S. It may not be improper to add, that the paper of the District, to which I referred in my communication to the House, as containing the statement therein alluded to, is the Phœnix Gazette, of the 28th December last, printed at Alexandria, and which I would respectfully refer the committee.

J. C. C.

No. 5.

Publication in the Phoenix Gazette; i.e. *Mix's letter to Hancock, with the Editor's remarks.*

Most of our readers, we presume, have either heard or read of the celebrated Elijah Mix, whose name has been so often associated with *Castle Calhoun* and the *Rip Raps*. This distinguished personage has again made his appearance in the political world, much to the annoyance, however, of those who contributed, and were still endeavoring to contribute, to his fortune and consequence. He has kicked up a dust in Washington, from which the whole tribe of his late associates are flying in every direction, denouncing him with an intensity of bitterness, equalled only by that of their previous friendship. It appears that the War Department was yesterday about to close a contract for a further supply of stone necessary to the completion of the fortifications at Old Point Comfort, and that this same Mr. Elijah Mix had made the lowest proposals; but, just when he and some of his particular friends in the Department thought that every thing was as snug as heart could wish, a gentleman opportunely arrived from New York, and, as the Roanoke Senator would say, blowed them *sky high, sir! sky high!*

The gentleman alluded to is the author of several articles, signed Hancock, which appeared in the New York papers, scrutinizing the official conduct of Mr. Calhoun, while Secretary of War. To this gentleman Elijah Mix addressed a letter, under date of the 1st of November, 1825, charging Mr. Calhoun and Mr. Vandeventer, of the War Department, with a direct participation in the notorious Rip Rap contract, and stating that he had the receipt of the latter gentleman for $19,500, a portion of which was declared, by him, to be for Mr. Calhoun's use. The letter was marked "confidential;" but Hancock, not choosing to consider it so, communicated it yesterday to the Secretary of War, who immediately rejected Mix's proposals, deeming him unworthy to be a party to a contract, and thinking, probably, that such a man might have the hardihood, hereafter, to make an attempt upon *his* reputation.

We have procured a copy of the letter, which will be found below, *verbatim et literatim*. What course will be pursued in regard to it, we cannot say; but it is rumored that a call will be made for it by the Senate to-day. For ourselves, we acquit Mr. Calhoun of any participation in the *profits* of contracts made by him; but we are not disposed to acquit him of *connivance*, nor can we disbelieve the charge in relation to Mr. Vandeventer, who is the brother-in-law of Mix, until he shall have vindicated his character, and punished Mix for so unprincipled an outrage.

GEORGETOWN, *November* 1, 1825.

TO THE AUTHOR OF HANCOCK

If any information is wanted on the subject of Mr. Calhoun's infidelity, I have it in my power, I think, to furnish you matter sufficient to awaken any unbiassed mind, that he was concerned in the Rip Rap contract, either directly or indirectly; and I have written letters of Vandeventer's, which most positively mention, that he (Calhoun) was engaged, and received some portion of the contract. I knew that Vandeventer was making a traffic of it, and I represented to him (Calhoun) the injustice of compelling me to pay the amount of the advance which Vandeventer had received. He told me his decision was final, and that there was no appeal; although he must have known the injustice of the decision; and I gave him, at the same time, a receipt which I had received from Vandeventer, which he (Calhoun) refused to receive. Let me hear from you as early as possible, and state what way I shall direct you.

Your obedient,

E. MIX.

N. B. On the subject of General Swift, you are misinformed; and I can put you in the way to know another person which you have not suspected.

No. 6.

Deposition of Mr. Barbour.—Sworn to and subscribed, this 4th day of January, 1827

Col. Gratiot, the Superintendent of the public works at Old Point Comfort, invited proposals for sundry articles wanted in the construction of those works. Among others, 16,000 perches of stone were submitted to the lowest bidder. Elijah Mix was the lowest bidder; Howes Goldsborough the next. Col. Gratiot, according to his limited powers, was obliged to recognise Mix, as the person entitled to the contract, subject, however, to the final sanction of the Secretary of War. Goldsborough presented himself at the Department, about the 22d December, (for the day is not particularly recollected,) to insist on his being entitled to the contract; first, on the ground of the great superiority of his stone, and their particular fitness for the works; and secondly, on the notoriously bad character of Mix, which, he urged, rendered him unworthy of the countenance of the Govern-

ment. As no official information had been received from Col. Gratiot, no step could then be taken. I stated to Mr. Goldsborough, that the rejection of the lowest bidder involved a delicate responsibility, both to the public and the individual rejected; that I had, in a few strong cases, rejected the lowest bidder, on the ground of his unworthy character; and that I should investigate maturely the objections he had urged, and, if I found sufficient reasons, I would do it in Mix's case.

The Monday or Tuesday thereafter, Satterlee Clark called upon me, at my dwelling. He stated that he had heard that Mix was seeking to obtain another contract from the Government, and that he was satisfied, after the perusal of a letter from Mix to him, I would be of an opinion, that he was not entitled to such attention from the Government; and, thereupon, he took from his pocket the letter of Mix, and commenced reading. So soon as he had reached the part implicating the integrity of Mr. Calhoun, I interrupted him, by saying, that it must be a foul calumny; Clark replied, that he so considered it, and that, under that impression, he had brought the letter for the purpose of convincing me of the baseness of Mix; and, he added, if you give him countenance, you will be just as liable to the same imputations. He stated, that I might either at once return him the letter, or if I preferred to keep it, for the purpose of being more fully satisfied, that he would call upon me, at the office, for it. As I was just setting out to the office, and expected to meet the rival parties for the contract, I retained it. On arriving at the office, after perusing the report [made] some years [since,] of the House of Representatives, and the accompanying documents, on the Rip Rap contract, among which I found evidence of Mix's having been indicated for forgery, and his flying from the prosecution, I called in Gen. Macomb, to inquire if Col. Gratiot had yet been heard from; being answered in the negative, I told him of this letter, and that I was so well convinced of its being an unfounded calumny, that he would consider Mix's offer as not to be regarded, and, of consequence, to accept Goldsborough's; and that he might state, that my decision was founded on Mix's bad character, to Col. Gratiot, and the parties concerned. The papers from Col. Gratiot were not received till Thursday.

I heard, on Wednesday morning, from Major Nourse, that one or more copies of Mix's letter were in circulation, and I think, he added, that he had seen it, and had heard that the original had been shown to me. I explained to him to what end it had been presented to me. About 4 o'clock on that day, the Board of Commissioners on the Navy Hospital Fund, composed of Mr. Rush, Mr. Southard, and myself, being in session, in my office, a note was sent me from Major Nourse, submitting the propriety of sending Mix's letter to Mr. Calhoun. The idea of taking such a step had not occurred to me. Considering it an unfounded calumny, and the source from which it came as unworthy of notice, and the sentence which I myself had passed on the author, these considerations, when I was called to decide on the question submitted, brought my mind at once to the conclusion, that it would be indelicate to Mr. Calhoun, as it might imply that I thought some explanation necessary. But, lest my views might be incorrect, I took counsel of Mr. Rush and Mr. Southard, both of whom promptly

expressed a coincidence of opinion with me; and was agreed by all, that as Clark had not applied for the letter, it ought to be returned to him. Accordingly, the next morning, the first thing I did, was to enclose it and send it to Clark, through the Post Office, before leaving my own house. To the Committee, and to all who know me, it is unnecessary to state, that the copy or copies of this letter, alluded to above, had been taken before the letter was put in my possession, and that none were permitted by me, and the fact is adverted to only to protect me from the inferences of the malignant.

After my reaching my office, on Thursday, Gen. Floyd called, to say to me, that he, in common with some other of my friends, had been pained to hear a rumor, that Mix and Clark had filed, by letter, a serious charge at the Department, against Mr. Calhoun; they being of an opinion, that I ought either to have burnt it, or sent a copy to Mr. Calhoun. Upon which I gave him the above narrative, with which he said he was relieved on my account, and satisfied. He suggested the propriety of my stating, on paper, the facts. This, I told him, I thought unnecessary; but asked him to communicate them to Mr. Calhoun or to any other person he might think proper. I stated to him, furthermore, that I would see him at my own house that evening, and that I was willing to adopt any proper course, that a misrepresentation of the facts as far as I was concerned, might make necessary. The General wrote me, in the evening, that on his getting to the House, he found the Phoenix Gazette, containing Mix's letter, in the hands of some of the members; and, in consequence, he had made no communication to Mr. Calhoun. Most anxious to have my conduct fairly represented, and fearful that the ear of Mr. Calhoun had been abused, I sent, early on Friday morning, for Col. Richard M. Johnson, a friend to us both, and requested him, as soon as his convenience would permit, to see Mr. Calhoun, and give him the history of the transaction, as detailed above. He readily consented, and proceeded, as he informed me, immediately to his lodgings, where he complied with my request; when Mr. Calhoun replied, that he was entirely satisfied with my conduct in the whole affair.

After this, I saw with surprise, that Mr. Calhoun had stated, in his communication to the House, that charges of a serious character, against him, had become in some degree official, by being placed among the public records, and had become the basis of an official act at the War Department; when, in truth, the letter of Mix to Clark, never was among the records, nor was ever intended by me to be placed among the records; when no charge was made by Clark, in consequence of Mix's letter, but, on the contrary, as avowed by himself, to fix the crime of calumny on Mix, which was predicated exclusively on the innocence of Mr. Calhoun, for his innocence made Mix's crime. Nor was any official act of the War Department based on the charge; but the *falsehood* of the charge, united with other imputed crimes, induced me to reject Mix, as unworthy of any connexion with the Government. And I solemnly aver, that, in receiving this letter, and, in short, that every act of mine, in this whole affair, was guided by an exclusive eye to the public interest, and in rejecting Mix's proposals, as I thought, by a due regard to the moral sense of my country; that from the first moment of hearing the

charge, I thought it a calumny, and, coming from the quarter it did, unworthy of any man's notice. The declaration of Mr. Calhoun, made to Col. Johnson, of his entire satisfaction with my course, and indeed, self respect, forbid me from applying to myself any of the innuendos in Mr. Calhoun's communication to the House, yet, as the world may infer from the communication, that they have a bearing against me, I think it proper to add, that any such imputation will constitute a calumny.

Questions and answers of Mr. Barbour.

Question by Mr. Wright. Have you knowledge of any contract, entered into in behalf of the United States, by the War Department, while Mr. Calhoun was Secretary of that Department, in which he was in any way interested, or in the profit of which he participated?

Answer. I know nothing of such contract.

Question by Mr. Campbell. Did you speak of Mix's letter to any other person than those whose names you have already mentioned, while the letter was in your possession? If your answer be affirmative, to whom?

Answer. I have no recollection of having spoke or shown it to any other persons than those referred to in my deposition. I recollect consulting the President on the propriety of rejecting Mix's proposals; whether before or after the receiving Mix's letter, I do not distinctly recollect. If after receiving it, I presume I spoke of it to him. The conversation with the President took place in a walk with him from church on Christmas day.

JAMES BARBOUR.

No. 7.

Deposition of Mr. Rush, sworn and subscribed to the 4th day of January, 1827.

Mr. Rush, being first sworn, deposeth and saith—"I believe it was one day last week, perhaps on Wednesday, that I attended at the War Office to meet the Secretary of War and of the Navy, in discharge of duties which attached to us as Commissioners of the Navy Pension and Hospital Fund. After the business upon which we were engaged had been nearly finished, a note was handed to the Secretary of War by his messenger. After reading it, he digressed from the business in which we were engaged, and proceeded to inform us that the letter in question, from Mr. Mix, had been put into his hands a day or two before, and that he would read that letter to us. This he did, taking the letter, as I think, from his pocket. After reading the whole of it, which, as it appeared to me, he did not so much for the purpose of inviting consulation as for that of expressing his own opinion upon it, he went on to express that opinion. He said that he considered it as containing a calumny upon the Vice President expressing himself to that effect, in language very strong. He continued his remarks upon it by saying, that he had determined, since the receipt of that letter, to have no connection whatever with the writer of it, touching a

certain contract then pending before his Department, even if he should have entertained any connection with him touching that contract prior to the receipt of the letter, under the conviction that the author of so base a fabrication was not a suitable person to approach his Department. Finally, he remarked, that his desire and his purpose was to have nothing to do either with Mr. Mix or his letter. Both Mr. Southard and I unequivocally expressed our conviction of the propriety of his course, and, above all, our own belief also that the charge against the Vice President could be no other than such a calumny as he had represented it. The Secretary of War further expressed his intention of getting rid of this letter as soon as he could, in the propriety of which course the Secretary of the Navy and myself also concurred. The Secretary of War said, in effect, that, to be in the possession of that letter at all was disagreeable to him, and that his wish was to part with it immediately.

The witness adds, that it was not until last evening that he had any occasion to recall the circumstances attending the conversation above described; he therefore cannot vouch for accuracy either as regards the order of the conversation or the words employed in it; but he feels much confidence that he has given, correctly, its true spirit and drift.

Question by Mr. Wright.—Have you knowledge of any contract entered into, in behalf of the United States, by the War Department, while Mr. Calhoun was Secretary of that Department, in which he was, in any way, interested, or in the profit of which he participated?

Answer.—None.

Question by Mr. Campbell.—Did the Secretary of War, at the time he read the letter to you and Mr. Southard, impose injunctions of secrecy as to the contents?

Answer.—Not to my recollection.

Question by Mr. Clarke.—Did the Secretary, in the conversation you had with him, as detailed by you, speak of communicating the contents of the letter to the Vice President, and, if he did, what he did say on that subject?

Answer.—I have, at present, no recollection of his having said any thing upon that point. I left the War Office before either of the other gentlemen, who, as well as I can remember, were still in conversation upon the subject of the letter.

RICHARD RUSH.

No. 8.

Deposition of Mr. Johnson.—Sworn to and subscribed this 4th day of January, 1827

Richard M. Johnson, a Senator of the United States from the State of Kentucky, appeared before the committee, was sworn and testified as follows:

Immediately after breakfast Friday morning Gov. Barbour, Secretary of War, sent a messenger to my room with a request to come to his house, if convenient, without delay; if not convenient, he would call at my room. I, without any delay, went to his house;

he informed me that he wished to state his conduct and proceeding relative to the charge which had been made against Mr. Calhoun by Mr. Mix; that I might see Calhoun, and, as a mutual friend, give him the facts in detail.

I heard what Gov. Barbour had to say and then went to the lodging of Mr. Calhoun. Col. Hayne of the Senate was present. I told Mr. Calhoun that Gov. Barbour had requested me to call on him, and explain the course he had taken in regard to the charge aforesaid. He was then busy in folding up and sealing some letter, which I presume was the one he directed to the Speaker of the House on the subject. I stated to Mr. Calhoun that Gov. Barbour had been presented with the letter of Mix, by a Mr. Clark, making the charge aforesaid; that upon reading the letter he came to the part which made the charge against Mr. Calhoun; that he, Gov. Barbour, told Mr. Clark, that he had no doubt that the charge was a base calumny against Mr. Calhoun. Mr. Clark replied, that he believed so likewise, and it was with a view to present Mix as making this foul charge, to prove him unworthy of the confidence of the Department, and, therefore, should not obtain a certain contract for which he was then the lowest bidder; and state, that if he could make such a charge against Mr. Calhoun, he might make the same charge against him, Gov. Barbour. This was urged, as I understand, by Clark, to have the proposition of Mix for the contract rejected—that he requested Mr. Clark to leave the letter with him, that he might look over it, as he was also examining some other papers which made charges against Mix, showing him unworthy of confidence—that, in examining the papers alluded to, he found charges of such a character against Mix, that, connected with his charge against Mr. Calhoun, he had no hesitation in rejecting his proposals, although the lowest bid, as unworthy of the confidence of the Department. Gov. Barbour stated, that he understood that some friends of his and Mr. Calhoun's thought he ought to have retained the letter and advised Mr. Calhoun of it, or, that he ought to have sent the letter to Mr. Calhoun; upon that subject he stated, that believing the charge false and not entitled to any credit, he did not think that it was worthy of such consequence or notice, and that, moreover, he feared that he might insult the feelings of Mr. Calhoun by giving such serious importance to the charge, and in order to wash his hands of the whole affair, he had returned the letter to Mr. Clark under cover and rejected the proposals of Mr. Mix, upon the grounds aforesaid, that he was unworthy of confidence and public trust, upon the ground of this charge against Mr. Calhoun, as well as other infamous charges against said Mix. I think it was the charge of forgery; and he hoped Mr. Calhoun knew him too well to believe that he should for a moment suppose he was capable of acting in any way to give countenance to such a slander against him. I communicated in substance these facts to Mr. Calhoun, who without hesitation said he believed Gov. Barbour incapable of a design to do him injustice in the case, and acquitted him, as I understood, of any wish to injure him in this respect, by giving the least countenance to the charge aforesaid.

Question by Mr. Clarke.—Did you hold this conversation with the Vice President, before he made his communication to the House?

Answer.—I did. It was the morning of the day, and before he made the communication to the House.

Question by Mr. Campbell.—Did Mr. Calhoun, when you called on him, speak of the publication in the Phoenix Gazette of the 28th of December; if he did, what were his observations?

Answer.—I do not recollect of having any other conversation with him than that I have related. We did not go into any detail in relation to the publication.

Question by Mr. Wright.—At the time you made the communication to Mr. Calhoun, at the request of Governor Barbour, did he speak on the subject of the Mix contract? And if so, relate what he said.

Answer.—I do not recollect that he said a single word respecting the Mix contract. We entered into no detail. My object was single and identical: viz: to show him that Governor Barbour had acted honorably towards him. Upon satisfying Mr. Calhoun on that subject, we had no farther conversation. In fact, I talked and said nearly all that was said; and that I have related as nearly as I can.

Question by Mr. Wright.—Have you knowledge of any contract entered into in behalf of the United States by the War Department, while Mr. Calhoun was Secretary of that Department, in which he was in any way interested, or in the profit of which he participated?

Answer.—I never have; and I should be sorry to know or believe such a thing of him or any other man who has ever filled that Department, or ever will fill it. I have had a great deal of business with him during his whole term of service, as the agent, or rather friend, of army contractors; and I say, that I believe he is a man of as much integrity as any on earth.

Question by Mr. Clarke.—Had you been informed by any person before the publication of Mix's letter in the Phoenix Gazette, that the said letter would appear there, and by whom were you so informed?

Answer.—I never did know or hear of the existence of any such letter, until it was published.

Sworn to and subscribed this 4th day of January, 1827.

RICHARD M. JOHNSON.

No. 9.

Deposition of Mr. Southard, Secretary of the Navy.

At two o'clock, on Wednesday of last week, at my instance and request, there was a meeting of the Secretary of the Treasury, the Secretary of War, and myself, as Commissioners of Navy Hospitals and of the Pension Fund, in the office of the Secretary of War, for the purpose of considering certain matters relating to the Hospital and Pension Funds, and, on which, I wished the advice and direction of the other Commissioners. About an hour and a half after we met, and sometime, perhaps a half an hour before we separated, and while engaged in the business for which we met the messenger brought to

Mr. Barbour a short note, which he read, and, immediately remarked, "I have a case of conscience; come tell what I ought to do." He then took from his pocket, a letter which seemed to be very much worn, and remarked, that it contained as base a calumny as had ever been uttered by any calumniator—that he would read it, and state how it came into his possession, and then ask us whether we thought he ought to send it to Mr. Calhoun. He read it—and stated, that stone being necessary at some of the works, near the the mouth of the Chesapeake, Mix had made the lowest bid for the contract, and been so reported by the officer directed to receive the bids; that the person, (I think a Mr. Goldsborough) making the next lowest bid, objected to Mix's receiving the contract, and requested the Secretary to look into his conduct on a former occasion; he did so, and was satisfied that the stone furnished by him, was not so good as that furnished by Mr. Goldsborough; and that he was a most corrupt man, having been guilty of most improper and criminal conduct; and that he had resolved not to give Mix the contract. I do not positively recollect whether Mr. Barbour stated, that his resolution not to give him the contract was taken before or after he received Mix's letter; but think it was after he had received it.

Mr. Barbour then informed us, that, on the day before our conversation, Major S. Clark had called at his house, and presented to him Mix's letter, to shew, as he had said, that Mix was so great a scoundrel that he ought not to be trusted with the contract; that when he (Mr. B.) learned the contents of the letter, he instantly denounced Mix as a calumniator, and the letter as a calumny; to which Major C. replied, that it was solely with that object the letter was presented to him; to prove the extent of his villany, and that there was no safety in making a contract with him. Major C. requested Mr. B. to examine the letter and then return it to him.

Mr. Barbour then stated to Mr. Rush and myself, that it had been suggested to him (and, I believe, by the note just received) that he ought to communicate Mix's letter to Mr. Calhoun, as it contained such a charge against him, but that he thought it would be an offence and so considered by Mr. Calhoun, to communicate such a letter, coming from such a source, and that he did not think it right to send it.

I concurred in this opinion, and added that I neither saw the necessity nor propriety of that measure; that I presumed no one could be found who would question Mr. Calhoun's integrity, or credit, for one moment, so foul a charge, that, receiving the letter as he did to examine and return it; I thought he had nothing farther to do with it, but ought without delay to return it to Major Clark; that sending it to Mr. Calhoun would be giving to it a notice and weight of which it was, both from its character and author, utterly unworthy—might be misconstrued by others, and unkindly received by Mr. Calhoun himself.

I believe Mr. Rush concurred in this opinion, and Mr. Barbour said that he would immediately return it to Major Clark through the Post Office.

Until Mr. Barbour shewed me the letter in his office, I had never seen it, nor heard of its existence; nor, after our conversation there, did I see it or hear it mentioned, nor, did it, as I believe, recur to

my recollection, until I saw it in the Phoenix Gazette next morning, about ten o'clock, in my own office.

Question by Mr. Wright. Have you knowledge of any contract entered into in behalf of the United States, by the War Department while Mr. Calhoun was Secretary of that Department, in which he was in any way interested, or in the profit of which he participated?

Answer. I have not.

Sworn and subscribed, this 4th day of January, 1827.

SAMUEL L. SOUTHARD.

No. 10.

Deposition of General Alexander Macomb, taken Jan. 5th, 1827.

Some time last week, I believe it was Wednesday, the Secretary of War sent for me in the War Office, to inquire whether the proposals for furnishing stone for the works at Old Point Comfort and at the Rip Raps, had been received at my office: I informed him that they had not been received, but expected them every minute. The Secretary then informed me that the reason he made the inquiry was in consequence of his understanding that Mr. Mix was a bidder, and that his character had been represented to him as being of such a cast as to make it proper that he should be excluded; that, besides unfavorable reports of him, he had now conclusive proofs of his baseness in a letter which he had written some time ago to an anonymous writer in New York, in which he accuses Mr. Calhoun—Here, read it, said the Secretary, handing me the letter. I commenced reading it, but did not get along with reading it very well. The Secretary of War said, hand it to me and I will read it. I did so; and the Secretary of War read the letter; and when finished, he asked me what I thought of such a fellow? (meaning Mix)—Have you not heard he has been guilty of forgery in New York? Do you think that we ought to permit him to have the contract if he should be the lowest bidder, as I am informed he is? I replied certainly not; well, then, you will not count on Mix's bid at all: for, if he can act towards my predecessor so infamously, he will not hesitate when it suits his views to act in the same manner towards me. I then returned to my office. The day the proposals arrived, which I believe was the next day, I handed them to the Secretary of War; he examined them, and desired me to accept Mr. Goldborough's bid, the next lowest after Mix's bid. The Secretary of War afterwards informed that it was reported about that the letter which he had shewn me, meaning Mix's letter, was used by him for the purposes of injuring the character of Mr. Calhoun. God knows, said he, that I should be the last man to take such means to injure the character of any one, especially one of the high standing of Mr. Calhoun, in whose integrity he had the greatest confidence; and generally the Secretary spoke in terms of contempt of the letter and of the writer. This I believe to be the words or conversation had with Mr. Barbour, the Secretary of War, and I am sure the above is the substance of the conversation.

ALEX. MACOMB,
Maj. Gen.

Question by Mr. Wright. Have you knowledge of any contract entered into in behalf of the United States, by the War Department, while Mr. Calhoun was Secretary of that Department, in which he was in any way interested, or in the profit of which he participated?

Answer. No; I never heard of his having anything to do with any contract, or ever heard it surmised that he had, at the War Department.

Question by Mr. Sprague. Was the letter of Mix at any time placed on file in the Department?

Answer. It was not; it is customary to put on file in the proper sub-department the documents which refer to that Department; such, for instance, as letters, papers containing accounts, recommendations, and generally all documents which appertain to the objects with which the sub-department is charged.

Question by Mr. Campbell. Is this letter now shown to you, purporting to be written by E. Mix to S. Clark, on the 2d of November, 1825, the same that was exhibited to you by Governor Barbour, and to which you have alluded?

Answer. It is; I know it to be the hand writing of Mr. Mix. Perhaps, in giving my testimony in this case, as I am sworn to tell the truth, the whole truth, and nothing but the truth, it would have been proper for me to have added to my narrative, that Mr. Mix was the lowest bidder for the stone, and that he offered Mr. Clement Smith, of Georgetown, for his security, and a Mr. Oakley, or some such name, in New York; that on New Year's evening, I met Mr. Clement Smith, and in talking of the subject now under consideration, Mr. Clement Smith stated, that he was informed that Mr. Mix had given his name in as one of his sureties. Why, said Mr. Clement Smith, it is the most impudent act I ever heard of. I would not have been his security for fifty dollars. I never authorized him to use my name in any way whatever in this transaction. I would also state, that Mr. Mix called upon me at my office, to ascertain whether the bids for the contract had arrived from Old Point Comfort. I informed him that they had not as yet arrived, but were hourly expected; that the steamboat had been stopped in the ice at Alexandria. Mr. Mix said that he had received from Col. Gratiot a certificate that he was the lowest bidder, and that his proposals were accepted. I told him I could do nothing until I should see the proposals. Mr. Mix withdrew from the office, and after a while came again, and begged me to inform him if there were any objections to his having the contract, or any prejudices against him. I replied that there was strong prejudices; for I had been informed that he had written a letter, which had been published in the Alexandria paper, accusing the Vice President of participation in the contract, (commonly called the Mix contract,) and otherwise accusing him of misconduct in his Department as Secretary of War. Mr. Mix said, that some time ago that he had addressed a letter to Hancock, in New York, a copy of which letter he still had in his possession, and that he never had mentioned the name of Mr. Calhoun; that it was an infamous forgery, if any such accusations were in any letter purporting to be one from him; that when he wrote the letter, he was mad with Major Vandeventer, and in a fit of anger and excitement, he wrote a letter to Hancock, which

be marked confidential, and that his name was not to be used. That it was an infamous thing to publish any letter with such a mark upon it! I believe he then left my room and returned again much agitated, requesting me, for the sake of his family, to let him know if his bid would be rejected; for, if that was the case, he would withdraw his bid and his sureties' names: for, if he should be publicly refused the contract, after being lowest bidder, his character would be ruined, and his family suffer thereby. I say I believe he returned, because he was in my room several times that day; it was the day the publication appeared in the Alexandria paper.

Question by Mr. Floyd. Where, when, and by whom, was the contract now referred to by you, advertised?

Answer. The proposals for forming the contract alluded to, were advertised in several newspapers; I have seen it, I believe, in the National Intelligencer, the Norfolk paper; it is probable that they were also advertised in New York. I cannot state the date of the advertisement; but it can be readily known by reference to the National Intelligencer. The advertisement was signed by Lieut. Col. Charles Gratiot, of the Corps of Engineers, who is the chief officer of Engineers in Hampton Roads.

Sworn and subscribed this 5th day of January, 1827.

ALEX MACOMB,
Maj. Gen. Chief Eng.

No. 11

Deposition of Major Satterlee Clark

I am the author of some pieces, signed "Hancock," and "Young Rifle," which were published in the Autum of 1825, in the New York National Advocate. At this period, the columns of a scurrilous paper, in this city, believed to be under the control of Mr. Calhoun and his friends, were employed to disseminate the vilest slanders against me. The papers containing these slanders were sent to the city of New York, and thrown into hotels and reading rooms, the keepers of which did not subscribe for them, and at the time, this was done, an important suit was there depending between the United States and myself. On the 9th day of November, 1825, the letter, which I yesterday gave to the Chairman of this committee, was received by me at the office of the New York National Advocate, and from the hands of the editor, by whom it had been opened. A conversation then ensued between the editor and myself, as to the propriety of publishing the letter. He said "it would make a devil of a noise, that nobody could blame me, considering the course which had been pursued, in relation to myself, by Mr. Calhoun, and the Washington City Gazette; that the publication of the letter would mortify the Vice President, when he found that his old friend Mix had turned against him, and that he deserved to suffer the mortification for the part he had taken in the infamous plot against Mr. Crawford." I replied, "the letter shall not be published." My reasons for the course which I determined to pursue were these. I

had no acquaintance whatever with Mr. Mix, and I could not readily believe that he had taken the liberty of addressing such a letter to me. My first impressions were, that it had been forged by some of the creatures of Mr. Calhoun, who were silly enough to suppose that I would make charges against him upon it, and thus bring disgrace upon myself. If I had known the letter to be genuine, and that Mix could prove all which he stated in it, I would not have consented to its publication, because, I was not ambitious of appearing before the public in connexion with a man of his character, and because I have too much magnaminity to accuse any public officer upon the testimony of such a man as Mr. Mix. The only use I made of the letter, at that time, was to take a copy if it; that copy, I sent to a gentleman in the War Department, and requested him to call upon Mr. Mix, and ask him if he had written that letter to me; and, also, to ask him, if he had Major Vandeventer's account for $19,500, received on account of the Rip Rap Contract; and, also, letters which he said he had received from Major Vandeventer, charging Mr. Calhoun with having participated in the contract. If he had, to exhibit them to this gentleman. The gentleman to whom I wrote, declined calling on Captain Mix, and so the business rested until my arrival in Washington, in December last. Charles Hills is the gentleman to whom I write, as above mentioned. On the evening of the 24th December, I was introduced to a gentleman of the name of Howes Goldsborough, in this city.

Knowing that he had previously been a contractor with Government about fortifications I asked him if he got the contract this year? He replied, he had not; but that Elijah Mix had got the certificate of the officer that he, Mix, was entitled to it; he being the lowest bidder. I asked him, if the Secretary of War, yet has no power over it. He replied, that the contract had not been made, and that the Secretary could otherwise dispose of it if he should think proper. I remarked, that I had in my possession a letter, purporting to be written by E. Mix, which, if genuine, I thought would induce the Secretary of War to refuse to make a contract with him. He replied to me he was well acquainted with the hand writing of Mix, and if I would shew it to him, he could tell if it were genuine. I did so; he pronounced it genuine, and said he could swear to it. He asked my permission to take a copy for the purpose of shewing it to the Secretary of War. I gave my permission, and he took a copy. I afterwards concluded it would be most delicate and proper for me to go to the Secretary of War with the original letter; but, as I was personally unacquainted with the Secretary, I called on Judge Anderson, First Comptroller, for advice. He had served with my father in the Revolutionary War, and had always been friendly to me, and I could rely on his judgment and friendship. I shewed the letter to him, and told him the object I had in view in calling upon the Secretary. He advised me to call on the Secretary and shew him the letter; expressing his belief that the Secretary would be obliged to me for the information. Accordingly, I went to the Secretary's house on Christmas morning; I stated to him his predecessor had been very much censured for making a contract with Elijah Mix, that I had the evening before been informed that Mix was again an

applicant for a contract, at Old Point Comfort, and heard he was the lowest bidder; that, in my opinion, it would be neither honorable nor safe for him to contract with Mix. In addition to all which had heretofore been said of Mr. Mix, I had, in my pocket, further evidence of his rascality. He had written me a letter, in which he had vilely slandered Mr. Calhoun, which letter I wished to shew him; I put the letter into his hands, and he commenced reading it; before he had gotten through reading the letter, he broke off, and said, it is, indeed, an infamous calumny. After he had read the letter through, he said he would make no contract with the rascal; he might probably charge him with going snacks if he did; he considered him civiliter mortuus, as he did not offer to return the letter to me. I remarked to him, as soon as he should have decided on the contract, I should call on him for it. It was my belief he would shew the letter to Mix himself, and it was my intention, if Mix admitted the letter to be genuine, to send it to Mr. Calhoun.

On the evening previous to the publication in the Alexandria paper, a Captain Thornton, whom I had known during the war, commanding a company of volunteer Cavalry, told me he had heard the circumstances which I have recapitulated, and asked me if I had any objections to show him the letter. I replied, the letter was in the possession of the Secretary of War, and I had retained no copy of it. He asked me, if there was no one in the city who had a copy. I told him Mr. Goldsborough had taken a copy, but whether he had retained it, or given it to the Secretary of War, I did not know. He then called on Mr. Goldsborough, and asked permission to see the copy, if he had it in his possession—(this was in my presence). Mr. Goldsborough came to me and asked me, (we were all in the same room at supper, at Williamson's,) if I had any objections to Captain Thornton seeing the copy. I said I had none. Captain Thornton took it, went out of the room, was absent two or three minutes, not more, returned and gave the copy back, either to Mr. Goldsborough, or myself; I don't know which. I did not know he had made a copy, nor did I suppose he had been absent sufficient time to have done it. He then made some remark, which induced me to suppose he was connected with some newspaper, upon which I stated to him that I was ignorant of his being connected with any newspaper, and that, if he had made a copy of the letter, I hoped he would not publish it. That it was not my province to advise as to what editorial remarks he might think proper to make on Mr. Mix; but I should be very sorry, if the letter should ever appear in the public prints. It is my belief, that Mr. Thornton had a copy when he came there, and his object was to compare it, either with the original or another copy. This is my inference, from the short time he had the copy from Mr. Goldsborough. Thornton immediately left me. I was much surprized and displeased, when, next morning, I saw what purported to be a copy of the letter in the newspaper.

Question by Mr. Wright.—Have you any papers, going to shew that Mr. Calhoun ever participated in any contract?

Answer.—No.

By Mr. Wright.—Do you know of any contract being entered into by the War Department, while Mr. Calhoun was Secretary of War,

in which he was, either directly or indirectly interested, or conducing to show such interest, or of the profits of which he received any part? If yea, state particularly what you know, and name those persons, if any, you have heard accuse Mr. Calhoun of being interested in any such contract, or of receiving any part of the profits of any such contract.

Answer.—I do not. I have already stated, that I did not know of any contract in which he was interested; nor did I believe he participated in the profits of any such contract.

MONDAY, JANUARY 8, 1827.

Continuation of the testimony of Major Clark.

I had no intercourse whatever with any member of the Administration, nor did I consult or advise with either of them, unless the first Comptroller of the Treasury be so considered, and him only, so far as I have stated.

Cross examined by Mr. McDuffie.

Question. Was any person in company with Mr. Thornton when he applied to see the letter of Mix? and, if yea, state who it was.

Answer. Whether any person came with Mr. Thornton I do not know. I have already stated that there were many persons in the room: it was a public hotel. I do not know whether he had company with him or not.

Question. Was there any other person present who had any agency in obtaining a sight of the letter, or whom you have any reason to suppose had any agency in procuring a copy, or causing its publication?

Answer. I was sitting by the fire, in conversation with some of the boarders, whose names I do not now remember. Capt. Thornton came up to the fire: I think Mr. Haughton, who is also a boarder in the house, introduced him to me. I remarked that Capt. T. had been known to me during the war. Mr. Haughton remarked that Thornton wanted to speak to me. Thornton then requested me to step aside, when the conversation which I have already detailed took place. This is all that did occur.

Upon being asked the christian name of Mr. Haughton, Major Clark answered that he did not know it. He understood he was a reporter for some newspaper, which he did not know. He was commonly called "Major Haughton."

Question by Mr. Clarke (member of the committee.) Did the Vice President know of the letter of Mix to you before the same was made public through the Phoenix Gazette? and, if yea, what reasons have you to suppose he had such knowledge?

Answer. It is my belief that the Vice President has known the existence of the letter for a long time. My reasons for believing so are, that Major Vandeventer has known of its existence, and I presume from the circumstances of the intimacy between Major Vandeventer and Mr. Calhoun, and from its containing charges against them both, that Major Vandeventer had communicated the fact of the existence of this letter to Mr. Calhoun.

Question by Mr. Ingersoll. What reason have you to believe that Major Vandeventer knew of the existence of the letter prior to its being handed by you to Gov. Barbour?

Answer. Major Vandeventer has so stated in conversation, to several gentlemen, as those gentlemen informed me, and that he was informed of it by Mix's brother, who, I believe, is a Lieutenant in the United States' Navy. I have had no personal intercourse or conversation with Major Vandevener upon the subject.

Question by Mr. Wright. Will you name those gentlemen who have given you this information?

Answer. Although I have heard it repeatedly, yet I cannot now recollect them all. I will mention Mr. Howes Goldsborough as one of them. I think Mr. Charles Hills, whom I have heretofore named in my testimony, also gave me the information.

Question by the Chairman. Has the letter of Elijah Mix to you, bearing date the 2d of November, 1825, been constantly in your possession until you handed it to the Secretary of the Department of War, in December last?

Answer. It has been constantly in my possession from the date of its receipt by me (the 9th of November, 1825,) till handed to the Secretary of War.

Question by the Chairman. Why did you preserve the letter of Elijah Mix above alluded to, believing it a calumny, as you have stated?

Answer. I have stated in my deposition that I had sent a copy of the letter to a gentleman in the War Department. I preserved the original lest that Mr. Mix might be disposed to deny, if the original should be lost, that he had ever written a letter. I also preserved it as a curiosity.

Question by Mr. Williams. How long have you known the general character of Mix?

Answer. I have known the general character of Mix since the famous Rip Rap contract was made. I have never had any personal intercourse or acquaintance with him.

Sworn and subscribed this 8th day of January, 1827.

SAT. CLARK.

No. 12.

EXHIBIT accompanying the testimony of Major Clark. Original letter from E. Mix to Hancock, with Governor Barbour's envelope, enclosing it to S. Clark.

The letter of Mix is returned.

JAMES BARBOUR.

Major CLARK.

Confidential to S. Clark, Esq. my name not be disclosed at present.

GEORGETOWN, 2*d Nov.* 1825.

To the writer of "Hancock:"

If any information is wanted on the subject of Mr. Calhoun's infidelity, I have it in my power, I think, to furnish you matter suffi-

cient to awaken any unbiassed mind that he was concerned in the Rip Rap contract, either directly or indirectly, and have a written letter of Vandeventer's, which most positively mentions that he was engaged and received some portion of the contract, or knew that Vandeventer was making a traffic of it; and when I represented to him the injustice of compelling me to pay the amount of the advance which Vandeventer received, he told me his decision was final, and that there was no appeal, although he must have known the injustice of the decision; and I gave him at the same time a receipt, which I had received from Vandeventer, stating that I had paid him $19,500, which he refused to read. Let me hear from you as early as possible, and state what way I shall direct.

Your obedient, E. MIX.

N. B.—On the subject of Swift, you are misinformed; and I can put you in the way to know another person, which you have not suspected.

No. 13.

Testimony of Elijah Mix.

Elijah Mix appeared before the Committee, in obedience to the summons served on him; and being sworn in due form of law, and informed by the chairman of the purposes for which his attendance was required, proceeded as follows:

I arrived here in July, 1818. On passing Old Point Comfort, on my way here, I understood that there was a contract for stone for that place to be given out. I made application to the Engineer Department. They stated, that, on General Swift's return, who was then absent from the city, the contract would be given out. On the 25th of July, I was informed that I was the lowest bidder. After I had received the contract, I went immediately to New York, and applied to James Oakley to be my security. Previous to my going to New York, Major Vandeventer stated to me, that he considered one half the contract as belonging to him. On the 6th or 7th August, I received a letter from Major Vandeventer, (See No. 1.) stating, that he had subdivided the contract into four parts; one to me, one to Mr. Jennings, one to himself, and one to a person whose name was not to be known. He stated likewise, that he should bring on the advance that was required, which was $10,000. He did so, gave it to Major Cooper, of New York, who is the father mentioned in Major Vandeventer's letter, and what became of it I do not know. The draft for this sum was in my favor, was presented to me, with the blank side uppermost, by Major Vandeventer, for my endorsement, and was endorsed and returned to Major Vandeventer. A portion of that money was for the outfit of some vessels I had purchased in New York. I went on with the vessels to York river, where I had commenced my operations and continued delivering stone from there, until the 10th of September, 1818, when I received another letter (See No. 2.) from Major Vandeventer, stating that he had made an arrangement with the Agent of fortifications, to receive the money for all the deliveries of stone on my contract. I remonstrated with him

for receiving the money; he stated, that he should mange the whole of the funds of the contract, and requested me to accede to his proposals to Major Maurice, who was the Agent. I refused to acknowledge Major Maurice's right to receive my money; but on the 6th November, same year, I deposited to the credit of Major Vandeventer, in the Branch Bank at Norfolk, out of the first deliveries I had made of stone, $4,000, which he received and used for his private purposes.

In April, 1819, Major Vandeventer called on me for a bill of sale for that half of the contract which he claimed. I gave it him, without any consideration whatever, and it remained in his possession until some time in October, 1819. Finding it was a great inconvenience that the contract should be thus divided, I made a proposition to him to take it back again; he answered, that he would take $12,000 for one half of the half he owned; that is, one fourth of the whole contract. I gave him that sum, $5,000 in cash, and $7,000 in two accepted drafts of $3,500 each, upon which I have his receipt. (See No. 3, *a* and *b*.) The other quarter he consented to transfer to me, upon my paying all the claims on the one-half which he has held. I consented to it, and took the remaining fourth. The first year the contract was not profitable; it had, however, become so by this time.

I now come to that part which has produced the present inquiry. The contract having now become profitable, Major Vandeventer made a second sale of the last quarter which I had previously purchased, to a Major Cooper, of New York, for a sum which I understood to be $13,600. Major Cooper sold to Howes Goldsborough. On learning this, I represented the matter to Mr. Calhoun, and exhibited Mr. Vandeventer's bills of sale of the contract to me. (See No. 4.) Mr. Calhoun would at no time read them, and stated, that he had had an explanation with Major Vandeventer on the subject. I then left Washington for New York; two or three days after my arrival there, I received a letter from the Chief Engineer, (No. 5.) Walker K. Armistead, which is hereunto annexed, marked No. 5. I also received, at the same time, a letter from Major Vandeventer, annexed and marked No. 6. On Major Vandeventer's arrival at New York, he informed me that Mr. Calhoun had determined that, unless I gave up this quarter, he (said Vandeventer) should leave the office. Rather than suffer him to lose his situation in the office, I consented to give up the fourth of the contract in controversy, and wrote a letter to the Department to that effect, dated 13th April, 1821.

On my arrival in this place, previous to the 13th April, I presented to Mr. Calhoun the two bills of sale, a copy of a confidential letter which Major Vandeventer stated he had written to him, with a letter of my own, stating all the facts as they then were. I presented these papers to Mr. Calhoun myself, in the presence of General Macomb and Captain Smith, observing that they were explanations of my contract. Mr. C. took the papers, laid them on the desk before him, and stated he would attend to them. I left the room, and, in the course of five or ten minutes, returned into the audience room and wrote Mr. C. a note, asking to see him for a few moments, or to return me my papers. The porter brought them to the door; I opened them, and found the copy of the letter of Mr. Vandeventer to Mr. Calhoun missing. I went immediately into the office, and stated the fact of this letter's being missing

to Mr. Calhoun, in the presence of General Macomb and Captain Smith. He called Major Vandeventer into the room, to whom he had given the papers in my absence, and asked him if he knew anything of it. Major Vandeventer answered, decidedly, no. The Secretary then looked severely, first at Major Vandeventer, and then at me, and said that he knew nothing of it. Under these circumstances I found there was no redress and that something was wrong whenever I appealed for justice. The confidential letter alluded to was addressed by C. Vandeventer to J. C. Calhoun, Secretary of War, and had been communicated to me by Mr. Vandeventer, as a copy of one which he had written to Mr. Calhoun, and was marked "private," dated 1st April, 1821, the substance of which was that he had brought me to terms, and that I had only to return to Washington and conform to the Secretary's wishes in the transfer to that quarter of my contract to Messrs. Goldsborough and Co. At the bottom of this copy was a writing addressed to me, stating that he hoped that I would not have any objection to go before the Secretary of War and fulfill what he had that morning stated to him I would do, which was to give up that portion of the contract to Goldsborough.

The letter dated, "Georgetown, 2d Nov. 1825, was here shown to Mr. Mix, when he acknowledged the letter to be written by him, and observed, that the first reason he had for using the terms, "*directly or indirectly*," as contained in it, was, that on my appealing to Mr. Calhoun, to have my portion of the contract restored to me, and that the debts might fall where they ought to have fallen, was that Mr. Calhoun at all times told me the decision was final; another reason was, that on Major Vandeventer stating that he had nothing to do with the contract in the early part of it, and that another person was concerned in the contract, and that he advanced more on the contract, when it was the reverse, and that he stated before the committee, that he asked the Secretary, and that the Secretary gave permission, but stated, that perhaps it might be the cause of some inconvenience to himself, and that he stated to me on the 7th of August in the letter above referred to, that another person was concerned in the contract, whose name was not to be known; these were the causes which influenced me to write the letter in question to Major Satterlee Clark, and that it might also be the means of causing the money which I conceived to be unjustly withheld at the War Department, paid or returned to me, and not for the purpose of injuring Mr. Calhoun.

I called on Mr. Calhoun about December 1825, or January 1826, since he has been Vice President, and presented those bills of sale and two letters which I had of Major Vandeventer, one of which, after he had read it, he requested me to state what "Sect" meant; I told him I did not know, I thought it explained itself. He made no reply to me, took one of the bills of sale, and after reading a part of it, he stated, that he thought, if I made an appeal to Major Vandeventer, he would see those accounts settled; he stated at the same time, that he had better pay them than to lose $2,000 a year. I then requested Mr. Calhoun to intercede with him to pay them—he stated that he would have nothing to do with the business.

Question by Mr. Campbell. Do you know that Mr. Calhoun participated in the profits of the contract to which you have so often alluded? If yea, to what amount?

Answer. The sums of $10,000, $4,000, and $12,000, have never been accounted for to me as yet, on account of the contract. I don't pretend to say what because of them; they were taken from the proceeds of my contract.

Question by Mr. Ingersoll. Have you produced all your letters from Major Vandeventer in relation to the Rip Rap contract? If not, where are the remainder?

Answer. I have one in my hand, which I now produce, (See No. 7.) the remainder were burned at Capt. Smith's house, in Georgetown, in the presence of Capt. Smith, James T. Dent, and Major Vandeventer, at the request of Major Vandeventer.

Question by Mr. Williams. In the interview with Mr. Calhoun since he became Vice President, as described by you, you say he asked you what *Sect* meant, and you answered, you thought it explained itself; what explanation would you attach to it?

Answer. I could not pretend to say, I thought the Secretary had discernment enough to make the explanation.

Question by Mr. Sprague. What were the contents of the letters which you say you exhibited to Mr. Calhoun at his house, and particularly that which contained the letters *Sect?*

Answer. I recollect perfectly well that it began that the *Sect.* ordered me to, &c. I can't now pretend to repeat, or recollect the contends. I don't recollect the contents of the other letter.

Question by Mr. Sprague.—How did Major Vandeventer become the original owner of one half of the contract?

Answer.—I made it on the 24th of July, and as near as I can recollect, on the 27th, or 28th, I was about leaving for New York; Maj. Vandeventer stated to me, that I had better let him have a part of the contract; this was the first time that he had mentioned it to me. I asked him, on what ground he wanted it; he stated, that he should be able to render me many facilities, which I would not be able to get in any way; one of which would be, that he would give one half the bonds. Upon my arrival in New York, I gave my bondsman; his refused to sign, without some other person was let into the partnership; out of which grew the correspondence, and the letter of the 7th of August, 1818.

Question by Mr. Wright.—State, whether the person applied to, to sign the bond, as Major Vandeventer's surety, was not the father-in-law of Major Vandeventer and yourself?

Answer.—He was.

Question by same.—Was the person mentioned in Major Vandeventer's letter of the 7th August, 1818, as "George," the brother of the witness's and Major Vandeventer's wives?

Answer.—He was.

Question by Mr. Campbell.—May not the sums $10,000, $4,000, and $12,000, still be in the Treasury, and be drawn by you on the exhibition of the proper vouchers?

Answer.—They cannot.

Question by Mr. Campbell.—Do you know to whom Major Vandeventer alludes, in his letters to you as a partner in the contracts, whose name was to be concealed? if yea, name the person?

Answer.—I do not know to whom he alludes; I have suspected many.

Question by Mr. Wright.—Did Major Vandeventer ever inform you directly, or otherwise give you to understand who was the person interested in the contract whose name was to be kept secret?

Answer.—No, I don't think he ever did. I am confident he did not.

Question by Mr. Williams.—By what authority did Major Vandeventer make the sub-division of the contract, of which he informed you, in his letter of the 7th August, 1818?

Answer.—By the same authority that he drew the $10,000, and used it; he had no authority whatever to do it.

Question by Mr. Wright.—Do you know, of your own knowledge, or have you any good reason to believe, that Mr. Calhoun, while he was Secretary of War, had any interest in any contract entered into with that Department, or participated in the profits of any such contract? if yea, state particularly what you know, and the reasons, if any, for your belief?

Answer.—My only reasons are those already stated, that these sums of money have never been accounted for to me, in the contract, by the Chief Clerk. I have no personal knowledge, that Mr. Calhoun participated in the profits of any contract.

Question by Mr. Clarke.—Did General Swift, at any time before the completion of the contract, know that Major Vandeventer was to participate in the profits of it?

Answer.—I cannot say. I don't know any thing in relation to this inquiry.

Question by Mr. Ingersoll.—How were you informed that proposals would be received for the Rip Rap contract, to which you made the lowest bid?

Answer.—I was informed of it by Captain Lewis, of the Engineer corps; I saw him at Old Point, on my way to Richmond; this was the only information of it I received; it was in April, 1818, as well as I now can recollect.

Question by the Chairman.—May not the $10,000, which you have just spoken of, in your answer to Mr. Campbell's question, be the same money which you state Mr. Vandeventer to have taken to you in New York, and which, you say you endorsed in his presence, and which he deposited in one of the banks of that city, subject to his own draft?

Answer.—It is the same sum.

Question by Mr. Campbell.—What sum, in clear profits, did Major Vandeventer realize from the contract; and if he realized any thing, how do you know the fact?

Answer.—I have paid to him money, which I know he received, of $4,000, $12,000, $2,500, and $2,500, making altogether $21,000: the proof of the fact, is the bill of sale of $12,000, $4,000 deposited by me, to his credit, in the Branch Bank at Norfolk, the two sums of $2,500, which I paid to the United States, and the advance which he received of the United States, viz: $10,000, one half of which is accounted for by these two sums of $2,500 each, which I refunded to the United States, and that portion which was taken from me and given to Goldborough and Co. of $13,600, this was clear profits; these several sums amount to $34,600. I will state, that this is not all that Mr. Vandeventer received; the whole amount he did

receive, was $45,100; he however expended, on account of the contract, a sum of about $7,366.21, as far as I could ever learn, leaving the balance of $37,283 clear profits.—See a statement hereto annexed, marked No. 8.

Question by the Chairman.—Do you know what words those were, which appear to have been erased at the end of the first line, and the beginning of the second line, in Mr. Vandeventer's letter to you, bearing date, the 7th of Aug. 1818; or do you know who erased them?

Answer. I do not know what the words were, the letter came to me with the erasure.

Question by Mr. Sprague. Had you any communication with Major Vandeventer, in relation to the contract at any time prior to the conversation on the 27th or 28th of July, which you have mentioned?

Answer. I cannot say positively, I may have conversed with him in relation to the subject, but I have no kind of recollection now of the fact.

Question by Mr. Sprague. Did you make any transfer of any part of the contract to Major Vandeventer? if yea, when and of what part?

Answer. I have already given an answer to this question; if my memory serves me, I did on the 24th April, 1819, transfer him one half of the contract. I wish to be distinctly understood, that, although I did make this transfer, it was not because Major Vandeventer had any right to the contract. I found I was compelled to do it; and all subsequent transfers were made by Major Vandeventer arbitrarily, and not by any authority of mine. I was ruled with a rod of iron, and had to submit.

Question by Mr. Wright. Did you make the obliterations near the close of the letter from Major Vandeventer, of 7th August, 1818, heretofore referred to and, if so, state when you made it?

Answer. I did make the obliteration herein referred to, the matter relates exclusively to domestic or family concerns—it was made about the time of the former investigation of the subject of the Rip Rap contract in 1822, as well as I now recollect.

Question by Mr. Williams. At the time Major Vandeventer proposed to become interested in the contract, had he become bound in your behalf for the reimbursement of any loans or advances of money made to you.

Answer. None; none whatever; he was not bound, for my account, to any person on earth.

Question by Mr. Wright. Was he bound, for you, for any sum, when he took the interest in the contract in April?

Answer. He was not. He has never, at any time, been bound, on my account, for any sum of money, but was, on the contrary, at that time, indebted to me in a very considerable sum of money, on account of the contract. I have never been indebted to Major Vandeventer in a sum equal to one hundred dollars.

Question by Mr. Clarke. Is the Major Cooper, to whom Major Vandeventer sold a fourth of the contract, the father-in-law of Vandeventer, and the security, in the bond, for the fulfilment of the contract?

Answer. Yes.

Question by Mr. Clarke. In your letter to "Hancock," you have stated that you have in your possession letters from Major Vandeventer, which state that Mr. Calhoun was interested in the contract: did you ever receive any such letters? If yea, produce them; if not in your possession, what has become of them?

Answer. The letter I alluded to was the copy of a private communication to Mr. Calhoun, dated 1st April, 1821, from Major Vandeventer, which I presented, with a package, to Mr. Calhoun; and, on my calling for said letter, as heretofore stated, Mr. Calhoun stated he knew nothing of it, and called upon Major Vandeventer when the occurrence took place, which I have, in a former part of my examination, detailed; and another letter, dated 3d August, 1818, which I showed to the Vice President; he read it twice, and requested to know what "Sect." contained within it, meant. This is the same letter before referred to; and the occurrence took place which I have heretofore detailed. That letter was in my possession within a month past; during my absence from home, and while at my farm in Virginia, the publication of the letter to "Hancock" was made; I looked for the letter here referred to, it was gone from the place in which I had deposited it, with other letters and papers of value to me, and I do not know what has become of it.

Question by Mr. Clarke. Did any person, except yourself and Mr. Calhoun ever read that letter? and if yea, who was that person?

Answer. Captain John S. Smith, of the Engineer Department, read that letter on the evening after the missing of the letter in the War Department.

Question by Mr. Williams. What idea did you intend to convey in your letter to "Hancock," as to the interest of Mr. Calhoun in the contract?

Answer. The idea I intended to convey in my letter to "Hancock," as to the interest which Mr. Calhoun had in the contract, was, that he was indirectly concerned in compelling me to deliver up to Mr. Goldsborough that fourth or portion of the contract which I had previously purchased of Mr. Vandeventer, as per his bill of sale dated 19th of October, 1819.

Question by Mr. Williams. Why did you, in April, 1819, convey one half of the contract to Vandeventer, when, in his letter to you of the 7th of August, 1818, he informed you that he had subdivided the contract into four equal parts, of which one only was given to himself?

Answer. He claimed jurisdiction over the quarter which was assigned to the unknown person, and stated that he had a right to manage it.

Question by Mr. Williams. Are you acquainted with Mr. Jennings, referred to in Major Vandeventer's letter of the 7th of August, 1818, as a partner in the contract?

Answer. At the commencement of the contract I did not know him, nor had I ever seen him. It was two months after the contract was formed before I saw him.

Question by Mr. Williams. Do you know how he happened to be a participator in the contract, or whether he paid any thing for his share of it?

Answer. I do not. I had always contended against his right, and did not, until June, 1821, after a great deal of altercation, give up to his participation in it.

Question by Mr. Williams. At what time did you present the papers to Mr. Calhoun containing the confidential letter to him from Major Vandeventer, and which you say was never returned to you, in the manner before stated?

Answer. I do not remember the time. I think it was about the time of making appointments of Cadets. The year I do not remember; it was probably five or six months or a year before he left the Department.

Question by Mr. Campbell. Did Goldsborough and Jennings give bond and security for the performance of their parts of the contract, as you did?

Answer. Mr. Jennings never gave security. Mr. Goldsborough was admitted to give security when he took that part of the contract.

Question by Mr. Williams. How happened it that your papers were exposed to the inspection and use of other persons beside yourself, and by whose negligence or design do you think they have been lost?

Answer. My papers are kept in an office where my whole family have access. They are usually filed in bundles, and laid on the table, and numbered and lettered, letters of such and such dates. This was among a bundle containing thirteen or fourteen confidential letters, from Robert Fulton, and others.

Question by Mr. Wright. Did you ever authorize the Secretary of War or Major Vandeventer to subdivide your contract, and give any part of it to any other person whatever? If so, state particularly the authority, the time when given, and in what way it was given.

Answer. I don't recollect ever giving any authority to subdivide my contract, except in the way already stated, on the 13th of April. I might have given Mr. Jennings authority to deliver stone on my part of the contract, but did not authorize him to divide it.

Question by Mr. Wright. Have you made search for the confidential letter since you were under examination yesterday, and what is the result of that search?

Answer. I have made the search, but have not found it.

Question by Mr. Wright. Have you any memorandum by which you can arrive at its contents, or do you remember them? If so, detail them.

Answer. There is one part which I think I recollect; it is the latter part of the letter. It related to Mayor Vandeventer's going abroad, or on some mission, which he had stated to the Secretary he could not finally answer till his return to Washington, or till the contract was put to sleep. It was my belief that he never sent any such letter to the Secretary, and that he was holding it out to me as an inducement to surrender that part of the contract which Goldsborough afterwards obtained; or, in other words, to induce me to believe that he had great power and authority in the Government. This letter, about two years ago, I showed to Gen. Macomb, who laughed heartily at it.

The witness here produced a paper, which he stated was a part of the substance of the letter, whereupon he was required to give it to

the committee, but declined, on the ground that it was too imperfect.

Question by Mr. Wright. Will you state particularly what is the character of the paper to which you have referred, when it was written, and for what purpose you read it here?

Answer. It is, in part, a copy of the letter I lost at the War Department. I copied it about or previous to the time I lost the original. I read it merely to call to mind some of the circumstances to which it alluded, and not for the purpose of offering it as evidence.

Question by Mr. Wright. Was the original present when you wrote the paper you say was in part of a copy?

Answer. I wrote a copy from the original letter; I took the heads of the letter on another occasion, and on another I took a part, all three of which I filed together, and found them this morning.

Question by Mr. Wright. Have you either of the other papers alluded to in your last answer?

Answer. I have them at home as I think.

Question by Mr. Wright. Have you seen those copies since your examination yesterday, and if so, why did you not bring them with you?

Answer. Because I could not say which was the original; I have seen the copies since my examination yesterday.

Question by Mr. Wright. How came you to select the one you brought in preference to the others?

Answer. I merely selected it provided I might refer to it in case any question should be asked concerning the letter. I am perfectly willing all three copies should be seen together by the committee. One of them is a copy, or nearly so, though, probably not perfectly accurate.

Question by Mr. Ingersoll. In answer to my question yesterday, you stated, that a number of your letters from Major Vandeventer were burnt at his request. How many letters were burnt at that time?

Answer. About twenty-five or six, which, I supposed, was all I then possessed.

Question by Mr. Williams. Did Major Vandeventer state his reason or motive for burning the letters?

Answer. He has, for some time previous to this, mentioned several times that he thought we ought to meet together, and burn all our old papers, and pass accounts and be friends again, and stated he would fulfill some things which relate to family concerns, and which he did not and has not fulfilled. I put the letters into his hands, and he threw them into the fire, and immediately thereafter was as hostile as ever.

Question by Mr. Sprague. In a letter of Major Vandeventer to you, dated 24th March, 1821, he says: "I will state fully to you my situation when I see you in New York"—Did he soon afterwards visit New York and make a statement of his situation? if yea, what was that statement?

Answer. He visited New York immediately after he wrote me this letter, and stated that a situation was offered him of very great importance, and provided I did not make the transfer, as he required, he would lose this appointment, as well as his situation in the War Office. He gave me no reasons why he should lose his situation.

Question by Mr. McDuffie. Did the letter of Major Vandeventer, which you shewed to Mr. Calhoun, since he was Vice President, con-

taining the doubtful letters "Sect," contain any statement that he (Mr. Calhoun) was interest in the contract, which you made with the Engineer Department?

Answer. Not directly; it did not, if I recollect right. I don't pretend to say that it contained any indirect charge, as I cannot recollect the amount which the letter intended to convey. I was under the impression that, by showing it to Mr. Calhoun, it would throw some light on the subject and convince him of the deception which I believed had been practiced upon him.

Question by Mr. McDuffie. State the substance of that letter, as far as you can recollect it?

Answer. I could not, positively, state one word of the subject. The latter part of the letter stated something about the bond for twenty thousand dollars, sending it on, &c. Mr. Calhoun read it twice over, and read it attentively, and will, probably, recollect something of its contents. Capt. Smith may also recollect something of it. Mr. Calhoun, after reading the letter the second time, stated that he had always been under the impression that Major Vandeventer, previous to this, had acted correctly, or something which conveys this idea.

Question by Mr. McDuffie. Have you not recently stated that you presented a letter to the present Secretary of War, containing the letters "*Sect*," and that he asked you what those letters meant—and is the fact so?

Answer. No, I have not—never. I showed him the letter of Col. Armistead. It is the only letter I ever showed him or communicated. When he asked me what my views were, I told him it was to show him that part of my contract had been taken from me by the same Messrs. Goldsborough before. He stated that the investigation was too long to look into at present. I then offered him a letter from Col. Gratiot, which I now exhibit. (See No. 9.) This will show that I had again obtained the contract, which was about now, (that is about the 28th of December last,) to be taken from me again, at a loss of upwards of 2,400 dollars to the Government.

Question by Mr. Ingersoll. When you speak of Mr. Calhoun's refusing to interfere between you and Mr. Vandeventer, saying, that his determination was final, do you mean to be understood to say that he refused to recognize any one as contractor, who was not originally so, and who did not appear so by the records of the department?

Answer. In the instance of Mr. Goldsborough he did recognize another person. I did not so understand him: but understood that his decision was final as to any representation I might make as to any transactions between Major Vandeventer and myself.

Question by Mr. Ingersoll. When you were called upon by the Secretary of War to refund money, was it money which you had received as Contractor?

Answer. It was the $10,000 which Major Vandeventer had received in the first instance from the Department.

Question by Mr. Ingersoll. Has your loss been occasioned by your permitting money that you had drawn as contractor to get into the hands of persons who purchased under you, but who were not recognised as contractors by the War Department.

Answer. No: my losses have been occasioned by the decisions of Mr. Calhoun in making me pay up money that was advanced on the con-

tract, and of which I had no control; that is the $10,000 advanced to Major Vandeventer.

Question by Mr. Wright. You have stated that you were perfectly willing all the three copies of the letter of Major Vandeventer sent you purporting to be a copy of a confidential letter sent by him to Mr. Calhoun should be before the Committee; will you hand or send those papers to the Committee?

Answer. Yes.

Question by Mr. Williams. How much did Goldsborough & Co. pay for their shares of the contract; and to whom did they make payment?

Answer. They paid 40 cents a perch on 34,000 perches; the money was left in the hands of the receiving officer at Old Point (Major James Maurice and Col. Gratiot) and drawn, as I supposed, by Major Vandeventer or Major Cooper; it was left there subject to their order.

Question by Mr. McDuffie. You say Major Vandeventer received $10,000 from the Department—do you mean to say he received the money from the Department, or a warrant issued in your favor?

Answer. I do not know, the draft on the Branch Bank in New York, was brought on by Major Vandeventer in my favor, was endorsed by me and return to him, as I have heretofore stated.

Question by Mr. McDuffie. Was not the $10,000 in question, received by Major Vandeventer from you?

Answer. No, it was not. It was brought on from the War Department by himself, and the first time I saw it was when he presented it to me with the back up.

Question by Mr. McDuffie. Did you not endorse to him the draft in your favor, from the War Department, for $10,000?

Answer. Yes.

Question by Mr. McDuffie. Was not that endorsement the authority by which he received the money?

Answer. Yes.

Before signing and closing this testimony, I wish to state distinctly to the Committee, that, at the time of writing the letter to "Hancock," I had no intention of injuring Mr. Calhoun. I supposed I was addressing a man of honor, who would not expose it to the public; it was headed "*confidential.*" I hope the Committee will view the thing in the light I have mentioned. I wish it to be borne in mind, that my only object was to obtain justice, and vindicate myself from charges which had been made against me.

ELIJAH MIX.

January 9th, 1827.

No. 14.

Exhibit No. 1, accompanying Elijah Mix's deposition

7th August, 1818.

DEAR SIR; I am very sorry that the [obliterated] are concerned in the contract will not agree to admit George on the terms you have stated. When I informed father that you and I and Mr. Jennings were

each to have one-fourth, I stated that one other person (whom I did not name, because his name is not to be known,) was to have the other fourth part, and the contract is concluded accordingly, and all the other partners have given bonds; and as we cannot admit, without their consent, any one into the concern, I do not see but that if father insists on George's having an equal part, we must either give up the contract to the other partners, or get some one else to be our security; for the other gentleman [erasure] will not admit any new associate, but insist that we either fulfill our agreement, or give the whole up to them. Under this circumstance, I hope father will agree to sign a bond with Mr. Oakley for the amount which he has already signed, leaving George's name out of the question. I would most cheerfully have made a reservation in favor of George or father, could I have foreseen that either would have wished it; but now it cannot be done. If, therefore, when I come on, and explain fully to father the whole circumstances of the case, he should still make it a condition to signing a bond that George be equally concerned with us, we must give up the contract to those who have complied with their engagements to us, or we must find other security. I do not think this would be difficult for me, but I do not like it, because I am unwilling to make any one else but father acquainted with my being engaged in the contract. I therefore feel confident father will not insist on this condition, when he reflects that it is not in my power or in yours to comply, because the other partners will not agree. In a word, we must abide our engagements or lose all; and father, when he knows the whole facts, will not think it reasonable to ask of us what we cannot, if we would, grant, and by insisting on our performing an impossibility, deprive us of a competency, and thus enrich others at our loss.

I shall procure an advance of the money you require on security, which I have gotten here, but this security is [erasure] only for the advance now made, and is not equal in amount to what must be given. I shall leave here on [MS. torn] morning, for New York, when I [MS. torn] part of the contract which you must sign, and then I will return the bond, provided father will not consider it as independent of George. This step I really regret, but it is imposed upon me by the determination of other associates.

Show this to father, if you please. Yours truly,

C. VANDEVENTER.

E. Mix, *Esq.*

Exhibit No. 2, accompanying Elijah Mix deposition.

WASHINGTON, *September* 10, 1818.

DEAR SIR: I have received a letter from Mr. Maurice, acceding to the arrangement of paying for the stone by a draft in my favor on the bank here. But the late order of the United States' Bank respecting deposits, will make a difference of exchange between Norfolk and this place, for which he will have to pay. To avoid this expense I have requested Mr. Maurice to deposite to my credit, in the Branch Bank of the United States at Norfolk, the amount of the deliveries of stone, and to transmit to me the certificate of the cashier of such deposits. This mode will save the premium of exchange be-

tween this place and Norfolk both ways. I wish you to state your approbation of this arrangement to Mr. Maurice.

Inform me as soon as convenient what prospect of deliveries this month, and whether you can get wood sent up to us, and at what rate; so that we may calculate for Winter supply accordingly. If you can procure a few hundred weight of best Virginia hams, put them into a cask, and send them up. I forgot to mention these things to you before you left us. Let us hear of your progress, and of wood and bacon, as soon as you have time to inform yourself on these points.

Yours truly,

C. VANDEVENTER.

Captain E. Mix.

Major Cooper has just informed me that he cannot effect insurance on the vessels in New York without having the vessels examined by an agent of some of the insurance companies in New York. You must, therefore, try to effect insurance in Norfolk. Let me hear from you soon on this subject. Do not hazard the vessels, if insurance can be had for a reasonable sum.

C. V.

Exhibit No. 3a accompanying Elijah Mix's deposition.

To all people of the United States of America, I, Christopher Vandeventer, of the City of Washington, District of Columbia, send greeting: Know ye that I, Christopher Vandeventer, for, and in consideration of the sum of twelve thousand dollars, five thousand of which to me in hand paid, by Elijah Mix, of the City of Georgetown, District of Columbia, I truly acknowledge to have received; and I do acknowledge to have received two drafts, drawn by the said Elijah Mix, on James Maurice, Agent of Fortifications at Norfolk, Virginia, in favor of Major C. Vandeventer, for three thousand five hundred dollars each, the one dated the 15th of October, 1819, and made payable to the said C. Vandeventer or order, the first day of June, 1820, the other for the same sum, dated the 15th of October, 1819, and made payable above, on the first day of August 1820; which drafts, being together seven thousand dollars, when paid, will constitute the whole sum of twelve thousand dollars, to me to be paid, by the said Elijah Mix; and this bill of sale which hereinafter follows, is not to be considered binding in law or equity on me, but will be null and void, unless said drafts above mentioned, to wit: two drafts for three thousand five hundred dollars each, drawn by the said Elijah Mix aforesaid, payable, the one, the first day of June, 1820, the other, the first day of August, 1820, on James Maurice aforesaid, in favor of the said C. Vandeventer, to be paid to me in hand, at the times above specified, to wit: the first of June, 1820, and the first of August, 1820, have granted and sold, and by these presents, I, the said Christopher Vendeventer, do grant, bargain, and sell, unto the said Elijah Mix, on the condition of the punctual payments of the drafts above mentioned, for seven thousand dollars, thirty seven thousand five hundred perches of stone, being one fourth part of the amount of stone, which the said Elijah Mix contracted with the Engineer Department of the

United States, to deliver at Old Point Comfort, or the Rip Raps, in Hampton Roads, Virginia, on the 25th day of July, 1818; of the same quality of stone specified to be delivered by the contract above alluded to, to have and to hold the said thirty seven thousand five hundred perches of stone. And all the other premises hereby granted, with the advantages thereof, under the said Elijah Mix, his executors, administrators, and assigns, as his and their own proper goods and property, and to his and their own proper use and uses forever.

And I, the said Christopher Vandeventer, do, for myself, my heirs, executors, and administrators, covenant and grant to and with the said Elijah Mix, his executors, and assigns, by these presents, that I, the said Christopher Vandeventer, at the time of sealing and delivering these presents, am the true and lawful owner and proprietor of the said thirty seven thousand five hundred perches of stone, being the one fourth part of the contract above mentioned, and advantages hereby granted, upon the conditions before mentioned; and that I have full power and authority to grant, bargain, and sell, to the said Elijah Mix, thirty seven thousand five hundred perches of stone aforesaid, with the advantages hereby mentioned to be granted, namely, that thirty-seven thousand five hundred perches of stone, are thus conveyed as above mentioned, with the conditions aforesaid, to wit: the due and faithful payment of the drafts for seven thousand dollars above mentioned, and for every perch of stone delivered at Old Point Comfort, or the Rip Raps, the said Elijah Mix will receive three dollars; and it is expected and agreed upon by and between the said Christopher Vandeventer and the said Elijah Mix, that this instrument be null and void, unless the drafts before mentioned be punctually paid when due as before mentioned; and also, that it shall and may be lawful to and for the said Elijah Mix, his executors, and assigns, from time to time, and at all times, hereafter, quietly and peaceably to have, hold, posses, and enjoy, the said thirty-seven thousand five hundred perches of stone, after the drafts for seven thousand above mentioned are fully paid, and all other the premises hereby granted, or mentioned, or intended to be granted, with the appurtenances, without lett, trouble, denial, molestation, hindrance, or disturbance, whatsoever, of me the said Christopher Vandeventer, my executors, administrators, or assigns, or any other person or persons whatsoever, lawfully claiming, to claim, from, by, or under, me, them, or any of us, and that freed and discharged of and from all former and other bargains, sales, forfeitures, and incumbrances, whatsoever, made, done, or committed, by me, the said Christopher Vandeventer, of the City of Washington. The above bill of sale and instrument to continue in force if the two drafts, to wit, in words following:

NORFOLK, *October 15th*, 1819.

SIR: On the first day of June, 1820, please to pay to Major C. Vandeventer or order, the sum of three thousand five hundred dollars, for value received; and place the same to account of

Your most obedient servant,

$3,500. ELIJAH MIX.

To JAMES MAURICE,
Agent for Fortifications, Norfolk, Virginia.

NORFOLK, *October 15th*, 1819.

SIR: On the first day of August, 1820, please to pay to Major Christ. Vandeventer or order, the sum of three thousand five hundred dollars, for value received; and place the same to account of

Your most obedient servant,

$3,500. ELIJAH MIX.

To JAMES MAURICE,
Agent for Fortifications.

Signed, sealed, and delivered, this nineteenth day of October, one thousand eight hundred and nineteen.

Witness C. VANDEVENTER.
SAMUEL COOPER, Jun.

Exhibit No. 3*b*, accompanying Elijah Mix's Deposition

FORT MONROE, *May 19th*, 1820.

Mr. E. MIX,

Dear Sir: I avail myself of the return of Captain Clark to acknowledge receipt of yours of the 15th instant, enclosing my acceptance to your draft in favor of Major Vandeventer for $3,500, payable 1st of June next, and which is passed to account accordingly.

I am much rejoiced to hear from you, that I may expect a remittance soon of the balance of my estimate, for the amount sent is already disposed of, and I have not a sufficiency to meet the payment of freight for stone. One half of the second quarter is already passed, and no money has been sent on account of it. I hope now that the bustle among the Heads of Departments is somewhat removed by the rising of Congress, I shall be kept more regularly supplied with money in advance. I wish you to write me immediately and inform me of the precise time, as near as possible, when further funds will be sent; this you no doubt can learn through our friend the Major, to whom I beg you to present my best salutations.

I calculate that about 9,000 perch of stone will be delivered on the Rip Raps, in all this month alone, and perhaps as much in June.

Yours sincerely,

JAMES MAURICE.

Exhibit No. 4, accompanying Elijah Mix's Deposition.

To all people of the United States of America, I, Christopher Vandeventer, of the City of Washington, District of Columbia, send greeting: Know ye, that I, Christopher Vandeventer, for and in consideration of the sum of two thousand five hundred dollars, which is agreed to be paid by Elijah Mix, of the City of Georgetown, District of Columbia, to the United States, being one-fourth part of an advance to him on his contract; and in consideration of said Mix assuming to pay such other demands as the said Vandeventer is liable for as owner of that portion of the contract he now conveys, have granted, bargained and sold, and by these presents, I, the said Chris-

topher Vandeventer, do grant, bargain and sell, unto the said Elijah Mix, one the condition aforesaid, 37,500 perches of stone, being one fourth part of the amount of stone which the said Elijah Mix contracted with the Engineer Department of the United States to deliver at Old Point Comfort or the Rip Raps, in Hampton Roads, in the State of Virginia, on the 25th day of July, 1818; to have and to hold the said 37,500 perches of stone, and all the other premises hereby granted, with the advantages thereby, under the said Elijah Mix, his executors, administrators and assigns, as his and their own proper goods and property, and to his and their own proper use and uses forever. And I, the said Christopher Vandeventer, do, for myself, my heirs, executors, and administrators, covenant and grant to and with the said Elijah Mix, his executors and assigns, by these presents, that I, the said Christopher Vendeventer, at the time of sealing and delivering these presents, and the true and lawful owner and proprietor of the said 37,500 perches of stone, being the one-fourth part of the contract above mentioned, and advantages hereby granted, upon the conditions within mentioned, and that I have full power and authority to grant, bargain and sell the said Elijah Mix 37,500 perches aforesaid, and also, that it shall and may be lawful to and for said Elijah Mix, his executors and assigns, from time to time, and at all times hereafter, quietly and peaceably to have, hold, possess and enjoy the said 37,500 perches of stone, and all other the premises hereby granted or mentioned, or intended to be granted, with the appurtenances, without lett, trouble, denial, molestation, hindrance, or disturbance, whatsoever of me the said Christopher Vandeventer, my executors, administrators or assigns, or any other person or persons whatsoever, lawfully claiming or to claim from, by or under me, them, or any of us, and that freed and discharged of and from all former and other bargains, sales, forfeitures, and circumstances whatsoever, made, done or committed by me the said Christopher Vandeventer, of the City of Washington, District of Columbia.

Signed, sealed, and delivered, this fifteenth day of October, in the year of our Lord one thousand eight hundred and nineteen.

C. VANDEVENTER.

Witness,
SAML. COOPER, Jun.

Exhibit No. 5, accompanying Elijah Mix's Deposition.

ENGINEER DEPARTMENT,
March 24th, 1921.

DEAR SIR: Goldsborough & Co. have now come forward to claim their right to deliver the quantity of stone which now remains to be delivered, as the fourth part of your contract, which Major Cooper has transferred to them, and the title to the remaining fourth part, equally good. I am instructed to state to you that they will be recognised by the Department, unless you voluntarily empower them to deliver proportionally on your contract, and receive the pay for the same; the final order to this effect is postponed to offer you the opportunity of adjusting this matter without the interference of the Depart-

ment. As your well wisher, and the friend of Major Vanderventer, the unfortunate results that may take place in regard to him if you do not come forward, and grant the parties full powers of attorney to receive payment for such stone as they may deliver, must be foreseen. This voluntary act on your part may protect all.

I shall delay giving the order until the time expires for a reply to this, which will be by return of mail.

I am, dear Sir,

Your most obedient.

Capt. E. Mix. W. K. ARMISTEAD.

Exhibit No. 6, accompanying Elijah Mix's Deposition.

Dear Sir: Goldsborough has again come before the Secretary, and the Secretary has told him you would not put any obstacles in his way; but, if you did, he then would decide that payments be made to him for such deliveries as he should make on the part of the contract the company own. The Secretary would have decided at once, but upon my representation that you would give the necessary authority voluntarily for payments to Goldsborough & Co. Nor until this morning did I know the consequences to myself if you oblige the Secretary to interfere. I therefore request you will not leave New-York until I arrive there. I will leave here on Monday morning. On your conduct in this matter will depend whether or no I shall return to my functions in this Department. It has finally come to that unfortunate result. You can stay the evil or complete the ruin. Truth obliges me to speak thus plain. The issue can be no longer avoided. I will state fully to you my situation when I see you in New-York.

Yours, truly,

C. VANDEVENTER,

Saturday, 24th March, 1821.

E. Mix, Esq.

Exhibit No. 7, accompanying Elijah Mix's Deposition

New York, *8th July, 1820.*

Dear Sir: Thine of the 4th is with me, and I would address this to Norfolk, if I had not supposed it would be there too late.

I wrote from Philadelphia to Mr. Smith, to call on Major Maurice, and formally stop payment of the draft, so that the Major could not in future say he was not properly noticed of its loss.

I wished much to see you about the Goldsborough deliveries. I want you to allow me to deliver, of your quantity this year, 3 or 4000 perch, which quantity is necessary to make up to Goldsborough, the 900 perch for this year. If this can be done, all the difficulty with Goldsborough will be closed.

I will be in town again by the 15th or 18th inst. when I hope to see you, and have all matters adjusted to mutual satisfaction.

Yours, truly,

Capt. E. Mix. VAN.

Exhibit No. 8, accompanying Elijah Mix's Deposition

Statement of Major Vandeventer, account with the Rip Rap contract with E. Mix

1818. August 8.	Received the advance of $10,000	$10,000
	Cash deposited in Branch Bank, Norfolk	4,000
1819. Oct. 15.	Cash paid him for ¼ contract	12,000
	Compelled to pay by Mr. Calhoun's order	2,500
	To the United States for his other quota	2,500
	Cash sundry times from me	550
1820.	Sold to Major Cooper 34,000 perch of the contract	13,000
		$45,150

Exhibit No. 9, accompanying Elijah Mix's Deposition

FORTRESS MONROE, *December* 21, 1826.

SIR: Your proposals for supplying sixteen thousand perches of stone for the construction of this Fortress and Fort Calhoun, during the year 1827, at an average cost of two dollars eighteen cents per perch, are accepted.

The written contracts for signature will be forwarded to you in a few days, and before returning them, you are requested to have them confirmed by the War Department, as required by the advertisement, under which the proposals are predicated.

I am, respectfully, sir,
Your most obedient servant,
C. GRATIOT, *Lieut. Col. Com.*

E. MIX, ESQ. *Georgetown, D.C.*

No. 15

Testimony of Major Vandeventer.

January 10, 1827.—Major Vandeventer appeared before the committee, and being duly sworn, deposed and said, that the contract was formed with the Engineer Department, I think, the last part of July, 1818. I had not the least agency in procuring said contract, nor the slightest interest in it at its formation. At the time it was made it was considered by those most experienced in such business, as a bad contract, and as "ruinous to the contractor." Mr. Mix finding difficulty in procuring security on account, as I believe, of this impression of the contract, he applied to me for my assistance; we had married sisters, and I considered him an active business man, well caculated for such an undertaking; from no other motives but kind feelings towards himself and family, and the mortification of seeing one standing in the relation that he did to me, fail in a public engagement, I determined to afford him what aid I could in obtaining security, and executing his contract. Having determined to afford him assistance. I went to New York, at the urgent request of Mr. Mix, for this object. and in the course of the operations of this year, 1818, I became responsible for facilities afforded him through my agency, to the amount of $5,583.63, a sum greater than the whole amount of my property

at the time; about this time Mr. Mix offered me one-fourth of the contract, as security for my responsibility, which I took, simply with that view, on a verbal understanding only. In this state my relation to the contract remained until April, 1819, all of which time it was a losing transaction, according to Mr. Mix's own statement.

Having lost some confidence in his manner of executing the contract, and seeing no way of securing myself against eventual loss to the amount of my fortune, I became at the time, with the view of so securing myself, interested in one-half of the contract. Previous to my being so interested, I intimated to the then Secretary, Mr. Calhoun, without stating the particulars of the case, my wish, if it could be done with propriety, to invest money in it; that Mr. Calhoun replied that it would not be illegal as there was no law to prohibit it, but he thought it would expose me to improper insinuations, and would, therefore be injurious. I had subsequently no further conversation with the Secretary, and it is due to him to state that I have every reason to believe that he remained under the impression that I had declined, in accordance with his suggestion, being concerned in the contract, and that he remained ignorant of my actual connexion until after the subject was first moved in Congress, at which time I had parted with all my interest in it. Feeling, however, uneasy on account of my liability I determined to secure myself in the manner above stated; in doing so, I believed I violated no law, and that I could not by possibility do injury to the public. I neither had nor could have control over the contract—it was made in the Engineer Department, and was executed wholly through that Department, without passing, in its details, through myself or any other Clerk in the immediate office of the Secretary, and in fact, neither while a portion of the contract remained in me, nor at any time before or since, did I ever attempt directly or indirectly to exercise the least influence in relation to it, nor has the public, to my knowledge, suffered the least loss by my connexion with it, but, on the contrary, I believe it was owing to my assistance, given from motives which I have stated, that the contract, which at the time was supposed to be on terms favorable to the public, was executed at all. I do not excuse myself for this participation by the previsous example of others in the Departments being engaged in transactions of this kind, although such instances existed, as I do not conceive it necessary to my justification.

So soon as I found that I could free myself from my original responsibility, I determined to separate myself from all connection with the contract, which I did, by re-conveying to Mr. Mix himself one-half of the portion that I held, in October, 1819; but a few months after I purchased from him; and the remainder to Mr. Cooper in January following. I took this step, when by the great fall of prices in freight and labor, the contract promised to be very profitable, but I was induced to do it after having effected the original object I had in view in entering into it, that of securing myself, from a sense of delicacy as connected with my situation. This took place before the subject was agitated in Congress. For the fourth which I sold to Mr. Mix, I received, as expressed in the bill of sale, I think $ 12,000, $ 5,000 of which, however, was never paid to me, but was inserted to conclude the transaction; $ 7,000 was paid to me, and was considered

in satisfaction of debts assumed by me, and for property retained by Mr. Mix, such as vessels, stone quarries, &c. The remainder I sold to Samuel Cooper in January, 1820; for the terms of this sale to Mr. Cooper, I refer to a copy of his account current herewith.

It is due to Mr. Calhoun to say, that he expressed his regret and disapprobation that I was ever engaged in the contract, when the facts came to be known to him; and that he determined if ever he should be compelled, in the discharge of his duty, to make a decision that might seem to favor the portion of the contract that was once vested in me, that the consequence would be I should no longer remain in the Department. He informed me and Capt. Smith, of the Engineer Department, of his determination, when Mr. Mix applied to the Department of War, to prevent Mr. Goldsborough, who had engaged to deliver the fourth I had transferred to Mr. Cooper, from receiving payment on the delivery of stone. Mr. Calhoun, on examination, came to the conclusion, as I understand, that the conduct of Mr. Mix was unreasonable, and consequently, determined to protect Mr. Goldsborough, the sub-contractor. But informed me, at the same time, the consequences of his decision would be my removal from office. He agreed, however, on application, to allow a reasonable time for the parties to come to some agreement, for which purpose I proceeded to New York to make an arrangement with Mr. Mix, after much vexations delay on his part, and for particulars, I would refer to Captain Smith of the Engineer Department, was effected.

In regard to Mr. Calhoun, it never entered my conception that he had the remotest connection with, or interest in, the contract. He would be, I think, one of the last men on earth to whom such a thing could be suggested. I have known him intimately, since the last part of 1817, and was Chief Clerk during the whole time he remained in the War Department; and I profited by so ample an opportunity to study well his public and private character, and can say, with confidence, that I have never known a man whose actions were governed by a higher sense of moral obligation; of purer patriotism; of a more stern integrity, and inflexible justice. In connection with this subject I deem it my duty to state the voluntary conversation of Mr. Mix since the agitation of this subject. Mr. Mix said, in reference to the charge contained in his letter, that he knew nothing against Mr. Calhoun, and his character in the matter was as pure as tried gold: and, on my declining to converse with him without a third person, he stated, in the presence of Mr. Gideon Davis of the War Department, whom I called in, what is contained in Mr. Davis' affidavit herewith annexed; and subsequently he alleged, in my presence, that as the cause of his feelings towards Mr. Calhoun, that he had never treated him with civility, or asked him to take a chair in his office when he called on him on business.

I also annex the affidavit of Mr. Jesse Scott, of Georgetown, which was placed in my hand voluntarily, of a conversation of Mr. Mix in his presence, which may have some bearing on the subject of the investigation before the committee. Mr. Mix has, however, subsequently stated to me, that he had never called on the President as he states he had done in Mr. Scott's affidavit, and I know from Gov. Barbour that nothing of what Mr. Mix states took place, mentioned in Mr. Scott's affidavit, ever happened.

Question by Mr. Sprague. Name all the persons who were at any time interested in the contract, the time when, and the manner in which they severally became interested, and the extent of the interest of each?

I answer, Mr. Mix made the contract; Mr. Jennings had one fourth, I had, at one time, one half, Mr. Cooper and Goldsborough and Co. under me, and one fourth resold to Mr. Mix. These are the names of all the persons I know of. I have stated when I became interested; my right was vested 24th April, 1810; I had a verbal lien only as security on one fourth, offered by Mr. Mix a few days after he concluded it. I have no precise knowledge when Mr. Jennings became interested, or the terms, but believe it was very soon after the formation. A few days after the formation of the contract, but how long I do not recollect, Mr. Mix mentioned to me that he had parted, or was about to do so, with one-fourth to a Mr. Walker, whose name he wished should not be mentioned.

Question by Mr. Campbell. Under whom did Jennings hold?

Answer. Under Mr. Mix, as I always understood.

Question by Mr. Wright. At what time did your verbal interest accrue—before or after the bond was signed by Cooper?

Answer. I am not precise as to date; I have no memorandum to go by, but it was when Mr. Mix requested my assistance in getting security and facilities to execute his contract. I think it was before I went to New York; the difficulty existed as to getting security, for some weeks after the formation of the contract, was owing to the name of George Cooper being inserted in the first bond as a party to the contract, when the contract was solely made by Mr. Mix, and a new bond became necessary to conform to the fact.

Question by Mr. Wright. When did you first converse with Mr. Mix on the subject of letting you into a participation of his contract, and what conversation did you have?

Answer. I can't recollect the precise day, nor do I recollect the precise conversation; the time has gone by almost nine years; it must have been, however, subsequently to forming the contract.

Question by Mr. Wright. Did Mix ever give you authority to divide his contract, and assign parts of it to himself, to yourself, to Jennings, and to another person whose name was to be kept secret? If yea, and it be in writing, produce it; if not, state it fully?

Answer. I have no such authority, and never exercised any such authority—no such authority ever existed. In reference to the distribution of this contract, I may have recapitulated what he himself informed me, to wit: that I should have one-fourth, as I have explained, as indemnity for my liabilities; Jennings one-fourth, as he informed me; and one-fourth to Mr. Walker, whose name Mix requested should not be mentioned—of course Mr. Walker's name was never mentioned by me till this time. This is probably the best time to state that I do not believe this last quarter was ever conveyed to Mr. Walker. At the time herein referred to, this Mr. Walker was, as I believe, a citizen of North Carolina. I do not know his Christian name. I do not know where he now resides.

Question by Mr. Wright. Were those persons, or any of them, ever recognized in the War Department as partners in the contract? If so, when, and in what manner, and by whom?

Answer. No, they were never presented, to my knowledge, for recognition, except Mr. Goldsborough & Co. remotely under myself; the 13th April, 1821, Mr. Mix authorized them to be acknowledged. Mr. Jennings has, I believe, presented himself for recognition, but I do not know that he has been acknowledged. At the time Goldsborough presented himself for recognition, it was explained to the Secretary of War that he was a sub-contractor remotely through me. (See document K, in the report of the Committee on Mix contract, made 7th May, 1822, No. 109 Rep. Com. House of Rep's, 17th Cong. 1st Sess.) This was not the first intimation that the Secretary had that I had been interested in the contract. I have already described or related the facts on this point as they occurred between the Secretary and myself.

Question by Mr. Wright. Was the letter, dated the 7th August, 1818, marked No. 1, and now shown to you, written by you; if so, relate who is therein meant by "father" and "George." and where those persons now are; state, also, who you describe in that letter by the following clause: "I stated that one other person, (who I did not name, because his name is not to be known,) was to have the other fourth part," and why was his name to be kept secret?

Answer. This letter appears to be in my own hand writing. The person mentioned as "father" means Major Samuel Cooper—George Cooper is the person mentioned as "George." Major Cooper is my father in law, and George was the brother of my wife. Major Cooper is in New York—the other is dead. The other person referred to in the letter, is the Mr. Walker before mentioned.

Question by Mr. Wright. Why was the name of Walker concealed in a letter to Mix, to whom it was before known?

Answer. It was not intended to be concealed from Mix, as the information was derived from him. All these statements were founded upon his statements to me, that those persons whom he designated had given security, and the tone which I here assume was only to admonish him that he could not depart from his arrangements.

Question by Mr. Wright. Who is the Mr. Jennings who has been mentioned as interested in part of the Mix contract, and to whom a part of it was assigned?

Answer. R. C. Jennings; he lives at Norfolk, Va. I believe. It is peculiarly unfortunate for me that my papers have been destroyed, as his (Mix's) letter to which this letter (No. 1) is an answer, would have completely explained the whole. This barely recapitulates the arrangements which he (Mix) had made, and communicated to me. All the information which I gave to Major Cooper was derived from Mix. It appears that the whole tone of this paper was assumed on the facts communicated to me by Mix, to extricate him (Mix) from the difficulties into which he had got, in proffering a portion of his contract to George Cooper, which he had already pledged to some one else.

Question by Mr. Wright. Was the obliteration in the first and second lines of said letter, of the 7th August, (No. 1,) made by you; if so, when did you make it, and what were the words obliterated?

Answer. I did not make it, and do not, now, know what the words were.

Question by Mr. Wright. Did you go to New York shortly after the 7th August, 1818? and, if so, did you see Mix and your father-in-law,

and have any explanation with them on the subject of your letter to Mix, of the 7th of August, 1818? if so, detail the explanation?

Answer. I went, I think, about the 10th of August, 1818; I saw both of them, and think a full understanding, in relation to the difficulties alluded to in the letter of the 7th August, was had; and that, in consequence, the difficulties respecting his sureties were done away.

Question by Mr. Wright. Did Jennings, or any other person, ever apply to you for a part of Mix's contract? if so, state particularly the time and manner of such application, and all the negotiations between you and either of those persons on that subject; and, if you have any document, or writing, connected with it, produce it.

Answer. I have no recollection of any person ever applying to me.

Question by Mr. Ingersoll. Where are the letters of Mix to you, received in course of the correspondence relative to this contract; if you have them, or either of them, produce them to the committee?

Answer. These letters have all been destroyed by the award of arbitrators, to whom all our difficulties were referred for adjustment: These arbitrartors were James T. Dent and Captain John S. Smith, who made their award the 11th March, 1825, in these words: (See No. 1.) These arbitrators required that all papers relating to the subject of this contract in the possession of either of us, should be delivered up to them. I gave them mine in good faith; they destroyed them, independently of my will. It appears, however, that Mix has kept back such as he deemed would be injurious to me in the absence of those which I had from him, and on which he has attempted to extort money from me.

Question by Mr. Wright. Were bonds ever given in the contract by Jennings and the person whose name was not to be known, on their parts of said contract? if yea, state the date and the amount of the bonds, the names of the obligors therein, and where said bonds are now; and, if you have them in possession, produce them.

Answer. Mix informed me that he had bonds from Jennings, and others, to whom he pledged his contract, but I have never seen them, never heard the names of the obligers, and gave him, myself, no bond. I do not know, of my own knowledge, of any such bonds.

Question by Mr. Wright. Did you receive from Mr. Calhoun, on or about the 13th of April, 1821, a package of papers, said to have been left there by Mr. Mix, relating to the Mix contract? if so, state what papers you received, and what Mr. Calhoun said, if any thing, when you received them.

Answer. I do not recollect any thing, as to this question, in 1821. Some time in the beginning of 1825, Mr. Calhoun sent to me, by the Messenger, a strip of paper, on which was written, by Mr. Mix, a request to return him the papers which he had just sent to him. On my reporting myself to the Secretary, that I had seen no such papers; he directed me to look on his table, where I found a package of papers addressed to the Secretary by Mr. Mix, and took it, passed from the Secretary's room to the door of the hall, called the Messenger, gave him the packet, with directions to hand it to Mr. Mix, who was then in the audience room. The whole time occupied did not exceed one or two minutes. Captain Smith, of the Engineer Office, I recollect, was with the Secretary when he called me in, and when I took the papers

to hand them to the Messenger. What the packet contained I do not know. In a few minutes after the Secretary again called me, saying Mr. Mix alleges that there is a paper missing; I replied I handed them to the Messenger as I took them up. If I recollect right, the cover was never opened, neither while in the Secretary's office, or in repassing to Mr. Mix. I did not know that such a packet of papers were in the office, til called upon by the Secretary to return them to Mr. Mix.

Question by Mr. Wright. Was any one of those papers taken out of the package by you, and retained?

Answer. No.

Question by Mr. Wright. Did you ever exhibit to Mr. Calhoun the bill of sale, from Mix to you, of any part of his contract, and come to any explanation with him concerning it? if so, state the explanation fully.

Answer. I do not recollect that I ever did: but I do recollect, while Mr. Mix was opposing the payment to Goldsborough for his deliveries, on the ground that I owed him $2,500, being the fourth of the advance of $10,000 made to Mix, of reading to the Secretary a memorandum of agreement between Mix and myself, which clearly proved that Mix, and not I, was to repay that portion of the advance. This, I think, was the only paper I ever exhibited to the Secretary, and was, I think, in the Spring of 1821.

Question by Mr. Clarke. Were you examined before the Committee *first* raised upon the Mix contract? and if yea, did you, on your examination, state that you had parted with your interest because it was disagreeable to Mr. Calhoun for you to retain it, or did you so state on your examination before the *last* Committee in 1822?

Answer. I was examined before the first Committee, but do not now recollect the particulars of my statement at the time. Before the Committee, on the second examinatoin, I stated as a fact that believing it was disagreeable to Mr. Calhoun, was one of my principal motives for freeing myself of the contract. I inferred this from the manner in which he had stated, in reply to my question whether it would be improper to invest money in it, that it would expose me to improper insinuations, and would therefore be injurious to me.

Question by Mr. Clarke. Did Mr. Calhoun know of your interest, before your first examination?

Answer. I have already stated that I did not believe that he did know it.

Question by Mr. Clarke. Is the letter No. 6, now shown to you, purporting to have your signature to it, in your hand writing?

Answer. Yes. I derived, I think, the information contained in that letter, first from Captain Smith, of the Engineer Department, and then from the Secretary himself.

Question by Mr. Clarke. Is the letter No. 7, now shown you, and signed "Van," in your hand writing?

Answer. Yes; one of the drafts which Mr. Mix gave me, and which are specified in the bill of sale, was lost. He would not give me a new one, and payment was obtained only through a bond of indemnity given to Mr. Maurice, the Agent of fortifications; while the fourth part of the contract, which I sold to Mr. Cooper, remained

in my possession, he (Mr. Cooper,) as my agent, made an arrangement with Goldsborough for the delivery of all that remained of that fourth, then to be delivered, at the rate of 9,000 perch a year, which corresponded to the portion to be delivered under the whole contract. While Goldsborough was executing this arrangement, the amount of stone to be delivered under the contract was greatly diminished, in consequence of the appropriations for fortifications for that year being lessened. This fact prevented Major Cooper from complying with his part of the engagement with Goldsborough, and, in consequence, Goldsborough exacted the penalty of the obligation. At the instance I think, of Major Cooper, I made the proposition contained in the third clause, to enable him to comply with his engagement; the right and interest at that time being in Major Cooper, and, previous to writing this letter, Cooper had alienated to Goldsborough.

Question by Mr. Williams. You have said it was customary for persons in the Departments to participate in contracts before you were concerned in the contract with Mr. Mix; state the names on the persons who were so interested, and the contracts in which they were concerned?

Answer. I have been informed that Mr. Forrest, of the State Department, had contracted with the Ordnance Department for the delivery of arms, under the administration of Mr. Monroe, as Secretary of War; as also of Mr. Boyd, of the War Department, with the Department, for the delivery of arms, flints, &c. under the administration of Mr. Crawford. There are the only instances I know of.

Question by Mr. Campbell. When did you first hear of the existence of the letter addressed by Mix, to "Hancock," and which was published in the Phoenix Gazette of the 28th December last?

Answer. I think it was somewhere between the 10th and middle of November, 1825. I think it was first mentioned to me by Mr. Anthony, of the Treasury Department, he having seen a copy of it sent by Major Clark to a gentleman in the City, a Mr. Hill, requesting him to procure the papers referred to by Mix from him, and stating that otherwise he might sell them to Vandeventer or Calhoun. On the 16th of November, I had a conversation with Lieutenant M. P. Mix, of the Navy, who was here at that time, who also mentioned to me this letter, and stated, I think, that its object was to extort money from me. Shortly after this conversation, and on the same day, I received a note from him, dated 16th November, 1825, giving me information respecting an affidavit taken at Richmond, which affidavit is the one purporting to have been made by Walter S. Conkling, on the 14th of May, 1822. This information induced me to call immediately on Elijah Mix, who told me that he did make that affidavit, and did not care how soon I published the fact; that he was as low and degraded as he could be made; and would not give twenty-five cents to have all the papers in the case destroyed. I also told Elijah Mix, at this interview, that I understood he had written to Satterlee Clark, to inform him that he had proofs of Mr. Calhoun's being concerned in the Rip Rap contract; he said, in reply, he had, and he would make that assertion to Congress, unless Mr. Calhoun procured some of his decisions, in relation to his contract, to be reversed. I said, "is it possible you can, Mr. Mix, assert so atrocious a falsehood?" He said he knew it was false, but did not care if he could get money by it.

Question by Mr. Campbell. At what time did you first converse with Mr. Calhoun, on the subject of Mix's letter to "Hancock."

Answer. I think it was the Wednesday preceding the publication of the letter in the Phoenix Gazette. I mentioned to him, that there was such a letter, and that I had seen a copy of it on the 26th of December, two days before its publication; it was shown to me by Mr. Goldsborough.

Question by Mr. Clarke. Is letter No. 2, and dated September 10, 1818, and now shown you, in your hand writing, and was the contracts, No. 3, and 4, signed "C. Vandeventer," and now shown you, executed by you, and is the letter No. 5, now shown you, signed "W. K. Armistead," in the hand writing of said Armistead?

Answer. Letter No. 2 was written by me. The contracts No. 3, and 4, were executed by me, when the bill of sale, of the 15th of October, was executed, the accounts incurred on account of the contract, prior to the bill of sale from Mix to me, of the 24th April, 1819, had not been settled. For particulars, I refer to a memorandum, which I now present to the Committee. (See No. 2.) A similar memorandum was made on the 15th of October, by which Mix obligated himself, for the half of these debts; it was, however, subsequently agreed, upon a partial adjustment of the accounts between us, that the bill of sale of the 15th October, should be cancelled, and a new bill, that of the 19th of October, expressing more fully the particulars of the transaction, should be given, and I accordingly gave that of the 19th of October, by which the bill of sale of the 15th was made void, as these bills were for the identical quantity of stone. No. 5, I believe to be the hand writing of W. K. Armistead, and the allusion made to me in it, refers, I presume, to the then known decision of the Secretary of War, to dismiss me from the office, if he had to make a decision upon the affairs of this contract, even remotely favoring my interest. In relation to No. 2 being responsible for the debts contracted by Mix, at the commencement of the execution of his contract, a portion of which debts, consisting of notes, payable at 60 days, 90 days, four and six months, it was important to make arrangements to meet these payments out of the proceeds of the first delivery of stone, for which purpose, it was agreed that Mr. Mix, should deposite such proceeds in the Bank of Norfolk, subject to my draft, of which he did deposite, I think $4,000; that as these notes came round for payment, I did draw 3,300 dollars of it, which were applied to the payment of these notes, as will appear by reference to the three checks, herewith (See No. 3. a, b, c) the balance of the deposite was paid to orders of Mix himself, and was accounted for in that way to him; that was the only sum ever so deposited to my credit.

Question by Mr. Clarke. Do you know who authorized Col. Armistead, to use in his letter, the language "I am instructed to state to you, that they will be recognized by the Department," &c. if state who gave the authority?

Answer. I do not know.

Question by Mr. Clarke. Have you a recollection of having written the letter dated 7th August, 1818, and if you have, is there no circumstance connected with it, that will bring to your recollection the name of the persons erased from said letter, or do you at this time recollect the names of those persons?

Answer. I have reflected much on this, and have no recollection of what is covered by these erasures. This whole letter was written, I think, to Mix, to enable him to extricate himself from the pledges which he was making, as I stated yesterday. I had no recollection of having written such a letter as this, until it was shown to me yesterday.

Question by Mr. Clarke. In your letter to Mix, dated 7th August, 1818, you state, that yourself, Mix, and Jennings were, each, to have one-fourth, and a person whose name was to be a secret, the other fourth; how did you become entitled to the one half you afterwards assigned to said Mix?

Answer. The arrangement for giving this fourth to Mr. Walker, who was the unknown person, was never, as I believe, carried into effect; Mix then had the right to dispose of that quarter.

Question by Mr. Williams. Do you know that Mr. Walker was in this city then, or at any other time?

Answer. He was here, I think, just after the contract was closed.

Question by Mr. Sprague. In concluding the letter No. 6, you say, "I will state fully my situation when I see you," what was the situation to which you then referred?

Answer. That I was to be dismissed from the office, if the Secretary was compelled to make any decision remotely affecting my interest, as I have heretofore stated.

Question by Mr. Sprague. Why did Mr. Calhoun declare that he would remove you from office, if compelled to decide between Mix and Goldsborough?

Answer. From my peculiar relation to him as Chief Clerk that he would not be in a situation in relation to this contract, that would subject him to any imputation on account of any decision respecting it.

Question by Mr. Sprague. When did you first become responsible for Mr. Mix; in what manner, and to what amount?

Answer. It was about the time I went to New York, in August, 1818, that I first became responsible. I do not, distinctly, recollect whether it was before or after I went to that city; the manner, was by assuring Major Cooper, that I would see him paid for any facilities, liabilities, or advances, he might make to Mix on account of this contract; the amount is stated in Mr. Cooper's account current with me in December, 1818, at $5,583.69. I went to New York about the 9th or 10th of the month.

Question by Mr. Sprague. When did you first ascertain or believe that the contract would be profitable?

Answer. The first year's operations were a losing business, and I think it first became profitable in the Summer of 1819; from the calculations made by Mr. Mix, at the time of his forming the contract, and in which he felt confident, he gave me the impression that it would be profitable from the beginning; but experience proved that these calculations were erroneous, and that the contract was not profitable the first year. The circumstances of the York river stone being rejected by the Engineer Department, and the contractors being obliged to furnish stone from other places at a much greater expenses, obviously made the contract a losing one during the period of high prices.

Question by Mr. Williams. Do you know, or have you understood that any person engaged in the service of the Government, at the time the contract was concluded with Elijah Mix, was connected with, or related to Mr. Walker, in any manner?

Answer. General Swift, was, I believe, his brother-in-law.

Question by Mr. Williams. Do you know, or have you ever understood, the reason for concealing his name?

Answer. No. I have no knowledge on that point.

Question by Mr. Campbell. Have you realized any profits from the Mix contract? If yea, to what amount? And please to state whether Mr. Calhoun, while Secretary of War, conversed with you on the subject of the profits.

Answer. I refer to the paper referred to in my general statement, marked B, from which it will appear, that a balance of about four thousand dollars was realized by me. I have no recollection of ever conversing with Mr. Calhoun respecting the profits of the contract.

Question by Mr. Ingersoll. Were the papers which you have produced this morning to the comimttee, before the arbitrators? and if yea, why were they not burnt with the rest?

Answer. They were not—they were with my accounts with Major Cooper, to which the appertained.

Question by Mr. Williams. Did E. Mix allege as a reason for his unwillingness to admit Goldsborough and Co. to participate in the contract, that you had previously sold to him that portion of it to which Goldsborough and Co. set up a claim, by virtue of the purchase they had made from Major Cooper?

Answer. Never that I heard of; but he objected on the ground that I was liable for the one-fourth of the advance of $10.000, which pertained to the fourth that I re-conveyed to him. I read at the time, as I stated yesterday, an agreement between Mr. Mix and myself, which clearly proved that he, and not I, was liable for that portion of the advance. Mix well knew at this time that the bill of sale of the 19th of October, was the only valid bill on the subject.

Question by Mr. Wright. Did Jennings and Mix continue copartners in the contract after the 24th April, 1819?

Answer. Jennings, I believe, continued sub-contractor in the execution of one-fourth of the contract. Mix, of course, continued in the contract, having the entire control of one-fourth.

Question by Mr. Wright. Were the facts connected with your sale to Mix and to Goldsborough, communicated to the Secretary of War before the date of the letter of Colonel Armistead to Mix, dated 24th March, 1821? If so, state when, and by whom, they were communicated.

Answer. I have no recollection on these points. I made no communication of these facts to the Secretary of War.

Question by Mr. Wright. Was there any written transfer from Mix to Jennings?

Answer. I have no knowledge on that subject. I have an impression there was; the time and circumstances I do not know.

Question by Mr. Wright. You have said you became interested to the amount of one-half of the contract, solely with a view of indemnifying yourself against liabilities incurred for Mix in the year 1818; state

what these liabilities were, specially, with whom incurred, and when, and to what amount, with each person, and the particular nature of the contracts out of which your liabilities accrued; and whether these liabilities existed before you wrote the letter of the 7th August, 1818.

Answer. I have stated that my liabilities amounted to $5,583.65, at the close of the year 1818; they were for advances and facilities furnished by Major Cooper, from the beginning of the execution of the contract. Of course these liabilities accrued subsequent to the 7th August, 1818, as the contract had not then gone into execution, although the purchase of some of the property, for the payment of which I became liable, was purchased before the 7th August. My engagements were to Major Cooper. I was under obligation to no other that I now recollect of.

Question by Mr. Wright. When did Mix begin the execution of his contract?

Answer. He began his preparations about 1st August. When he made his first deliveries I cannot state.

Question by Mr. Wright. At what time was Mix's bond under the contract filed in the Office—was it before the 7th August, 1818?

Answer. I don't recollect: those are details that belong to the Engineer Office; the bond came enclosed to me, I think, by Mr. Mix: I must have received it about the 8th or 9th August, 1818, and handed it over to the Engineer Department immediately.

Question by Mr. Wright. According to the practice of the War Office, is the contract considered complete until the bond is approved and filed?

Answer. These are details of office that do not go through me, and I am ignorant upon the subject: my impressions are that the practice is that they must be approved and filed: but the details refer themselves to subordinate offices of the Department—I am not prepared to speak positively on the subject.

Question by Mr. Wright. Were you ever notified by the War Department that Mix's bond was approved? and, if so, when, and by whom?

Answer. I have no recollection on this point.

Question by Mr. Wright. Have you any knowledge that Mix was notified of the approval of his bond; if so, when, and by whom?

Answer. I have no knowledge or recollection of any official notification, but in a private communication from myself to him, I think I advised him of the difficulties in relation to the first bond, and that a substitute would perhaps be required: but the persons who were on the first, continued the surety to the end, and the bond was approved, if I recollect, by the Recorder of the city of New York.

Question by Mr. Wright. What difficulty did arise in relation to Mix's bond; by whom were objections raised, and communicated to you?

Answer. Difficulty arose in relation to the name of George Cooper being mentioned as a party to the contract, when, in fact, he was not. The objections arose in the Engineer Office, and by some of the officers there. I don't remember which, was communicated to me. It was a subject of general remark in the Engineer Office.

Question by Mr. Wright. Was any other bond ever filed by Mix, on his contract, than that of the 5th of August, 1818, signed by Mix, Samuel Cooper, and Joseph Oakley? if so, describe it, and state when, and by whom, it was submitted to the War Department for appropriation.

Answer. The bond was corrected by leaving out the name of George Cooper; but, whether the bond first transmitted was returned, I do not recollect; nor do I know whether it was retained on the files of the Engineer Office. Information on that point can be obtained from that office. The correction was at the instance, doubtless, of the Engineer Department, but I think I interested myself with Major Cooper, to have it effected. I cannot answer as to the time of the correction, because I do not recollect it. Major Cooper signed as the security of Mr. Mix.

Question by Mr. Wright. Was George Cooper's name mentioned in the first bond, on which the difficulty arose? if not, and you wrote the letter of the 7th August, 1818, to extricate Mix from his pledges in relation to the contract, how came the Superintendents of the Engineer Department informed of George Cooper's claim to an interest in the contract?

Answer. George Cooper's name was in the first; and when I wrote the letter of the 7th of August, it was upon information communicated to me by Mix, that that would be the case; but the Engineer Department did not know it until the bond arrived, which was probably the next day. Doubtless, when the bond was corrected, a transcript of the first bond was made, leaving out only the name of George Cooper; this is only my presumption. I do not know whether George Cooper's name was ever submitted to the War Department as a partner in the contract with Mix.

Question by Mr. Wright. Do you know, or have you good reason to believe, that Mr. Calhoun participated in the profits of, or was, either directly or indirectly, interested in any contract entered into in the War Department, while he was Secretary of that Department? if yea, state particularly your knowledge, and the grounds of your belief?

Answer. No. I believe he would be the last man on earth, standing in such a relation, to do such an act.

Questions by Mr. McDuffie.

Question. When you resold to Mix, in October, 1819, how did you know, or what induced you to believe, your participation in the contract was disagreeable to the Secretary of War?

Answer. From his expression to me that, although it was not illegal, as there was no law to prohibit it, yet it would subject me to improper insinuations, and would therefore be injurious. In fact, a belief that it was disagreeable to him was the strong motive for divesting myself of all interest in the contract.

Question. When did Mr. Calhoun use the expression to which you refer, and did he repeat it?

Answer. The precise time I cannot recollect, but it was between the Fall of 1818 and the Spring of 1819, before the execution of the bill of sale, of 24th of April, 1819. He never repeated it; that was the only conversation we had respecting it.

Question. Was this the same conversation to which you alluded in your general statement?

Answer. Yes.

Quest. You state that the Secretary of War determined to dismiss you in the event of his having to decide in favor of the claim of Goldsborough, because it might favor your interest remotely. How could it be supposed to affect your interest?

Answer. Because Goldsborough derived his title from me, through Major Cooper.

Quest. Did the Secretary of War, in the decisions he had occasion to make, on the contract of E. Mix, ever manifest any disposition to favor that contract? Or were his decisions strict and rigorous, in their operation against it?

Answer. His decisions were always considered as strict and rigorous, in the extreme, in their operation upon it.

Quest. by Mr. Williams. Who were employed in the Engineer Department, at the time the objections were first made, to the original bond; and what are the names of the persons who raised the objections?

Answer. General Swift, Captains Smith and Blaney; who raised the objections, I do not recollect.

Quest. by Mr. Williams. Did you consider the objections as coming from those who had a right to control the contract?

Ans. I did. General Swift was the Chief Engineer, to whom pertained such details of his office.

Sworn on the 9th, and subscribed this 11th day of January, 1827.

C. VANDEVENTER.

Exhibit No. 1, accompanying Major Vandeventer's testimony.

We agree, that all money, or other business transactions, which have heretofore existed between us, shall be considered to be canceled, and we hereby mutually release each other from all liability, in relation to them, but it is understood that this mutual release is not to exonerate Major Vandeventer from the liabilities which attach to him, as one of the parties in the contract with the United States, in my name, for the delivery of 150,000 perches of Stone, at the Rip Raps, in relation to such portion of that contract as remains to be fulfilled. Duplicates hereof signed, and one copy delivered to each of the parties, at Georgetown, this 11th March, 1825,

In presence of

JAMES S. DENT, C. VANDEVENTER.
J. L. SMITH. E. MIX.

Exhibit No. 2a, accompanying Major Vandeventer's testimony.

GEORGETOWN, 24*th April*, 1819.

MEMORANDUM.

It is agreed, by and between Elijah Mix and C. Vandeventer, that the said Vandeventer, in consideration of payment for seventy five thousand perch of Stone, being one half of E. Mix's contract with the Engineer Department, for the delivering stone at the Rip Raps, and Old Point Comfort, which he, the said Mix, sold to said Vandeventer,

as per bill of sale of this date, binds himself to pay one half of the debts against said contract, at this date, which consists in the advance of ten thousand dollars, made the said Mix, by the Government, and certain accounts, incurred, on the deliveries already made, and not yet paid.

C. VANDEVENTER.
ELIJAH MIX.

Exhibit No. 2*b*, accompanying Major Vandeventer's testimony.

I, Eli Adams, now of New-London, in the State of Connecticut, of lawful age, on oath, do testify and say: That, being at Norfolk, in Virginia, about the first week in June, 1819, the deponent did then and there receive letters and papers from Major C. Vandeventer, of the city of Washington, appointing the deponent agent, on his behalf, to settle and adjust accounts between him, the said Vandeventer, and Mr. Elijah Mix, up to the 24th of April, of the same year, agreeably to papers, passed between them. The deponent immediately waited on Mr. Mix, who was then in Norfolk, and to whom the papers were shown. Mr. Mix appeared satisfied, and promised to attend to the settlement as soon as he obtained some Mechanics' bills, which, he observed, had not been sent in, and the amount of which, he did not recollect. Several appointments were made, by the said Mr. Mix and the deponent, in order to close this settlement, all of which were defeated by some excuse of his, or his not appearing at the time appointed. Some time in July, of the same year, we met in Norfolk, for the purpose of settlement, when the said Mix told the deponent that he had engaged an Accountant at ten dollars per day, to draw off his account current. After waiting two days, he promised to call that evening, with his papers, and make a final settlement; not calling that evening, according to appointment, the deponent inquired for him next morning, and found he had left town. The deponent met the said Mr. Mix, several times after, in the months of August, September and October, of the same year, and urged him to a settlement, but without effect.

Witness, ELI ADAMS.
FOSTER SWIFT.
DEBORAH SWIFT.

New London County, ss.

NEW LONDON, January 3*d*, 1822.

Personally appeared, Eli Adams, signer of the foregoing deposition, and made solemn oath to the truth of the facts therein stated and contained. Before

EBENEZER LEARNED,
Justice of Peace.

Exhibit No. 3*a*, accompanying Major Vandeventer's testimony.

WASHINGTON, *October* 28, 1818.

Cashier of the Office of Discount and Deposite, at Norfolk, Virginia, pay to Samuel Cooper, or order, one thousand eight hundred dollars.

C. VANDEVENTER.

Exhibit No. 3b, accompanying Major Vandeventer's testimony.

WASHINGTON, *November 19th*, 1818.

Cashier of the Office of Discount and Deposite at Norfolk, pay to Elijah Mix, or order, six hundred dollars.

C. VANDEVENTER.

Exhibit No. 3c, accompanying Major Vandeventer's testimony.

NORFOLK, *March 6th*, 1819.

Cashier of the Office of Discount and Deposite, please pay Samuel Cooper, or bearer, nine hundred dollars.

C. VANDEVENTER.

Exhibit A, accompanying Major Vandeventer's testimony.

GEORGETOWN, *April 24th*, 1819.

To all people of the United States, I, Elijah Mix, of Georgetown, send greeting: Know ye that I, the said Elijah Mix, for and in consideration of the sum of one hundred dollars, to me in hand paid by Christopher Vandeventer, of Georgetown, District of Columbia, the receipt whereof I do hereby acknowledge—have granted, bargained, and sold; and by these presents, I, the said Elijah Mix, do grant, bargain, and sell, unto the said Christopher Vandeventer one half part (the whole in half equal parts to the dividend,) of my contract made with the Engineer Department of the United States' service, on the 25th day of July, one thousand eight hundred and eighteen, for the delivery of one hundred and fifty thousand perch of stone at the Rip Raps or Old Point Comfort, in the Bay of Chesapeake and State of Virginia, at three dollars a perch: To have and to hold the said half part of the said contract, and all other the premises hereby granted, with the advantages thereof, under the said Christopher Vandeventer, his executors, administrators, and assigns, as his and their own proper goods and property, and to his and their own proper use and uses forever. And I, the said Elijah Mix, do, for myself, my heirs, executors, and administrators, covenant and grant to and with the said Christopher Vandeventer, his executors and assigns, by these presents; that I, the said Elijah Mix, at the time of sealing and delivering these presents, am the true and lawful owner and proprietor of the said half part of the said contract, and advantages hereby granted, and that I have full power and authority to grant, bargain, and sell, the said half part of the said contract aforesaid with the advantages hereby mentioned to be granted, namely, that 75,000 perch of stone, being one half of the amount of the said contract, is thus conveyed as above mentioned; and for every perch of which delivered or caused to be delivered at Old Point Comfort or the Rip Raps aforesaid, by the said Christopher Vandeventer, he will receive three dollars; and it is expected that the said Christopher Vandeventer will deliver or cause to be delivered at least one thousand five hundred perch a month, beginning the first of June ensuing the date hereof, except in such months as it is inclement and boisterous on that coast—to the said Christopher Vandeventer,

his executors, and administrators, and assigns, in manner aforesaid, and also, that it shall and may be lawful to and for said Christopher Vandeventer, his executors and assigns, from time to time, and at all times hereafter, quietly and peaceably to have, hold, possess, and enjoy the said half part of the said contract and all other the premises hereby granted, or mentioned, or intended to be granted, with the appurtenances, without let, trouble, denial, molestation, hindrance or disturbance whatsoever, of me the said Elijah Mix my executors, administrators, or assigns, or of any other person or persons whatsoever lawfully claiming, or to claim from, by, or under me, them or any of us: and that freed and discharged of and from all former and other bargains, sales, forfeitures and incumberances whatsoever, made, done, or committed by me the said Elijah Mix, of Georgetown, District of Columbia.

Witness my hand and seal, this 24th day of April, 1819.

ELIJAH MIX, [SEAL.]

Witness, SAMUEL COOPER, Jr.

No. 17.

Testimony of Colonel Armistead.

Colonel Walker K. Armistead, of the Army of the United States, appeared before the Committe, was duly sworn, and testified as follows:

Question by Mr. Ingersoll. Was the letter now shewn to you, and marked No. 5, written by you? if yea, by whose authority did you write it?

Answer. This letter was written by me. Major Vandeventer advised me to write it to Mix; that is, to the best of my knowledge; it is so long since it was written, that I cannot speak positively.

Question by Mr. Ingersoll. In that letter, you say I am instructed to state to you, &c. who gave you the instructions?

Answer. I imagine that Major Vandeventer must have given them to me.

Question by Mr. Ingersoll. From whom did you, ordinarily, receive instructions in the department?

Answer. Mr. Calhoun.

Question by Mr. Ingersoll. Did Major Vandeventer tell you at the time that letter was written, that he was directed by the Secretary so to instruct you.

Answer. No, he did not.

Question by Mr. Campbell. Was Mr. Calhoun absent at the time you wrote the letter, if so, do you know where he was?

Answer. No, he was not as I recollect.

Question by the Chairman. Do you know the names of all the persons who were, at that time, or any other time, concerned in the contract for the delivery of stone at the Rip Raps and Old Point Comfort, commonly called *the Mix Contract.*

Answer. Major Vandeventer, General Swift, Mr. Jennings, or Mr. Robertson, (I don't know which,) and Mr. Mix.

Question by Mr. Campbell. Was there a person by the name of Mr. Walker concerned?

Answer. Not to my knowledge. I never heard of the man, that I now recollect.

Question by Mr. Clarke. From whom did you learn that General Swift was interested in that contract?

Answer. I learned, as I think, from General Swift himself, and probably from Major Vandeventer afterwards.

Question by Mr. Campbell. State the extent of the interst held in the contract by Gen. Swift, and state all you know of his being concerned.

Answer. I can only state that I heard he held a fourth.

Question by Mr. Clarke. Have you a distinct recollection of General Swift's having held any conversation with you about his (Swift's) interest in the contract?

Answer. I think, while I was superintending the erection of the works at Fort Washington, I was on a visit to this city, and General Swift told me he had some idea of becoming concerned in the contract, as he did not intend to remain in the army any longer. I do not now know whether this was before or after the formation of the contract—it was somewhere about that time.

Question by Mr. Campbell. Can you say that Mr. Calhoun, while Secretary of War, had any knowledge of General Swift's being concerned in the contract?

Answer. Nothing but what General Swift himself told me. As well as I recollected the conversation, I asked General Swift if he had asked permission from the Secretary for his being concerned. He said he had.

Question by the Chairman. Have you knowledge of any contract with the Department of War, whilst Mr. Calhoun was Secretary of that Department, in which Mr. Calhoun was concerned, or in the profits of which he participated?

Answer. No, Sir.

Question by Mr. Sprague. Can you recollect any conversation with Major Vandeventer as to General Swift's interest in the contract? If so, state it.

Answer. I don't recollect of any particular conversation with Major Vandeventer on the subject.

Question by Mr. Sprague. What order had you received, which, at the close of your letter, you say you should delay?

Answer. I presume it was the order for the transfer of the fourth of the contract from Mix to Goldsborough.

Question by Mr. Sprague. From whom did you receive such authority, to give such an order?

Answer. I received no such order. I presume the right to give the order was in myself. It is now so long since these transactions took place, that my recollections upon the subject are not distinct; I may have received orders from Major Vandeventer, or I may have acted from my own views and knowledge of the business, as it then existed.

Question by Mr. Clarke. Was it ever made known to Mr. Calhoun, that Vandeventer and Swift, or either of them, was interested in the contract, and when was he informed of it?

Answer. I don't know.

Question by Mr. Williams. At what time did you take the place of Chief Engineer of the Department?

Answer. I can't recollect the month. General Swift left the Department in November, (I believe,) in 1818, or 1819. I came in, some months after. Reference to the Army list will show the time.

Question by Mr. Sprague. Had you more than one conversation with General Swift, as to this contract?

Answer. Not to my knowledge.

Question by Mr. Ingersoll. Did General Swift mention to you his concern in the contract, as a secret?

Answer. I do not know that he did, specially, intend it to be secret; I presume he intended it to be confidential.

Question by Mr. Ingersol. Have you ever mentioned the subject till the present time?

Answer. It is probable that I may have, in conversation with Major Vandeventer, mentioned it to him. I have no diary of my conversation. And never expected to be questioned on the subject.

Question by Mr. Wright. Are you confident that Major Vandeventer had knowledge of General Swift's interest in the contract?

Answer. I presume he had.

Question by Mr. Wright. Please state the grounds of your presumption?

Answer. I think Major Vandeventer mentioned it to me in conversation; I am not certain, and will not speak positively. I do not recollect the time.

Question by Mr. Wright. Why were you desirous of recognising Goldsborough, as holding part of the contract, as intimated in your letter, written on the 24th of March, 1821?

Answer. It was from instructions from Major Vandeventer, as I have heretofore answered. I knew nothing of the transfers from one party to another, until informed of them by Major Vandeventer.

Question by Mr. Wright. When was the bond on Mix's contract received in the office, from whom was it received, and at what time, and when, and how was it approved?

Answer. The Honorable Committee will have to get that information from the Engineer Department. It was before I went into the office.

Question by Mr. Wright. Had you no agency in the receipt of any bond connected with that contract?

Answer. None that I now recollect.

Question by Mr. Wright. Was it the custom of the Engineer Department, while you was engaged in it, to make a record of bonds given to ensure the performance of contracts?

Answer. Yes, Sir. I think it was a custom at that time to copy them in a book, and file the original. They were sent in to the clerk, whose duty it was to attend to such business; and it is most natural to suppose that such was the course.

Question by Mr. Wright. Do you recollect the name of George Cooper, as in any way connected with the Mix contract?

Answer. No, Sir. I never heard his name coupled with the contract.

Question by Mr. Wright. Do you know of any other person employed in the War Department, who have been concerned, directly

or indirectly, in contracts entered into with that Department, while they were so employed?

Answer. None.

Question by Mr. Sprague. Had you no information or instructions on which to write the letter, of the 24th March, 1821, except from Major Vandeventer?

Answer. None. It is now my impression, that it was more a threat on the part of Major Vandeventer, to make Mix comply, or render justice to the parties concerned, than instructions received from any other person. It is possible I may have had this view of it at the time, but am not able, positively, to say so. I, however, think the letter originated in this way.

Question by Mr. Wright. I will ask you whether any proposition from Goldsborough to be recognised as a party in interest in that contract, was before you at the time, or prior to your writing the letter of the 24th March, 1821?

Answer. I don't recollect that there was; it was a matter entirely among themselves.

Question by Mr. Williams. Did you understand from Major Vandeventer, or any body else, what was the cause of Mix's unwillingness to transfer one fourth of the contract to Major Cooper?

Answer. I can't distinctly recollect any cause being given to me. Major Vandeventer may have assigned a cause, but I don't recollect it.

Question by Mr. McDuffie. Do you know of any facts connected with the execution of the Mix contract, which go to shew that General Swift was interested in that contract, or received any part of the money appropriated for it; if yea, state them fully?

Answer. I have no other facts than those I have stated; how much he received, or did not receive, I do not know.

Question. Do you know of General Swift's having received any money under this contract?

Answer. None to my knowledge. I never heard him say he did.

Question. How were the payments made under that contract, and to whom?

Answer. I believe, always to Mix.

Question. Could Gen. Swift have received money under that contract without the knowledge of Mix?

Answer. I presume he could not. I cannot conceive how he could.

Question. Could he have received money under this contract, without the knowledge of Vandeventer?

Answer. I think not.

Question. Why must Vandeventer have necessarily known it, if Swift received money under the contract?

Answer. Because the profits of the contract, I presume, were divided among them. I can't conceive any other way, if Gen. Swift was a party concerned.

Question. If Mix sold to Gen. Swift, one-half of his half of the contract, and authorized, or permitted him to draw money on it, must this have been necessarily known to Vandeventer?

Answer. It does not follow of course; that if there were private transactions between them, that Vandeventer must have known of the receipt of money.

Question. Is there any thing in the nature of the transaction from which it follows that Vandeventer must have known of Gen. Swift's participation in the contract, or of his receiving part of the money, admitting that Gen. Swift was concerned in it?

Answer. If the circumstances of partnership existed, I presume one could not have received money on it, without the other knowing it.

Question. If Swift claimed by virtue of a private contract, with Mix, could not the matter have been conducted, and the money paid by Mix to Swift, without the knowledge of the other persons concerned?

Answer. It think it possible—I will here state as an explanation of the answer, to the question sometime since put to me, by Mr. McDuffie, "why must Vandeventer, have necessarily known it, if Swift received money under the contract," that if Gen. Swift was not originally concerned, and Mix afterwards sold part of his contract to him, I conceive Mix might have paid money to Gen. Swift, without the knowledge of Major Vandeventer.

Question. When Gen. Swift conversed with you about being concerned in this contract, was the name of Mix mentioned?

Answer. I don't think it was; indeed I am sure it was not, as I did not hear of Mix, till some time afterwards, to the best of my belief.

Question. Do you think, from any circumstances, that this conversation was before the contract was made with Mix?

Answer. It was before the contract was made with Mix, as I had not then, to the best of my belief, heard of Mix; this is all conjecture on my part; this contract might have been then in the Engineer Office, for I had very few opportunities of visiting Washington, and never inquired respecting the contracts made by that Department.

Question. When Gen. Swift spoke of becoming concerned in a contract, did he state particularly what contract he alluded to?

Answer. I don't know that he did; I conceived it to be the contract for the delivery of stone, at Old Point Comfort: I know of no other at the time.

Question. Did you ever afterwards have any conversation or transaction with Gen. Swift, from which you inferred that he had actually become interested in this contract?

Answer. None that I recollect of.

Question. Are you distinct in your recollection that Major Vandeventer ever had any conversation with you, going to show that General Swift was interested in the Mix contract?

Answer. I do not, distinctly, recollect any such conversation, save on one point alone; and that was, I think, that General Swift had made a purchase of a house in Brooklyn from money derived from the contract; it is so long since this converstation took place, that I cannot pretend distinctly to state all the circumstances of it; and up on reflection, I will say that I am not even certain that this conversation was with Major Vandeventer: I think, however, it was.

Question. Where was this conversation held?

Answer. I don't, distinctly, recollect.

Question. Was it in Washington?

Answer. I believe it was in Washington or Georgetown.

Question. In your letter to Mix, dated March 24th, 1821, you speak of the "unfortunate results that may take place in regard to" Major Vandeventer, if Mix should refuse to comply voluntarily, with what you state would be the decision of the department. To what results did you have reference?

Answer. I apprehended that however honorable the motives or intentions of Major Vandeventer were in joining in this contract, that it would be considered improper by the world at large—that the contract was made under my positive belief, and I may say assurance, lower than it could possibly have been from any other quarter.

Question. Did you understand that Major Vandeventer was to be dismissed from office in case the Secretary of War should have to decide the point in controversy between Mix and Goldsborough?

Answer. No, I did not so understand.

Question. Are you clear in your impression that the letter to Mix, dated 24th March, 1821, was written without any order from the Secretary of War?

Answer. The Secretary never gave me the order.

Question. How happened it that you wrote such a letter without the order of the Secretary?

Answer. I wrote the letter by request of Major Vandeventer.

Question. Were you in the habit of giving orders by the request of Major Vandeventer?

Answer. No.

Question. Do you know that the Secretary of War was absent in South Carolina, in the Spring and Summer of 1818? If yea, when did he leave Washington, and when did he return?

Answer. I think he was absent in South Carolina in 1818, but when he left home or returned I can't recollect.

Question. Did you examine the bond given by Mix to secure the performance of his contract, when it was first presented? If not, when did you first examine it?

Answer. I never did examine it, to the best of my knowledge; the bond was given and filed before I came into the office.

The witness here explained the answer "no" given to the question of Mr. McDuffie, "were you in the habit of giving orders by the request of Major Vandeventer," by adding these words—"unless in the absence of the Secretary of War."

Question by Mr. Sprague. Did you ever have any conversation with any person other than Major Vandeventer and General Swift, relative to General Swift's interest in the contract?

Answer. Not to my knowledge.

Sworn the 11th and subscribed this 12th day of January, 1827.

W. K. ARMISTEAD,
Col. 3d Regt. Artillery.

No. 18.

Testimony of Jesse Scott.

On this 18th day of January, 1827, Jesse Scott, of Georgetown, in the District of Columbia, appeared before the Committee, and deposed as follows:

On the 30th of last month, a gentleman of the name of Mr. Queen came into my house, and advised to get a contract at Old Point; that Mr. Mix had lost it by some letter, as he had understood. I then observed that I had never attempted to get a contract. He advised me then to go to John W. Baker, and inform him of it, so that he might get it. I went across the street to Mr. Baker's store, and asked him who had got the contract? He observed that he believed that Mr. Mix was the lowest bidder for it: but, by writing a confidential letter to some person in New York, he expected or thought he would not get it. About this time Mr. Mix came into Mr. Baker's store, and appeared to be very angry, and observed that the damned scroundel to whom he had written a letter, had published it in an Alexandria paper, and that he had written it when in a passion, and was sorry for it. Mr. Baker replied to him he ought never to write a letter in a passion; that he would injure himself by so doing, if he had not already done so, or to that amount. Mr. Mix then observed that the damned, drunken, gambling scoundrel, to whom he had written his confidential letter—he had paid a dollar to a watchman to take him out of the street, and put him to bed. Mr. Baker told him he ought to be very cautious how he put his pen to paper. Mix then, if I am not mistaken, said he had been to Mr. Secretary Barbour's on the day before, and compared the letter with the one published, and that they did not agree—he said he mentioned "Secretary" once in the letter, but never mentioned Mr. Calhoun's name; when Mr. Calhoun's name was mentioned in the paper several times. He then said he also shewed Governor Barbour a letter written by his Head Clerk; he said the Secretary, in reading it over, came to the letters "Sct." and asked him (Mix) what they meant, saying he did not understand their meaning. Mix said he told them he understood him to mean "Secretary." The Secretary then went on to read the letter, and came to the letters "Sct. rather says you can't do this, and Sct. says you shan't do that." Mix also observed that Mr. Barbour made use of some language that he thought unbecoming. Mix also observed that he went to the President, who advised him and asked him to have the letters published, so as to bring every thing to light. Mr. Mix said, if he did not get the contract he would publish the letters; that they were only mad with him for speaking the truth; that he had dined with Commodore Porter, in New York, who said to him that there was no purity in the Government, and that they were angry with him for telling the truth. He (Mix) also said it was in the mouth of every person in Washington, that Mr. Goldsborough had given a thousand dollars for this letter (the letter to Hancock) to publish it. Mr. Baker observed, "perhaps conditionally so." Mr. Mix then said that he supposed he gave two hundred dollars cash to the damned, drunken, gambling scoundrel, Clark, and if he (Goldsborough) got the contract, was to pay him the balance. Mix also observed that if Clark was a gentleman, he would put a brace of balls through him. Mr. Purley, a stone quarrier, who was present, observed that he thought it very curious that Goldsborough was not at Court to attend to the trial between Mr. John W. Baker and him (Goldsborough.) Mr. Mix then said that Goldsborough was at a damned sight better court, in buying that letter to publish it. I believe this all, or the sub-

stance of all, the conversation I heard on that occasion, as I then left the room.

Question by Mr. Floyd. Is this your signature to the paper now shown to you, and marked D? If so, who requested you to prepare the statement therein contained?

Answer. It is my signature; the statement was prepared at the request of Mr. Richard T. Queen, and was then handed by me to Major Vandeventer.

Question by Mr. Wright. Had you any conversation with Major Vandeventer, or any other person except Mr. Queen, about reducing it to writing, before it was so reduced?

Answer. No, Sir, and never before saw Major Vandeventer, to the best of my knowledge; and should not know him now, if I were to meet him.

Question by Mr. Wright. How came you to present the affidavit to Vandeventer, and what conversation had you with him at the time you presented it to him?

Answer. By the request of Mr. Queen, I carried the affidavit to Mr. Vandeventer's office; after reading it, he asked me if I would swear to it? I told him I would—and did do it. When I offered the paper to Major Vandeventer, I observed, in handing it to him, that I was requested to do so by Mr. Queen.

Question by Mr. Wright. Did Vandeventer, when you presented him the paper, express any surprise that Queen should have requested you to deliver him the paper?

Answer. No, sir.

Question by Mr. Wright. You have observed that Mix said he had shown Secretary Barbour a letter from the Head Clerk, and that he in reading came to the word "Sct," and asked him what the letters meant—Did Mix, when speaking of having shown that letter, mention the name of Barbour, or was it your inference from the conversation that Mr. Barbour was the person alluded to?

Answer. He mentioned "Secretary Barbour."

Question by Mr. Wright. Have you knowledge of any contract with the Department of War, whilst Mr. Calhoun was Secretary of that Department, in which he was concerned, or in the emoluments of which he participated?

Answer. None, sir.

Sworn to and subscribed this 13th day of January, 1827.

JESSE SCOTT.

Exhibit D.—Accompanying the testimony of Jesse Scott.

WASHINGTON COUNTY, GEORGETOWN, }
District of Columbia. }

On Saturday last, (the 30th December, 1826,) I called at the store of John W. Baker, about 8 o'clock in the morning, and spoke to him about a contract, and asked him, "who had the contract," alluding to the contract at "Old Point;" he told me that Mr. Mix was the lowest bidder, but having written a confidential letter to some person in

New York, in a passion, he was thrown out of it, (as he understood.) Mr. Mix here came in, and appeared to be in a passion, and observed, "that the damned scoundrel, to whom he had written a confidential letter, some time past, in a passion, for which he was sorry, had published it in an Alexandria paper." Mr. Baker then observed, "that he should not write a letter in a passion; that he was injuring himself, and had, perhaps, already injured himself by it, in some measure." Mr. Mix then replied, that "the damned scoundrel, to whom he had written the confidential letter, was a drunkard and a gambler, and that he had to pay (or) paid a dollar to a watchman, to take him out of the street, and put him to bed, and that if he was a gentleman, he would put a brace of balls through him." Mr. Baker then, the second time, observed, that he ought to be very cautious how he used his pen. Mr. Mix then observed, that he had been to Secretary Barbour's the day before, and that he, and the Secretary had compared "the letter" with the one published, and that they did not agree, because *he* had only used the word "Secretary," once, and had not mentioned Mr. Calhoun's name; whereas, in the paper, Mr. Calhoun's name was used several times. Mr. Mix, then further said, that he had shown Secretary Barbour a letter from the head Clerk; that the Secretary, in reading said letter, came to the letters "S. C. T." who asked him, (Mix,) what they (the letters) meant, for that he did not understand it? Mix answered, that he should take them to mean, "Secretary;" and went on to say, that, said "S. C. T." said, "you could not do this, and you should not do that;" and that Governor Barbour said, he could not understand what "S. C. T." meant; that he then told Mr. Barbour, that he took the "letters" to mean "Secretary;" and that Governor Barbour then made use of remarks, which he thought unbecoming him, (or words to the same import;) that he (Mix) then went to the President's, who told him to have all the letters published, in order to bring all to light. Mix then further observed, that if *he* did not get the contract, he would publish them, (the letters,) and that they were only mad with him for speaking the truth; and said, that in dining with Commodore Porter, in New York, he, (P.) remarked, that there was no purity in the Government, and that they were angry with him, for speaking the truth; and Mix further observed, that it was in the mouths of every person, in Washington, that Goldsborough had given one thousand dollars to Clark, for the "letter," (alluding to the letter handed to Gov. Barbour.) Mr. Baker then observed, perhaps conditionally, Sir. Mix then said, that Goldsborough had given, he supposed, $200 cash, to the damned drunken, gambling scoundrel, and that if he (G.) got the contract, he was to pay him the balance. A gentleman being in the store, at the time, by name Purly, observed that he thought it very curious, that he did not see Mr. Goldsborough in court, during the trial between him (G.) and Baker. Mix replied, that he, (G.) was at a damned sight better court, about buying this letter, in order to publish it.

JESSE SCOTT.

Sworn to, before me, this second day of January, 1827.

R. JOHNSON,
Justice Peace.

No. 19.

Testimony of Gideon Davis.

On this 13th day of January, 1827, Gideon Davis, of Georgetown, in the District of Columbia, a Clerk in the Department of War, appeared before the Committee, and being duly sworn, deposed as follows:

The only information I have, in relation to a letter signed Elijah Mix, and addressed to "Hancock," and which has appeared in the public prints, arises from a conversation which took place in my presence, between Col. Vandeventer, and Mr. Nix. I think this conversation was on the 28th December, 1826. I know it was on the morning on which the letter appeared in the Phoenix Gazette. Mr. Vandeventer on that morning came into my room, and requested me to go into his. I did so; and he then requested me to witness a conversation between himself and Mr. Mix. Mr. Vandeventer read to Mr. Mix a letter purporting to be a letter from Mix to the author of "Hancock." When he read a part of the letter, that part which contained the charge against Mr. Calhoun, he stopped, and asked Mix, if that charge was correct. Mix answered that "it was not," or words to that effect, I will not be certain as to the precise terms. Mr. Vandeventer then read the balance of the letter, and then again asked him if the charges, in that letter, were true. Mix again repeated that the statements in that letter were not true. Mr. Vandeventer then asked him if he had written that letter. He said he did not, but that he might have written something contained in that letter. I understood him to say, it was in some other letter, and not in that letter, that he made such statements. He then asked for the paper in which the letter had appeared that morning, and declared, as I understood him, that he would deny the whole of it, through the channel in which it had appeared. This, I believe, is the substance of all I heard or know about it.

Question by Mr. Wright. Are you employed in the War Office as a Clerk, and if so, how long have you been so employed?

Answer. I am employed in the War Office, and have been so employed, as a Clerk, since August or September, 1815.

Question by Mr. Wright. Are your services in that office connected with the Engineer Department.

Answer. Not particularly so. I see generally the correspondence that goes to the Engineer Department, as all written instructions from the Secretary to that department comes under my inspection.

Question by Mr. Wright. Will you relate, if you know any thing of any directions from the Secretary of War to the Engineer Department, connected with the Mix contract?

Answer. I have no knowledge of having ever seen any such instructions, of any description.

Question by Mr. Wright. Did you ever reduce the substance of the conversation, between Mix and Vandeventer, now testified about, to writing? if so, state when and at whose request.

Answer. I did reduce it to writing, and, I think it was the day after it took place; and the request of Mr. Vandeventer.

Question by Mr. Wright. Is the paper now shown you, marked C, the paper to which you refer in your answer to the last question?

Answer. Yes.

Question by Mr. Wright. Was the request of Major Vandeventer to reduce that to writing made at the time of the interview with Mix, spoken of or immediately thereafter?

Answer. It was made immediately after Mix left Major Vandeventer's room—I wrote part of it down that day, but being very much engaged in official duties it was not finished till next day, when it was prepared and signed.

Question by Mr. Wright. What reason did Major Vandeventer give you, if any, for soliciting you to witness the interview between him and Mix?

Answer. He stated to me, that on Mix's coming into his room to make explanations, that he had said to Mix that he would have nothing to say to him on that subject, except in the presence of a witness.

Question by Mr. Wright. What reason did Major Vandeventer give for his request to reduce the substance of the conversation to writing?

Answer. The reason he assigned to me, was, that he was advised to have it published in the newspapers; he afterwards told me that he had been advised not to publish it; but I do not remember that he told me by whom he was so advised in either case.

Question by Mr. Wright. Do you know any instructions, written or verbal, proceeding from the Engineer Department at any time respecting the Mix contract?

Answer. I do not.

Question by Mr. Wright. Have you knowledge of any contract made with the Department of War whilst Mr. Calhoun was Secretary of that Department, in which he was concerned, or in the emoluments of which he participated?

Answer. I have no knowledge of any such contract or contracts.

Question by Mr. Wright. Do you know of any order from the Secretary of War to the Engineer Department, to write the letter of the 24th of March, 1821, signed "W. K. Armistead," addressed to Capt. E. Mix, and now shown to you?

Answer. I have no recollection of any such order—from the multiplicity of business that passes through my hands, it is not likely that I would remember distinctly any thing in relation to such an order. I, however, think there is no such order on the records of the office.

Question by Mr. Wright. Do you know any order from Mr. Calhoun for the recognition of any person other than E. Mix, as interested in any part of Mix's contract? If yea, state particularly your knowledge.

Answer. I have no knowledge of any such order.

Question by Mr. Wright. Do you know of any order or decision made by Mr. Calhoun, touching the bond or bonds given by Mix to secure the performance of his contract? If yea, describe such order or decision.

Answer. I have no recollection of any order upon that subject.

Question by Mr. Wright. Did Vandeventer send for Mix prior to the interview you were requested to be present at on the morning of the 28th December last?

Answer. I do not know, farther than I heard Major Vandeventer say that he considered it a providential circumstance, that Mix came into his room that morning.

Question by Mr. Ingersoll. Is it the practice of the Engineer Department to preserve copies of all official letters which issue from that Department?

Answer. My impression is, that that is the general practice.

Question by Mr. Williams. Did you ever hear Major Vandeventer or any other person, say who were the partners in Mix's contract? If yea, name the partners; the portion of the contract held by each, and the amount received.

Answer. I never heard any person say who were the parties to that contract; my impression is, that I heard Major Vandeventer say, on one occasion, that he had had an interest in that contract; that that interest accrued subsequent to the making the contract, and that it was acquired by purchase; this conversation was subsequent to a former investigation of the subject of that contract.

Question by Mr. Williams. Did you ever know anything of a person in this city by the name of Walker?

Answer. I have no knowledge of any Walker as connected with the Mix contract.

Question by the Chairman. Do you recollect any conversation between Mr. Vandeventer and Elijah Mix, relating to letters which Mix says, in his letter to the author of "Hancock," he had of Vandeventer's, showing that Mr. Calhoun had an interest in that contract? If so, state what you know.

Answer. In the interview between Major Vandeventer and Mix, at which I was present, and which I have described, Major Vandeventer asked Mix if he had the letters described in his letter to the author of "Hancock," he admitted that he had not, and that he never had them.

Sworn to and subscribed, this 13th day of January, 1827.

GIDEON DAVIS.

Exhibit C.—Accompanying Gideon Davis' Testimony.

Memorandum of a conversation and interview had in my presence between Colonel Vandeventer and Mr. Mix, being called by Colonel Vandeventer to witness the same. It was in the War Office, the 28th December, 1826. The Colonel read to Mr. Mix the following part of a letter, purporting to be from said Mix, to the author of "Hancock," dated Georgetown, 1st November, 1825, *viz*: "If any information is wanted on the subject of Mr. Calhoun's infidelity, I have it in my power, I think, to furnish you matter sufficient to awaken any unbiased mind, that he was concerned in the Rip Rap Contract, either directly or indirectly, and have written letters of Vandeventer, which most positively mentions that he was engaged, and received some portion of the contract;" and, after having done so, he asked Mr. Mix, if that statement was true, and he answered, no; he asked him then, if he ever had such letters as are referred to; he answered, he never had, or words to that effect. The Colonel then proceeded to read the balance of the

letter, and, after having finished it, he asked Mr. Mix, if any part of the statements therein contained, were true; he said, they were not; and that he would deny ever having written such a letter; but stated that he may have written some part of it, or, as I understood him, a letter containing some statements therein mentioned. He then inquired for the newspaper, in which it was published, in order, as I understood him, to deny the authenticity of the letter through the same channel.

GIDEON DAVIS.

December 20, 1826.

WASHINGTON COUNTY,
District of Columbia, 30*th December*, 1826.

Personally appeared, Gideon Davis, before me, a Justice of the Peace, in and for the county aforesaid, and made oath, that the foregoing statement is substantially correct, to the best of his knowledge and belief; but is not certain as to the identical words used in every instance, either by Colonel Vandeventer or Mr. Mix.

R. JOHNSON, *J. P.*

No. 20.

Testimony of James L. Anthony.

James L. Anthony, a Clerk in the Treasury Department, appeared before the Committee, was duly sworn, and testified as follows:

In the Fall of 1825, in going to my chamber at the Inn where I lodged, I met Mr. Charles Hill, who observed to me that he had received a very strange letter, and that, if I was at leisure, and would walk up with him to his chamber, he would let me peruse it. I did so, and then saw the letter for the first time, which has since been published, purporting to be a letter from Elijah Mix to the writer of "Hancock," copied on part of a letter addressed by Satterlee Clark to Mr. Hill, with a request from Clark that he would wait upon Mix, and receive from him the evidences in Mix's possession in support of the charges that he had made in his confidential note to "Hancock." Mr. Hill stated to me, that he felt somewhat at a loss what course to pursue. I observed to him, that I knew Vandeventer well, and that I considered the note of Mix to Hancock a base calumny; and that Mix, in addressing a confidential note to an anonymous writer, appeared to me to be both knave and fool; and that, had I received such a communication from Clark, I should have returned it promptly, and leave him to find out some other channel for Mix to convey his slanders in. I do not recollect having any further conversation with Mr. Hill on the subject. I mentioned it to Vandeventer in four or five weeks afterwards, and done it with a view of putting him upon his guard against Mix. I told him that I did not consider the communication of Clark's letter to Hill to me as confidential, but that I would rather not have my name mentioned, or Mr. Hill's, in any steps he might consider it proper to pursue in relation to the subject. I also told Vandeventer that I was not satisfied that I was acting with strict propriety in making to him the communication; that, although

secrecy was not enjoined, yet I considered it a matter left to my discretion, and that, probably Mr. Hill did not expect to hear of any thing farther on this subject.

Question by Mr. Wright.—Do you know whether the contents of Mix's letter to "Hancock" was ever communicated to Mr. Calhoun.

Answer.—I do not.

Question by Mr. Wright. Were you the clerk in the Treasury Department who, in 1818, 1819, and 1820, issued warrants for the payment of moneys?

Answer. I issued the warrants in those years.

Question by Mr. Wright. Do you recollect whether, during that time, any requisition from the War Department passed through your hands for disbursements upon the Mix contract, in the name of any person other than Mix? if so, name them.

Answer. No. During that period warrants issued from the Treasury Department in favor of the Treasurer of the United States, as agent for the War Department, for large or gross sums, under the different appropriations for that Department.

Question by Mr. Wright. Do you know of any person having an interest in the Mix contract, other than Mix? if so, state who they are.

Answer. I do not, except from report.

Question by Mr. Wright. I wish to know whether the report, of which you speak, implicated Major Vandeventer as being concerned, and whether it was before or after you had the conversation with him about the letter to "Hancock?"

Answer. I understand Major Vandeventer was interested. I heard it long before the conversation I have mentioned.

Question by Mr. Wright. Why then were you desirous of putting Major Vandeventer on his guard against Mix?

Answer. I knew that Mix and Vandeventer had had a difference, and I considered that it was probable that part of his confidential note was true, that is, that he had letters of Vandeventer's in relation to the contract, and not knowing what letters Vandeventer had written, and supposing that he probably might have resorted to some address in making a settlement with Mix, that it would be well for him to recollect what he had written to him, not doubting that Mix would make use of his letters, and misrepresent them, to suit his purposes.

Question by Mr. Wright. Why did you not communicate the circumstance of the existence of the letter of Mix to "Hancock," to Mr. Calhoun, or to the Secretary of the Treasury, in whose Department you was?

Answer. I did not consider it necessary, or that it was required of me to become public expositor; and because, as I have already stated, that I did not believe the charges contained in the letter, believing them a calumny.

Question by Mr. Wright. Had you ever any conversation with Major Vandeventer about his interest in that contract? if so, state the time when it took place, and what it was.

Answer. I do not recollect mentioning the subject to him prior to the Fall of 1825, that is, the time of this letter. I made no remark to him concerning the interest he had in the contract; but Vandeventer observed to me, that it was an unfortunate contract for him, in bring-

ing him in contact or connection with Mix, and that the charges made in Mix's note to "Hancock," as they related to Mr. Calhoun and himself, were utterly untrue.

Question by Mr. Wright. Do you know of any person, other than Mix and Vandeventer, as concerned in that contract? if so, please to name them.

Answer. I know of no other person.

Question by Mr. Williams. Do you know whether any money, drawn from the Treasury in the name of Mix, was subsequently paid to any other person? if yea, state the names of those other persons, and the purposes, as far as you know them, for which the money was so paid.

Answer. I do not.

Question by Mr. Floyd. Do you know of any contract made with the Department of War, whilst Mr. Calhoun was Secretary of that Department, in which he had an interest, or in the profits of which he participated?

Answer. I do not

Question by Mr. Floyd. Do you recollect whether or not Clark desired Mr. Hill to procure those papers from Mix, lest he (Mix,) should sell them to Mr. Calhoun or Vandeventer? if so, what do you know.

Answer. This, I think, was part of the letter from Clark to Hill; I know nothing more of this than reading some such expressions in Clark's letter to Hill. This was assigned by Clark as a reason for wishing to get the papers out of Mix's possession promptly.

Question by Mr. Floyd. How long have you been a Clerk in the Department of the Treasury?

Answer. About 18 years.

Sworn and subscribed, this 15th January, 1827.

J. L. ANTHONY.

No. 21.

Testimony of Charles S. Hill.

Charles S. Hill, of the Quartermaster General's office, appeared before the Committee, was sworn, and testified as follows:

Between the 1st and 10th of November, 1825, I received a letter from Major Satterlee Clark, containing a copy of a letter from Mix to him, with a request that I would call upon Mix, and ascertain what documents or evidence he had in support of the facts stated in his letter with some further remarks that he was anxious to get possession of the information as soon as possible, with a view of laying it before Congress at the then approaching session; also, desiring my interference in the matter, not only as a personal favor to him but saying that it was a public duty. His (Clark's) letter also contained one addressed to Mr. Mix, acknowledging the receipt of his communication addressed to the author of "Hancock," and authorizing me to receive any papers he might have touching the subject. This is the substance of the communication I received from Mr. Clark.

Question by the Chairman. Can you furnish the Committee with the letter from Clark to you, referred to?

Answer—Yes, Sir.

The witness then handed to the Committee the following letter, (marked F.)

Question by Mr. Floyd. Did you ever furnish this letter, or a copy of any part thereof, to any person?

Answer. I never furnished a copy of the letter to any person, nor did any person take a copy of it, or any part thereof. I read a part of the letter to an intimate acquaintance, and the letter was read by another.

Question by Mr. Floyd. Do you know how this letter of Mix to Clarke came to be published in the Phoenix Gazette?

Answer. No, Sir.

Question by Mr. Floyd. How long, and in what capacity, have you been employed in the Department of War?

Answer. I came to Washington in the Fall of 1820: at that time I was in the line of the Army, and employed in the Quartermaster's Department. In December, 1822, I was appointed Military Storekeeper on this station, which appointment rendered me liable to do duty in the office of the Quartermaster General, in the War Department.

Question by Mr. Floyd. Do you know of any contract made with the Department of War, whilst Mr. Calhoun was Secretary of that Department, in which he had an interest, or in the profits of which he participated?

Answer. I do not.

Question by Mr. Wright. To whom did you read the letter of Mix to "Hancock," and who is the other person who was permitted to read it?

Answer. I read part of it to General Jesup, and spoke to him, generally, of the other parts of it. This was, I think, within two days after the receipt of the letter. The other person who was permitted to read it, is Major Cross, who is associated with me in office.

Question by Mr. Wright. Have you had any conversation with Major Vandeventer about his interest in the Mix contract?

Answer. I have not.

Question by Mr. Williams. Do you know whether any persons, other than Mix, were concerned in the Mix contract?

Answer. I do not, except what I have learned through the medium of public newspapers.

Question by Mr. Wright. Do you know if Howes Goldsborough had a copy of the letter from Mix to Hancock, before its publication; and, if so, how he came by it?

Answer. I do not.

Question by Mr. Floyd. Had you ever any conversation relative to this letter with Mr. Anthony, of the Department of the Treasury?

Answer. Yes, Sir; and I only now recollect it. At the time of the receipt of the letter, I was living in Georgetown, and Mr. Anthony was my immediate neighbor. I don't think, however, he read the letter; but, upon this subject, my memory is not clear, and I am not willing to speak positively.

Question by Mr. Wright. Did you not call Mr. Anthony to your room, and disclose to him the contents of the letter?

Answer. I can only refer to my answer to the last question in giving an answer to this.

Sworn and subscribed, this 15th January, 1827.

CHAS. S. HILL.

After the witness had signed his testimony, the following question was put to him:

Question by Mr. Floyd. Why did you not communicate this information to Mr. Calhoun?

Answer. I did not place any confidence in it, and conceived he would have looked upon it as a piece of officious impertinence in me had I done so.

CHAS. S. HILL.

Exhibit F.—Accompanying Charles S. Hill's Deposition.

NEW YORK, *November 8th*, 1825.

DEAR SIR: You have below a copy of a letter which I have received from Mr. E. Mix, of Georgetown. If what he states be true, he is in possession of documents of the highest importance to the public, and I have taken the liberty of requesting you to call upon him, and ascertain the facts. I know nothing about the writer of the letter, and shall not make an assertion upon his authority; but if he will permit you take copies of the letters and receipt, of which he speaks, and you know them to be in the hand writing of Vandeventer, upon the receipt of those copies, I will cause an explosion which will blow the late Secretary of War and his chief clerk to the d—l. If I mistake not, the Major, in his examination before a committee of Congress, stated that he had not received any money, nor derived any benefit from the "Rip Rap" contract. Now, if Mix has his receipt for $19,500, on account of the contract, that will do his business; and if he has a letter from Vandeventer, stating that Calhoun was concerned, that will do his business.

If you are willing to do so much for me as I have requested of you, you will not only confer an obligation upon me, but you will be entitled to the thanks of the nation; and I pray you to do it speedily, that I may be able to present every member of Congress, on his arrival at Washington, with positive proof of Mr. C.'s and Major V.'s corruption.

Although my health is not yet perfectly restored, yet I am well enough either to write or fight, and as apt to do so as a Captain of Engineers.

I received your printed handbill, and assure you that the friends of Captain S. are surprised and mortified by his conduct. No one attempts to justify or defend it. Are you not the writer of "Hancock," No. 12?" I have examined the manuscript, and, at first, supposed it was written by Major Cross, but on comparing the writing with the superscription of your handbill, I have changed my opinion.

COPY.

"Confidential to S. Clark, Esq., my name not to be disclosed at present."

"GEORGETOWN, *2d, November*, 1825.

"To the writer of "Hancock." If any information is wanted on the subject of Mr. Calhoun's infidelity, I have it in my power, I think, to furnish you matter sufficient to awaken any unbiassed mind, that he was concerned in the Rip Rap contract, either directly or indirectly, and have written letters of Vandeventer, which most positively mention that he was engaged, and received some portion of the contract, or knew that Vandeventer was making a traffic of it; and when I represented to him the injustice of compelling me to pay the amount of the advance which Vandeventer received, he told me his decision was final, and that there was no appeal, although he must have known the injustice of the decision; and I gave him, at the same time, a receipt, which I had received from Vandeventer, stating that I had paid him $19,500, which he refused to read. Let me hear from you as early as possible, and state what way I shall direct to you.

"E. MIX."

From the tenor of the foregoing letter, you will perceive that the writer wishes to remain unknown at present, and I suspect he wishes to sell the information, of which he is possessed, to Mr. Calhoun, or Major Vandeventer. For this reason, I am anxious to get hold of it as soon as possible.

I am, very respectfully,
Your obedient servant,

SAT. CLARK.

Mr. CHARLES HILL.

No. 22.

Testimony of Samuel Snowden.

Samuel Snowden, of Alexandria, in the District of Columbia, appeared before the Committee, and testified as follows:

Question by Mr. Floyd. Are you not one of the editors and proprietors of the Phoenix Gazette, of Alexandria.

Answer. I am.

Question by Mr. Floyd. How came the letter signed, "E. Mix," addressed to the author of "Hancock," to be published in the Phoenix Gazette?

Answer. I am not aware how it came to be published: I was absent from Alexandria, at the time of its publication.

Question by Mr. Floyd. Do you know who wrote the editorial article, in relation to that letter, and which accompanied its publication?

Answer. I do not, positively, know, but presume the junior editor, William F. Thornton, wrote it.

Question by Mr. Floyd. Do you know of any contract made with the Department of War, whilst Mr. Calhoun was Secretary of that Depart-

ment, in which he had an interest, or in the profits of which he participated?

Answer. I do not.

Question by Mr. Floyd. Have you knowledge of the individuals who were concerned in the Mix contract? if so, state who they were.

Answer. I have no knowledge of any person as concerned in that contract.

Sworn and subscribed, the 15th January, 1827.

S. SNOWDEN.

No. 23

Testimnoy of William F. Thornton.

William F. Thornton, of the town of Alexandria, in the District of Columbia, appeared before the Committee, was duly sworn, and deposed as follows:

Question by Mr. Floyd. Are you not one of the Editors and Proprietors of the Phoenix Gazette, of Alexandria?

Answer. I am.

Question. How came the letter, signed "E. Mix," addressed to the author of "Hancock," to be published in the Phoenix Gazette?

Answer. On Wednesday morning, which was the day previous to the publication of that letter in the Phœnix Gazette, I heard, as a common street rumor, and generally about the house, some communication had been made to the War Department, implicating Mr. Calhoun and Mr. Vandeventer in the profits of the Rip Rap Contract. In the afternoon of the same day, it was communicated to me by Major Haughton, that a letter from Mix to a gentleman in New York had been communicated to the War Department, the result of which would be that Mix would lose a contract which, otherwise, he would have gotten. I inquired of Major Haughton, whether he could refer me to any source where I might obtain more correct information. He said that Major Satterlee Clark, formerly of the Army, was then at Williamson's tavern, and if I could procure an introduction to Major Clark, he expected that he would have no objection to give me the information I desired. I informed him that Major Clark had been an acquaintance of mine, as we had served in the Army together, and that I would call on him, and if his information was satisfactory, would make use of it. I did call on Major Clark after the adjournment of the House of Representatives, stated to him the rumors I had heard, and that his name had been associated with them. He then gave me a history of the manner in which he came by the letter, and the reasons which induced him to place that letter in the War Department: he received the letter during the year 1825, while he was writing under the anonymous signature of "Hancock," a number of strictures upon Mr. Calhoun's administration of the War Department; that he knew Mix to be a great scoundrel, and, in his opinion, a perjured villain; and that he would not sufficiently rely upon any thing coming from him to make use of his information against Mr. Calhoun; he wrote, however, to a friend in Washington, enclosing him the original, or a copy, I am not certain which, of Mix's letter, and

requesting him to see Mix, and endeavor to obtain the authentic papers, upon which Mix had grounded this information; that the gentleman being an officer under Government, declined, on the score of propriety, to have any agency in the matter whatever, and returned Mix's letter: that he afterwards saw Mix in New York, spoke to him on the subject of his letter, which Mix acknowledged he had written, promising at the same time, to furnish the evidence which he then had in his possession, relative to Mr. Calhoun's participation in the Rip Rap Contract, but left the city without complying with his promise; that he never did make any use of Mix's letter in his writings; that when he came on to Washington, a few days before I saw him, he understood, for the first time, I think he said, that Mix had made proposals for another contract, and that he then determined that he would give the Department such evidence of the base character of Mix as would induce it to reject his proposals; that he did carry this letter to the Secretary of War, and explained to him his motive for doing so, which was, in substance, the same he explained to me.

After having received this history of the transaction, and informing Major Clark, that it was my intention to explain it in the Phoenix Gazette, I asked him, if he had any objection to his name being used, or a reference made to him; he said he had not, but it might, perhaps, be as well to use the name of "Hancock," which would answer the same purpose; since every body knew that he was the author of the communications in the New York papers, over that signature. I then observed to him that I should be glad to get a copy of the letter; he said that, by calling at the War Department, he had no doubt that I could procure a copy, which I informed him I should decline doing. During my conversation with Major Clark, there was a gentleman with him, to whom I was introduced on first entering the room, and whose name I do not now remember; but he was one of those who had made proposals for the pending contract. He called me aside, and told me that, while the letter was in the possession of Major Clark, he had taken a copy of it, which he was satisfied was a true copy, even to the spelling, and that, if I thought it would be of any service to me, I might take a copy of it, under an injunction that his name was not to be referred to, since he expected that, if Mix lost the contract, he might possibly get it. I caused my Clerk to take a copy of the letter—I reading to him while he wrote; that letter I published, preceded by my own comments. After handing the manuscript to my printers, I left the office, and did not see the paper that evening until it was too late to correct an error, which I discovered had been made, that of omitting the $19,500; the word "Calhoun," introduced into the letter three times within brackets, was done by myself; that being the usual mode of printers to shew when interpolations are made, for the purpose of making the sense more clear. Upon coming to Washington the next day, I called upon Major Clark, and the gentleman before alluded to, and explained to them the cause of the omission. Major Clark then informed me, that the Secretary of War had returned him the letter, which letter he shewed me, together with the Secretary's envelope. From that time to this, I have held no communication either with Major Clark, or with the gentleman who furnished me with the copy. I will add, that, upon the first interview with Major Clark, he

expressed his decided disbelief of the charges brought by Mix's letter against Mr. Calhoun.

Question by Mr. Floyd. What is the name of the person from whom you received a copy of E. Mix's letter?

Answer. I do not remember: if I were to hear it repeated, it is probable I should remember it.

Question by Mr. Wright. Was it "Goldsborough?"

Answer. I believe it was.

Question by Mr. Floyd. Had you any assistance in writing the editorial article, accompanying the publication of E. Mix's letter; or did you ever consult any person about the propriety of publishing that letter?

Answer. I had no assistance; neither did I consult any person.

Question by Mr. Floyd. Do you know of any contract made with the Department of War, whilst Mr. Calhoun was Secretary of that Department, in which he had an interest, or in the profits of which he participated?

Answer. I have no such knowledge.

Questions by Mr. McDuffie

Question. Did Clark express any unwillingness to permit the letter to be published, in your first conversation?

Answer. He did not, that I remember.

Question. Did you inform any person or persons of your intention to publish the letter? If yea, state the names of these persons, and whether they approved or disapproved of the intended publication.

Answer. I informed no person except Major Clark, Mr. Goldsborough, if that be the name of the gentleman, and my own clerk.

Question. You speak of rumors which you heard on the Wednesday preceding the publication in your paper, of the letter signed "E. Mix," tending to implicate Mr. Calhoun and Major Vandeventer. Can you recollect any of the persons from whom you heard these rumors?

Answer. I can name no person distinctly, till Major Haughton gave me the information: no communication was made, direct to me except by Major Haughton.

Sworn and subscribed, this 15th day of January, 1827.

W. F. THORNTON.

No. 24.

Testimony of Captain J. L. Smith.

Capt. John L. Smith, of the Corps of Engineers, and now employed in the Engineer office of the War Department, appeared before the committee, was sworn, and testified as follows:

I have no knowledge of Mr. Calhoun's having been concerned, directly or indirectly, in the Rip Rap contract, nor do I know of any letters of Major Vandeventer, which have any reference to that circumstance. I know of Mr. Mix's having represented to Mr. Calhoun, the injustice of compelling him to account for all the advance, which had been made originally on the contract. In order to explain this

circumstance, it is proper to state, that, at the commencement of the operations of the contract, an advance, amounting to the sum of ten thousand dollars, was accorded by the War Department, to facilitate the operations under that contract; Mr. Mix, being the only person responsible to the War Department, directly, was held accountable for the liquidation of that advance. It was known, however, to the Secretary of War, that other parties were concerned in that contract. Major Vandeventer, Mr. Jennings, holding from Mix, were these parties, when the Secretary of War determined to have the advance liquidated, by withholding from the avails of deliveries under the contract, one-third of their amount, and applying it to that purpose.

The decision alluded to in the letter of E. Mix, as being final, is not distinctly recollected; but is supposed to have referred to the accountability of Mix, which has been explained. I know nothing of a receipt from Major Vandeventer to Mix, which it is alleged Mr. Calhoun had refused to receive.

Question by Mr. Wright. Do you know of any person or person being concerned in the Mix contract, other than E. Mix?

Answer. I know that Major Vandeventer and Howes Goldsborough & Co. were concerned in the contract. Major Vandeventer, I understood, became concerned in February or March, 1819, at which time, I understood, he had one half the contract. Howes Goldsborough & Co. became interested in April, 1821, as well as I recollect: these are the only persons that have been recognised; Jennings, as I have stated before, held under Mix, and was never recognised. I know the fact of Major Vandeventer's being concerned, from having seen the instrument of writing by which he became concerned; as it was, at one time, filed in the Engineer Department.

Question by Mr. Wright. When did Vandeventer become interested in the contract; and when and how was the knowledge of his interest first communicated to Mr. Calhoun?

Answer. I don't know when he became interested, other than by reference to the instrument of writing I have mentioned. As to the latter part of the qustion, I have no knowledge. The first investigation which resulted in a development of the circumstances relating to the Mix contract, was in the Spring of 1820, I think; it was induced by an anonymous communication to the President, alleging several instances of mal-administration of the War Department, and particularly of the Engineer Department. Among these allegations, was one referring to the connexion of Major Vandeventer with the Mix contract, which gave rise to a statement which was prepared privately, and handed to the President; it was wanted and sent for, before it was finished, and the original rough copy was sent, and no copy was preserved; it was not intended to be recorded.

Question by Mr. Wright. At whose instance, and by whom, was the private statement spoken of, made out; and what were its contents, as near as you can recollect?

Answer. It was prepared by me, by direction of Mr. Calhoun, Secretary of War. It contained answers to the allegations adverted to. Those of them which referred to the Engineer Department, and which, of course, were those only to which the answers referred, I believe to have been comprised in objections to the manner in which

the works were carried on at Old Point Comfort, and particularly to the number of houses that had been constructed, and to the fitting up of a vessel at a very great expense; there was some charge against Gen. Swift, but what it was I don't now recollect. The answers to the allegations were satisfactory to the President, with the exception of those which charged bad economy in the arrangements at Old Point Comfort.

Question by Mr. Wright. Was there any thing in those charges, or in the statement made out by you, relating to the Mix contract, or Vandeventer's or any other person's interest in it; and at what time was that statement made out?

Answer. I have stated that one of the allegations was Major Vandeventer's connection with it; I have also stated that it was in the Spring of 1820, but the month I cannot name.

Question by Mr. Wright. Had you any conversation with Mr. Calhoun, about his being satisfied with Major Vandeventer's participation in that contract, if so, relate it?

Answer. I have had a conversation with Mr. Calhoun respecting Major Vandeventer's connection with the contract; but so far from his expressing himself as being satisfied, he told me Major Vandeventer must leave the office, unless he should abandon his connection with the contract. I have heard Mr. Calhoun frequently express his regret at Major Vandeventer's connection with the contract.

Question by Mr. Wright. At what time did the conversation you have mentioned in your last answer, take place with Mr. Calhoun?

Answer. The conservation referred to in the first part of the answer, in which Mr. Calhoun expressed his determination to put Major Vandeventer out of the office, unless he should relinquish his interest in the contract, occurred some time before Goldsborough & Co. became interested in the contract, and was induced as, I believe, from the determination of Mr. Calhoun, to make the decision which has been adverted to in a previous part of the testimony, and which might operate immediately against the interest of Mix; because that decision would be unfavorable to the interest of Vandeventer, if he still continued to hold an interest in the contract.

Question by Mr. Wright. When did Goldsborough and Co. become interested in the contract?

Answer. On the 13th April, 1821.

Question by Mr. Wright. You say the statement was sent for before it was completed, and the rough draft forwarded; by whom was the statement sent for?

Answer. By the President.

Question by Mr. Wright. Did Mr. Calhoun give any specific directions what facts you shall carry into the statement?

Answer. No.

Question by Mr. Wright. Was Vandeventer ever recognised by the Secretary of War as a party in interest in Mix's contract; if so, at what time, and in what way?

Answer. I don't know of his having been directly recognised at any time.

Question by Mr. Wright. At what time was the instrument of writing you speak of, as showing Vandeventer's interest in the Mix con-

tract, filed in the Engineer Department; and when, for what purpose, and by whose order, was the instrument withdrawn from the Department?

Answer. Some time in the year 1819, to the best of my recollection, the instrument was filed as stated, and I don't recollect that it ever has been withdrawn; it may be there yet.

Question by Mr. Campbell. Have you any knowledge of a person by the name of Walker being concurred in the Rip Rap contract?

Answer. I have not.

Question by Mr. Williams. Was Major Vandeventer indirectly recognised, at any time, as a partner in the Mix contract?

Answer. He was known to be interested in the contract, and with the assent of Mix, his (Vandeventer's) agents were recognised by Col. Gratiot; so far as that may be considered as an indirect recognition, he was so recognised.

Question by Mr. Williams. Do you know whether money, drawn from the Treasury, in the name of Mix, was afterwards paid to any other persons? If so, state the name of those other persons, and the purposes for which payment was made to them.

Answer. I don't know that money was drawn from the Treasury in the name of Mix. It it unusual to draw money from the Treasury in the name of any but disbursing agents.

Question by Mr. Williams. Do you know whether the disbursing agent made payment to any person, other than Mix, under the Mix contract?

Answer. I have stated before, that Jennings held under Mix; money was paid to him under the authority derived from Mix; money was also paid to Goldsborough and Co. I don't know of money having been paid to any other.

Question by Mr. Ingersoll. At what time did Mr. Calhoun determine to have the advance liquidated, in the manner you have stated; and how do you know that he ever did so determine?

Answer. His first decision was communicated through the Engineer Department to Col. Gratiot, in January, 1821, to take effect on the 1st July, 1821. I know that fact of his determination, from my official situation in the Engineer Department.

Question by Mr. Ingersoll. How long have you been employed in the Engineer Department?

Answer. Since April, 1819.

Question by Mr. Ingersoll. Do you know when the bond was received in the Department for the performance of the Mix contract?

Answer. I was not in the Department when the first bond was received, and I have no distinct recollection respecting the second bond, whether it was received before or subsequent to my being in the Department.

Question by Mr. Ingersoll. Did you furnish the Committee, in 1822, with a certified copy of the bond given by Mix, Oakley, and Samuel Cooper, dated 5th August, 1818, with a certificate of R. Riker, approving the security, of the same date?

Answer. In conversation with Mr. Barbour, yesterday, he pointed out to me, among the documents accompanying the report made by the Engineer Department to the Committtee, and at the period referred to,

and observed that the certificate of Riker, which appears to have been written upon the copy furnished as a true copy of the second bond, was not written on the original bond. He inquired if I could explain it. I told him at the time, I had not recollection of the circumstance; that copies of papers prepared in the office by the clerks, were certified to by the officers, on faith of the correctness of the clerk. I have reflected a good deal upon the matter since; have conversed with one of the clerks now in the office, who was in the office at the period alluded to, and, also, with Major Vandeventer; the result of these conversations has made upon my mind an indistinct impression of the reason why the second bond was accepted without the certification, to wit; that the securities on the two bonds were the same, and that the first bond, having the certificate, was supposed to fulfill the object contemplated by the certificate. Respecting the certificate being attached to the copy of the same bond, I have no knowledge.

Question by Mr. Campbell. Was the information communicated to the President, and to which you have alluded, derived from the files of the Engineer Department?

Answer. So much of it as related to the charges against the Engineer at Old Point Comfort, was derived from the files of that Department. So much of it as related to Major Vandeventer and Gen. Swift, was obtained from them.

Question by Mr. Ingersoll. Were the parties to both bonds the same, and was the quantity of stone specified in both bonds the same?

Answer. The first bond was singed by Mix and George Cooper, as the parties to the contract; the second bond was signed by Mix only, as the party to the contract; the quantity of stone stated in the first bond, was one hundred thousand perches; in the second bond, the quantity is stated at one hundred and fifty thousand.

Question by Mr. Williams. By whose authority was the original bond cancelled?

Answer. My answer detailing conversations with Mr. Barbour, Major Vandeventer, and one of the clerks of the Engineer Department, contains all I know in relation to the object of this question.

Question by Mr. Williams. Was Mix in this city at the date of the execution of the second bond?

Answer. I don't know.

Question by Mr. Ingersoll. You say you have no knowledge of Mr. R. Riker's certificate being attached to the copy of the second bond furnished the Committee, in 1822. Was the paper now presented to you, marked H, certified "a true copy," by "J. I. Smith," furnished that committee by you?

Answer. The signature attached to the certificate is mine.

Question by Mr. Ingersoll. Why did you attach to that paper the certificate of R. Riker, approving of the bond, when there is no such certificate on the original bond?

Answer. I have stated that copies of papers prepared in the Engineer Department, were made by the clerks, and certificates of their being true copies were signed by the officers on the faith of the correctness of the clerks, and generally without examining by the officers.

Questions by Mr. Ingersoll. Did you certify that this paper was a true copy, without comparing it with the original?

Answer. I am sure I did, as I would not knowingly certify that to be a true copy which was not so.

Question by Mr. Ingersoll. What clerk made out this copy for you to certify?

Answer. George Bibby, who is now dead.

Question by Mr. Ingersoll. Is what purports to be a copy of Rikers certificate, in the hand writing of Mr. Bibby?

Answer. Yes.

Question by Mr. Wright. Have you knowledge of Mix presenting to Mr. Calhoun about April 1821, a bundle of papers relating to the Mix contract? If so, state particularly what you know.

Answer. I have no knowledge of the fact alluded to.

Question by Mr. Wright. Do you know any thing of a confidential letter written by, or purporting to be written by, Major Vandeventer, connected with Vandeventer's interest in the Mix contract? If so, state what you know, how you became informed, where the letter now is, or what become of it, and if lost, its contents, as well as you recollect.

Answer. I never heard of such a letter before.

Question by Mr. Wright. Do you know of Mix's ever requesting of Mr. Calhoun the return of such a letter, and alleging that such a paper had been withdrawn from his bundle? If so, state particularly what you know.

Answer. I have just stated that I never heard, before, of such a letter.

Question by Mr. Wright. Do you know of Mix's making a request of Mr. Calhoun to have any paper of that kind returned? If so, state what you know relating to that matter.

Answer. My answer is the same as before, but if the question were modified by striking out "of that kind;" I answer that I was in the room of the Secretary of War when Mr. Mix came in and demanded the return of some paper; of the nature of the paper I have no knowledge. I was engaged in business with the Secretary respecting the Engineer Department when Mr. Mix came into the room, and asked for the return of some papers. I don't recollect whether the Secretary handed the papers to him from his table, or whether he referred him to the clerk, but, very shortly afterwards, Mr. Mix returned and said that one of the papers contained in the bundle he had left with the Secretary, was not returned. I left the Secretary's room immediately after; Mr. Mix left the room before me.

Question by Mr. Wright. Was Mr. Vandeventer in the room after Mix demanded the lost paper and before you left it?

Answer. The Secretary of War sent for Major Vandeventer upon the complaint being made by Mix that one of the papers furnished was not included in those returned, and asked him if such was the fact, or if he knew any thing about it; Major Vandeventer replied that all the papers had been returned.

Question by Mr. Wright. If Mr. Calhoun made any observations relating to the lost paper, other than you have stated, relate them.

Answer. I don't recollect any.

Question by Mr. Wright. Were you ever present at any other interview between Mr. Calhoun and Mix, concerning the Rip Rap contract? If so, state what occurred during such interview.

Answer. I may have been present on occasions such as those adverted to, but have no recollection of any particular occasion, or of any thing that transpired concerning the Rip Rap contract.

Question by Mr. Wright. Have you ever seen a letter purporting to be from Vandeventer to Mix, dated the 3d August, 1818, in which there was any allegation that the Secretary directs, or the *Seet*, directs any thing touching the Mix contract? If yea, state particularly all you know relating to it.

Answer. I have never seen such a letter.

Question by Mr. Wright. Do you know of any person, other than Vandeventer, employed in the Department of War, being interested in any contract with that Department while they were so employed? if yea, name them.

Answer. The predecessor of Mr. Calhoun, Mr. Crawford, made a contract with a clerk in the War Department, (Mr. Boyd) for the supply of muskets for the Department; the fact is alluded to in the report of the Engineer Department of the 29th April, 1822, addressed to the committee then engaged in the investigation of the Mix contract. I recollect no other.

Question by Mr. Wright. Have you ever had any conversation with Vandeventer or General Swift, as to their's, or either, interest in the Mix contract? If so, relate it.

Answer. I have already stated that I have had conversation with Vandeventer respecting his interest in the Mix contract. I have never had any conversation with General Swift, in relation to any interest of his in the contract, nor do I believe he ever had an interest in the contract. His affidavit that he had no interest in the contract is sufficient to satisfy me.

Question by Mr. Wright. Do you know of Mr. Calhoun's ever having been interested in any contract made with the Department of War, while he was Secretary of War; or of his participating in the profits of any such contract?

Answer. I do not.

Question by Mr. Ingersoll. Were you one of the arbitrators to settle the difficulty between Mix and Major Vandeventer? If yea, state what you know about the papers being burned.

Answer. I was one of the arbitrators for the purpose stated; the other was Major Dent, the brother-in-law of Vandeventer and Mix. He was staying at my house, and being on friendly terms with both families, (Mix and Vandeventer's) he frequently alluded to hostile feeling which he supposed to exist at that time between them, and expressed a desire that a reconciliation should be brought about. In the course of our frequent conversations on the subject, it was suggested that, as their differences arose from a misunderstanding in relation to their pecuniary affairs, each supposing the other to be his debtor, that the matter might be settled by a reference to friends, and, the statements of each being exhibited, that the correct state of the fact could be ascertained. They, the parties, Mix and Vandeventer, were accordingly invited to meet Major Dent and myself at my house, and to bring with them all papers they had in their possession which had any bearing on the subject of difference between them. They assembled at my house some time in the Spring of 1825, I think in

pursuance of the invitation adverted to, each party provided with the papers necessary to establish his claim. On examining the papers, neither Major Dent nor myself could determine the merits of the relative claims. Major Vandeventer and Mix, each, in sustaining their claims, entered into a warm discussion, which amounted to very little more than crimination and recrimination, as to the designs of each to deprive the other of his just dues. After a while, when the parties became a little more moderate, it was suggested that as it was extremely difficult to ascertain which had right on his side; that it might be for the advantage of both to come to an amicable settlement of their accounts, by releasing each other from all obligations under them. The parties having agreed to this suggestion, it was inquired whether their accounts were embraced exclusively in the papers exhibited, and it was answered that their whole correspondence had reference to their pecuniary concerns. It was then suggested and agreed to, that each party should return to his house and bring with him all letters or communications received from the other, that he might have in his possession. The papers were brought and burned in the presence of Major Dent and myself, without being examined by either, each party having pledged himself that all the papers in their possession were included among those furnished.

Question by Mr. Ingersoll. Was any thing said, at this time, about a person being interested in the Rip Rap contract whose name was to be kept secret?

Answer. There was not, to my recollection.

Question by Mr. Ingersoll. Why did you advise that all papers relating to this contract should be burned?

Answer. For the reasons stated, that their whole correspondence referred to their pecuniary concerns, which it was proposed to settle by a mutual release of all claims.

Question by Mr. Ingersoll. Can you tell the committee what those papers which were burned, or any of them, contained?

Answer. I cannot, because they were burned without being examined.

Question by Mr. Williams. Have you any recollection of the points in contestation between Vandeventer and Mix? if so state them.

Answer. It related to expenses that had been incurred by each in the early stages of the contract, before it had gone fully into operation.

Question by Mr. Williams. At what time were these expenses incurred, and for what purposes?

Answer. I do not recollect distinctly, but it is my impression that Major Vandeventer's claim included responsibilities incurred by him as a friend of Mix, before he became interested in the contract.

Question by Mr. Williams. Who were the persons to whom Major Vandeventer became so responsible?

Answer. I don't recollect.

Question by Mr. Williams. Did you ever hear Mix say that Vandeventer had sold to him the fourth of the contract, which was subsequently sold by Vandeventer to Samuel Cooper, of New York?

Answer. I have, but don't recollect what he said about it.

Question by Mr. Williams. Did you ever hear Vandeventer say any thing on this subject?

Answer. I have no recollection of having heard him say any thing on this subject.

Question by Mr. Williams. Who owned the vessel in the fitting up of which bad economy, in the opinion of the President, had been used, and which you say was not satisfactory to him?

Answer. Government. The explanation of Colonel Gratiot was, that, relying on the experience of Commodore Barron, he had requested him to superintend the fitting up of this vessel, and Com. Barron had gone into greater expenses in effecting that object than he would have authorized, had he been aware of the fact that they would have been made. The vessel was called a "tender," and was intended to be used in plying between Old Point Comfort and Norfolk, or other places, with which communication was necessary in the prosecution of the works, in transporting freight and passengers.

Question by Mr. Williams. Why was it necessary to make a private explanation respecting that transaction?

Answer. The cause of the statement being made privately, was the shape in which the accusation was presented, being anonymous. So much as related to the transaction above stated, was afterwards made the ground of an official correspondence with Col. Gratiot.

Question by Mr. Floyd. When was the Engineer Department organized as it now exists; and when was the Chief Engineer ordered to this place?

Answer. The present organization of the Department, has been the effect of gradual improvement; the Chief Engineer was ordered to establish himself in Washington, as the Chief of the Engineer Department, on the 3d April, 1818. When I entered the Engineer Office, in April, 1819, there was no organization; the letters and papers were not filed, nor was there any arrangement of the drawings, which would admit of a ready reference to them; besides there was a great deal of business in arrear, and a number of voluminous reports were to be entered in the report book; the clerks were employed during such intervals as could be spared from the attention requisite to be given to the current business of the office, in filing and registering the letters and papers, and in bringing up the arrearage business alluded to. It is my impression that more than a year was consumed in effecting these objects.

Question by Mr. Floyd. Do you know whether Mr. Calhoun entertained any suspicion that Gen. Swift was concerned in the Rip Rap contract?

Answer. I have reason to believe that he did not entertain any such suspicion from the fact of his having declared to Commodore Lewis, upon the occasion of a general charge of misdemeanor, being alleged against Gen. Swift, in a communication from Commodore Lewis to Mr. Calhoun, that he would pledge himself to have a thorough investigation instituted upon any charge that he might make against any officer of the Government. Gen. Swift's name was included with that of Maj. Vandeventer and Col. Armistead, in the communication of Commodore Lewis, which has been adverted to; subsequent communications from Commodore Lewis, led to an investigation of

the charge alleged against Col. Armistead, and the result was, an honorable acquital of Col. Armistead of the charge. The charges against Major Vandeventer and Gen. Swift, were not repeated by Commodore Lewis, in such a manner as to warrant the Secretary of War in noticing them.

Question by Mr. Clarke. What were those charges made by Commodore Lewis, against Gen. Swift and Major Vandeventer; and were they made in writing?

Answer. I don't think there was any specific charge; but they were made in writing, and the communications on the subject are now official, although, at first, the letter of Com. Lewis was marked "private;" the files and records of the War Department will furnish the correspondence.

Question by Mr. Floyd. When did Gen. Swift resign his office of Chief Engineer?

Answer. On the 12th November, 1818.

Question by Mr. Floyd. Previous to Mr. Calhoun's going into the Department of War, what was the usage of the Engineer Department in relation to contracts, to records, and the routine of business?

Answer. I can only only answer from my own experience as a superintending Engineer and disbursing agent. I was not called upon by my instructions from the Chief Engineer, to submit contracts for approval, before they were entered into; I nevertheless, in regard to two large contracts that I entered into, did submit them to Gen. Swift of my own accord. Gen. Swift approved of them, and they were entered into without having been submitted to the War Department. I made other contracts of less importance, without consulting the Chief Engineer, upon the general authority vested in me, by my instructions to pursue such measures as should be best adapted to the prosecution of the object committed to my superintendence. As to records, and the routine of business, I am not able to say, distinctly, what was the practice of the Chief Engineer; but it is my impression that no records were kept, loose copies being preserved of communications that were made by the Chief Engineer, and the routine of business being confined, chiefly, to general instructions. I never received particular instructions, not even in relation to the mode of keeping and rendering accounts.

Question by Mr. Floyd. Was there any correspondence from the Department of War, relative to the execution of the Mix contract at the Rip Raps, or Old Point Comfort; if so, can you state the character of that correspondence?

Answer. I don't recollect any correspondence of the War Department, referring to the object of the question, except that in relation to the size of the stone required to be furnished. Mr. Mix contended that he might furnish the stone of any size that was most convenient to himself, as there was no provision in the contract respecting the size of the stone: the Secretary of War, contended, and decided accordingly, that the stone must be furnished of a suitable kind, with respect to size, as well as quality, to fulfill the object contemplated by the Government in entering into the contract: accordingly, in the first instance, he required the contractor to furnish stones weighing

one hundred and fifty pounds or more, and afterwards required him to furnish stones weighing at least one thousand pounds.

Question by Mr. Floyd. What is your impression relative to the manner in which the execution of that contract was enforced?

Answer. I have always considered the manner of the Secretary of War, Mr. Calhoun, alluded to, as just, although it may be considered severe, in comparing it with the manner in which other contracts, of the same nature, were permitted to be executed.

Question by Mr. Floyd. Have you any knowledge of Mix's impression on those points?

Answer. The indulgences granted, by Mr. Calhoun, to the other contracts alluded to, were known to Mix, and were the foundation of frequent complaints from him.

Question by Mr. Floyd. What were the impressions, as to the general conduct of the administration of the Department of War, from 1817, to March, 1825, whilst Mr. Calhoun was Secretary of that Department?

Answer. I will answer what were my own impressions, and what gave rise to them: my own impression has always been, that the War Department had great defects in its organization at the time Mr. Calhoun entered upon its administration, and that during his administration, it attained to as perfect a state of organization, as it was susceptible of. Since I have been employed in the Engineer Department, I have had occasion to hold frequent intercourse with Mr. Calhoun, concerning the details of the Engineer Department. When Mr. Calhoun first commenced upon the re-organization of the Engineer Department, I differed with him in opinion as to the expediency and propriety of some of the measures suggested by him, and carried into effect by his order. I stated my objections to him, but they were overruled, I have since been satisfied of the correctness of those measures.

Question by Mr. Floyd. Do you know when Mr. Calhoun left this city, for South Carolina, and when he returned, during the year 1818?

Answer. I was not in Washington at the period of his departure, or of his return, at the time alluded to.

Question by Mr. Floyd. Have you had any conversation with Satterlee Clark, touching this investigation, or the publication of Mix's letter? if so, state that conversation.

Answer. On the day before yesterday, on my way to the Capitol, to attend the Committee, I was stopped by Major Clark, near Williamson's hotel. The most friendly intercourse has always existed between Major Clark and myself. He commenced some remarks, the object of which appeared to be, to satisfy me that he had had no concern in furnishing the letter, published in the Phoenix Gazette, signed "E. Mix." I told him it was not necessary for him to offer any explanation to satisfy me that he would not be guilty of a discreditable act. He then declared, that, in this business, he acted independently of every one; that, on reading this communication, in the Phoenix Gazette, he had called upon the Editor, and demanded the author of the remarks which accompanied the communication, and the source from which both had been received. The answer of the Editor was,

that he could not give up the name of the author; that the communication was received from too high authority to warrant him in giving up the name. He also spoke of a letter, that had been written from Washington, stating that Goldsborough had paid him a thousand dollars, as a bribe, for delivering up the letter from Mix, and of two letters having arrived at the Post Office of Washington, on the same day; one of them known to be from the gentleman to whom the information alluded to, had been communicated; the other, in the same hand writing, addressed to Major Vandeventer. He stated, as his object in mentioning the circumstance to me, that he wished me to ascertain from Vandeventer, if he, Vandeventer, had made any such communication. I informed Major Clark, that Major Vandeventer had informed me of a declaration having been made, of such a bribe having been offered and accepted, and had been communicated to him; that he (Major Vandeventer) had, at the same time, mentioned to me that he regarded it as a fabrication, and not worthy of the consideration of any one. Major Clark then related to me what had passed between him and Goldsborough; he stated that, having understood that Goldsborough had been underbid, recently, in proposing for a contract, he had taken occasion to inquire of him the truth of the fact, and whether any decision had been made in favor of the bid of Mix, the person who furnished the lower bid alluded to; on learning from Goldsborough that it was not certain that any decision had been made on the subject, he mentioned to him that he had, in his possession, a letter, which, he supposed, if genuine, would prevent the Secretary of War from giving any contract to Mix, if he should become informed of the existence of said letter. He then showed the letter to Goldsborough, and asked him if he knew the writing to be Mix's? Goldsborough replied in the affirmative, and requested permission to take a copy of the letter, which was granted; that, on the morning of Christmas day, he called on the Secretary of War, and handed him the letter, privately, and, after several days, it was returned to him.

Question by Mr. Campbell. Please to state all you know of the letters to which you have alluded, in your last answer?

Answer. On mentioning to Major Vandeventer the conversation I had had with Major Clark, so far as he was concerned, he told me the letter, to which Major Clark alluded, must have been one he had addressed to Mr. Goldsborough, in which he had stated the fact alluded to, and, at the same time, his belief of its being without foundation; that the two letters received, on the same day, in Washington, must have been from Goldsborough, as he had, shortly after, received a letter from him on the subject, and supposed he, Goldsborough, may have communicated with some other friend at the same time.

Question by Mr. Ingersoll. Who determines on the sufficiency of bonds sent to the Department on their arrival there?

Answer. Since I have been in the Engineer Department, the Secretary of War has decided upon the sufficiency of bonds offered in relation to transactions in the Engineer Department.

Question by Mr. Ingersoll. Do the rules of the Department allow a contractor to receive advances, and to enter upon the performance of his contract, before bonds have been received and approved?

Answer. Not since I have been in the Engineer Department.

JANUARY 18, 1827—*Examination Continued.*

Question by Mr. Williams. What contracts did you make without consulting the Secretary of War?

Answer. I made two large contracts, one for the supply of stone, one for the execution of masonry, at Fort Niagara. The contract for stone was with Ephraim T. Gilbert; the contract for the execution of masonry was with Wilcox, McIntyre, and Stewart. Both contracts were made in the Spring of 1816. Besides these, I made a great many small contracts, that I do not now recollect; they have all been published among the documents of Congress; these contracts have all been executed.

Question by Mr. Floyd. Do you know whether the then Secretary of War had any knowledge of these contracts?

Answer. I do not.

Questions by Mr. McDuffie.

Question. When was it that Mix alleged to Mr. Calhoun the loss of a paper as you have testified?

Answer. I don't recollect the date exactly; I think it must have been late in the year 1824.

Question. In the execution of the Mix contract, was there a decision made by Mr. Calhoun that the stone should be delivered from the Potomac, instead of the York river; and have you heard Mix complain of that decision?

Answer. There was a decision of Mr. Calhoun that the stone of York River, being found to be of a quality unsuitable for the purposes for which it was wanted, would not be received; nor would any stone be received that was not of a suitable quality. I don't know that Mr. Calhoun specified the Potomac as the point from which the stone should be furnished. It is proper for me to state that the decision above mentioned, was made before I entered the Engineer Department, and that I can speak of it now only from information derived from others. I know that Mix has frequently complained at the refusal of the Government to receive the stone from York river, agreeably to the stipulations of the contract.

Question. What was the estimated difference in the expense of furnishing stone from these two points?

Answer. I don't know that any estimate has ever been made; but I suppose the difference would be that which would be produced by the difference in the expense of freighting the stone; the distance from York river being not more than a fourth or fifth of the distance from the Potomac; and the value of the stone in the quarry, which Mr. Mix was compelled to pay on the Potomac, and which would have been without expense to him in York river as he owned the quarry.

Question. What difference would these circumstances make in the price, according to the best opinion you can form?

Answer. I suppose the difference of freight would be more than one-half in favor of York river, say three-fifths; the freight, at the time the contract was entered into, was two dollars and a quarter to two dollars and a half per perch, from the Potomac; the cost of the stone

in the quarry, I have learned, was about fifteen cents a perch, at or about that time.

Question. In organizing the Engineer Department, to what extent did Mr. Calhoun bestow his personal attention and labor to the minute details of the system?

Answer. Besides suggesting most of the measures which led to the organization of the Department as it now exists, in the early part of his administration, while I was in the Engineer Department, Mr. Calhoun supervised the correspondence in relation to all important subjects, and entered into the most minute examination of the accounts of the disbursing agents; he devoted himself particularly to the supervision of the accounts. Since I have been in the Engineer Department, it has always been my duty to inspect the accounts; during the period above stated of the strict supervision of the accounts by Mr. Calhoun, I was required to carry the accounts into his room, and to read over to him every item of each account, and to state any objections to them that occurred to me in the progress of reading; it very often happened that objections were made by him to items that I considered to be unworthy of notice, on account of their trivial amount; he would then remark that the efficiency of an inspection depended more upon its being applied to small concerns, which it might be supposed would not attract notice or objection, than to large concerns, which were not likely to be neglected designedly; the effect of this minute inspection, and of frequency of objections to accounts, became manifest by the improvement which was gradually made by the disbursing agents in making out or preparing their accounts. The regulations now existing for the government of the Engineer Department, providing for the accountability for property resulted, from suggestions from Mr. Calhoun; the effect of these regulations, and of the regulations which they superseded, has been such that no measure can be adopted without knowledge being in possession of the War Department, in relation to all facts connected with it; that no estimate relating to an important and extensive object is acted upon without being submitted to the test of an examination of an individual not concerned in making out the original estimate; that no money is asked for without a detailed exhibit of the objects to which it is to be applied, being furnished; that the most minute information in relation to the manner of making, and the effect produced by a disbursement is furnished by the subordinate officers; that moneys being furnished monthly upon requisitions, no defalcations can now occur for a period beyond a month, as it is required before the money is furnished upon the monthly requisition, that an exhibit should be furnished of the money previously obtained.

Question. Are the accounts of the disbursing officers examined in the Engineer Department, before they are sent to the Auditors of the Treasury? if yea, state the difference between such examination and that which is made by the Auditors, and its importance.

Answer. The regulations alluded to, enjoin that such an inspection should be made at the Engineer Department, and it is made accordingly. The difference between the examination made at the Engineer Department, and that made by the Auditors, is, that the former is directed to the necessity and adaptation of the articles charged, for the

purposes for which they were procured; and, also, to the quantities and prices. The examination of the Auditor is intended to ascertain if the disbursements are authorized by existing laws, and if the calculations are correctly made, and the forms of the Treasury Department complied with. The importance of the inspection by the Engineer Department, is, that the objects to which it is directed are of a nature which can be understood by those only who have professional qualification, and which, therefore, it may be supposed the Auditors would not understand.

Question. Was there any examination, other than that by the Auditors, before the new organization of the Engineer Department by Mr. Calhoun?

Answer. I am under the impression that, after I entered the Engineer Department, the practice which had perviously existed of disbursing agents sending their accounts directly to the Auditor, was continued for some time.

Question. Under the new organization and arrangements, can you, at any time, by the documents filed in the Department, ascertain the exact state of every fortification, the amount of money expended, and the progress of the work? if yea, explain the manner of doing it.

Answer. To the question I answer, Yes. The following circumstances will admit of its being done. A report is made, monthly, exhibiting the progress and cost of the work during the month, and of the quantity and cost of the materials procured, and of the portion thereof consumed during the month. At the expiration of each quarter, with the quarterly accounts, are furnished returns of property procured during the quarter, and shewing the portion of it applied, and how applied. These returns constitute the accountability of the agents for the property, in contradistinction to their accountability for the moneys in their possession. At the expiration of each year, terminating on the 30th September, each superintending Engineer furnishes a statement exhibiting, in the most minute detail, the object of every expenditure that had been made, up to the termination of the 30th September preceding, and the same particulars in relation to the year between the periods stated. This statement also exhibits the amount of moneys available for the service of the year, whether derived from appropriations of the year, of balances of former appropriations undrawn from the Treasury, or for the balance remaining in their hands unexpended. The statement first represented, as to the application of the moneys disbursed, corresponds with this exhibit. The balance unexpended on the 30th September, of the year embraced by the report, whether remaining in the Treasury, or in the hands of the Agent, is exhibited, and its contemplated application is shewn. Accompanying this general statement, is a memoir, shewing the progress of the work since its commencement, and detailing more particularly any important incidents which may have occurred in its progress through the year reported upon; also, reporting the number of contracts existing, distinguishing those made during the year, and stating the opinion of the officer with regard to the ability of the several contractors. The results exhibited by the statement and memoir, are illustrated by a drawing, or drawings, exhibiting the exact condition of the work at the termination of the year reported upon.

Question. Did any of the means of enforcing accountability, enumerated in your answers to the foregoing questions, exist under the system which prevailed before Mr. Calhoun came into the War Department?

Answer. There were none other than the regulations established by the Treasury Department, which I suppose were not generally communicated, from the fact that they were never communicated to me while I was a disbursing agent.

Question. Was the general tendency of Mr. Calhoun's improvements to substitute fixed rules, in the place of discretionary power, in the head of the Department?

Answer. It was.

Question. What was the general character of his administration, as relates to the rigid and inflexible enforcement of the general rules established for the government of its subordinate agents?

Answer. That first impression among the Engineer officers was, that the rules, and the mode of enforcing them, were unnecessarily rigid. The present impression, and the impression for some time past, I believe to be directly the reverse of that represented to have been made in the first instance. My own impression respecting the rules, is very favorable to them, as to the effects they are calculated to produce; but I always considered that the effects alluded to, have been produced chiefly by the rigid manner in which they have been enforced.

Question. What was the general character of Mr. Calhoun's administration of the War Department, on the score of fidelity, zeal, and devotedness to the public service?

Answer. I think the best answer to that is a reference to the results that have been produced, during his administration of the War Department, compared with the results produced by the administration of any other Institution in the country. As far as my personal knowledge enables me to answer the question specifically, and the frequency of my intercourse with Mr. Calhoun gave me ample opportunity of acquiring such knowledge, I believe that the fidelity, zeal, and devotedness to the public service, of Mr. Calhoun, during his administration of the War Department, has never been surpassed by any public other in the performance of his duties.

Questions by the Committee

Question by Mr. Ingersoll. Have you examined the contract made between General Swift and E. Mix, of July 25th, 1818? if yea, in whose hand writing is the instrument drawn?

Answer. That writing is Major Vandeventer's.

Question by Mr. Williams. To which of the Auditors were the accounts of disbursing agents submitted for revision and settlement prior to the present organization of the Engineer Department?

Answer. In the year 1816, and in so much of 1815 as was subsequent to the ratification of the peace, the accounts of the Engineer officers were settled, I think, by the Second Auditor. My reasons for supposing so are, that the first account I settled was with Mr. Lee, the Second Auditor, in the beginning of the year 1817; and my next

accounts, in the beginning of the year 1818, were settled by the Third Auditor, Mr. Hagner. Since the year 1818, I know Mr. Hagner has settled the accounts of the Engineers Department.

Question by Mr. Wright. Do you know at what time the book, in which bonds are recorded in the Engineer Department, was procured, and at what time the record was made of the two bonds given by Mr. Mix, dated 5th August, 1818? if so, state when.

Answer. I do not.

Question by Mr. Wright. How long have you known the book existing in the Engineer Office?

Answer. Having, in the answer to the previous question, stated that I did not know when the book was procured, I am unable to answer this question.

Question by Mr. Wright. How long is it since you knew of the existence of that book in the office?

Answer. By its having the hand writing of Mr. Bibby among the records, I know of its having been there before he left the office. I do not recollect, precisely, the date at which he left the office, but I think it must have been after the year 1821.

Question by Mr. Wright. When did you first see the book?

Answer. I first saw it when it was brought into the office by the book-binder. The circumstance that enables me to state this is, that, for a number of years, I had disbursed the contingent expenses of the Department, and must have paid for the book. The date I do not recollect.

Question by Mr. Wright. Will not your memory enable you to state about what time it was received into the office?

Answer. My memory has experienced no change since my answer was given to the last question, in which I stated that I did not recollect the date at which it was furnished to the office.

Question by Mr. Wright. Can you ascertain, by reference to the books or papers of the Office, when you paid for the book?

Answer. I can.

Question by Mr. Wright. Will you do so, and inform the Committee?

Answer. I will, if called upon to do so.

Question by Mr. Wright. In whose hand writing is the body of the letter from Mix to Mr. Calhoun, dated "Georgetown, 18th April, 1821," signifying his assent that Goldsborough should be recognised as a partner in the Mix contract, and now shown to you?

Answer. In mine, the body of the letter; the signature is Mix's.

Question by Mr. Wright. How came you to write that letter for Mix? State all the circumstances that operated to induce you to write it.

Answer. I was present at the house of Mr. Mix, when Major Vandeventer and Mr. Mix, having agreed that such a letter should be written, made a draft of the letter they proposed to write, and requested my opinion if it would answer. I did not think it would answer, on account of its not stating explicitly the object contemplated. I was then requested by them to draft a letter, such as I thought would answer, and accordingly drafted the letter in question.

Question by Mr. Wright. Was you present at that time by request of either or both of these gentlemen? If so, state who requested you to attend, and the reason, if any, given for that request.

Answer. I do not recollect whether it was at the request of both of the gentlemen, or of Major Vandeventer only, that I was present at the time alluded to. I don't know any other object that could have been contemplated by either of the gentlemen, in desiring my presence, than to consult me with regard to the arrangement, when it should be agreed upon, as to its conformity with the views of the Engineer Department. I don't recollect that they assigned to me any reason for desiring my presence; what I have stated I presume to have been their motive.

Question by Mr. Wright. What considerations did Major Vandeventer urge upon Mix, to induce him to send the letter to the Secretary of War?

Answer. I don't recollect.

Question by Mr. Wright. When Goldsborough was recognized as holder of one-fourth of Mix's contract, was he (Mix) exonerated from accountability for one-fourth of the advance of ten thousand dollars made, and notified of his being so exonerated? If so, state when, how, and by whom, he was so exonerated and notified.

Answer. I cannot state by whom, or how, or when, he was notified of his being exonerated in the manner contemplated by the question; but I feel confident of the fact that he was exonerated.

Question by Mr. Wright. Have you seen the envelope covering the cancelled bond of Mix, George Cooper, and others, dated the 5th of August, 1818? If yea, state in whose hand writing the endorsement on that envelope is.

Answer. I have seen an envelope addressed "To Messrs. Samuel Cooper and James Oakley, New York," in the hand writing of Mr. George Bibby; and having upon it, in pencil, the words "Containing a cancelled bond for $20,000," in the hand writing of Mr. G. T. Rhodes.

Question by Mr. Wright. If Mix was exonerated from his liability for the one-fourth part of the $10,000 advanced to him, would there be any entry of such exoneration in the books of the Engineer Office, or that of the Secretary of War?

Answer. There ought to be, and I presume there is such an entry on the books of the Engineer Office.

Sworn to and subscribed, this 18th day of January, 1827.

J. L. SMITH.

Exhibition H, accompanying Capt. Smith's Deposition, Copy of Contract, &c. Certified 29th April, 1822.

This Agreement, made between Joseph G. Swift, on the part of the War Department of the United States, on the one part, and Elijah Mix, of New York, of the other part, witnesseth, that the said Elijah Mix agrees to deliver one hundred and fifty thousand perch of stone, from the banks of York river, Virginia, agreeably to samples this day lodged in the Engineer Department, at Old Point Comfort, and the Rip Rap Shoals, in Hampton Roads, Virginia, at the rate of not less than three thousand perch a month, commencing by the fifteenth day of September, 1818; and the aforesaid Joseph G. Swift agrees to pay, or cause to be paid him the said

Elijah Mix, three dollars a perch, for every perch of stone delivered at the above-mentioned places, agreeably to this contract.

In witness whereof, we have hereunto set our hands and seals, this twenty-fifth day of July, one thousand eight hundred and eighteen, at the city of Washington.

J. G. SWIFT.
ELIJAH MIX.

Witness, C. VANDEVENTER.

ENGINEER DEPARTMENT, *April 29, 1822.*

A true copy.

J. L. SMITH,
Capt. of Engineers.

Know all men by these presents, That we, Elijah Mix, Samuel Cooper, and James Oakley, are held and firmly bound to the United States of America, in the sum of twenty thousand dollars, lawful money of the United States, for which payment, well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors, and administrators, for and in the whole, jointly and severally, firmly by these presents, sealed with our seals, and dated the fifth day of August, in the year of our Lord, one thousand eight hundred and eighteen, and of the Independence of the United States, the forty-third.

The condition of the above obligation is such, that whereas, the above bounden Elijah Mix, has contracted with Joseph G. Swift, United States' Chief Engineer, to deliver one hundred and fifty thousand perch of stone, at Old Point Comfort, Virginia. Now, if the said Elijah Mix does faithfully perform his part of said contract, then the above obligation to be void, otherwise to remain in full force and virtue.

ELIJAH MIX, [L. S.].
SAMUEL COOPER, [L. S.].
JAMES OAKLEY, [L. S.].

Sealed and delivered in the presence of Edward Macomber, for E. Mix.

R. RIKER.

The sureties having been by me duly sworn, I do hereby approve of them as good and sufficient.

R. RIKER.

NEW YORK, *5th August, 1818.*

ENGINEER DEPARTMENT, *April 29, 1822.*

A true copy.

J. L. SMITH,
Capt. Corps of Engineers.

No. 25.

Captain J. L. Smith to the Committee.

WASHINGTON, *January 1, 1827.*

SIR: In pursuance of the desire of the committee over which you preside, of which I had the honor, yesterday, to be notified through

you, I have examined the accounts relating to contingent expenses of the Engineer Department, and have ascertained that the bond book of the Engineer Department is charged at the date of the 12th of April 1821, in an account that was settled on the 3d of October 1821.

I have the honor to be, Sir,
Very respectfully,

Your obed't serv't,
J. L. SMITH,
Capt. Corps of Engineers.

The Hon. J. FLOYD,
Chairman, Sec. House of Representatives.

No. 26.

Testimony of Howes Goldsborough.

Howes Goldsborough, of the town of Havre de Grace, in the State of Maryland, appeared before the committee, was sworn and testified as follows:

I owned on the Susquehannah river large and extensive quarries of grey granite stone, in the year 1821. Subsequent to the contract taken by Mr. Mix, I purchased of Major Samuel Cooper, of New York, a part of his, Cooper's, one-fourth of E. Mix's contract, as will appear by the letter which I herewith exhibit, marked [I.]. The committee will perceive by this letter that, without any manner of concern with E. Mix or Major Vandeventer, in the original taking of this contract, how I became possessed of a part of the Rip Rap contract. I went on and did complete that part of the contract mentioned in Major Cooper's letter, above exhibited.

On inquiry of Major Cooper, what authority he had for the disposal of this portion of the contract, he expressly stated to me, that he obtained his title from Major Vandeventer of the War Department; that Major Vandeventer received his title from Mr. Mix. On requiring from him a legal title, he produced to me a written title from Vandeventer to him, as well as a title from Mix to Vandeventer, which title was shown by me to Mr. Calhoun, then Secretary of War; this was, I think, in the Summer of the year 1822. The cause of my showing these titles to the Secretary of War, arose from this circumstance: After I had purchased of Major Cooper, I applied to Mr. Mix, to know whether the purchase met with his approbation, as he was the original contractor; he expressly stated, that he was happy it had fallen into my hands, as he knew it would now be executed; having received, as I now thought, a full and valid title to the contract, I went on to ship the stone; and having shipped, I think, from four to six thousand dollars worth, for which I held the receipts of the officer of the Government, Mr. Mix, without my having ever had a transaction with him to the value of a cent, ordered Major Maurice, the agent of the Government, not to pay me a cent.

Astonished at this conduct, I applied to Mr. Mix to know the cause, who told me, that, although he knew that I owed him not a cent, yet that Major Cooper and Major Vandeventer owed him large sums, and

that he had concluded, that I should not draw any money until he was reimbursed by Major Cooper and Major Vandeventer; finding that no redress could be had from Mr. Mix I applied to the Secretary of War, Mr. Calhoun, for redress, who immediately summoned Mr. Mix to appear before him, and to state why, after the title papers, which I had exhibited to him (the Secretary) from Mr. Mix, had the approbation he had given for my delivery of stone, he withheld my money. Mr. Mix not choosing to appear before the Secretary, after being so requested, the Secretary gave orders to General Hacomb to instruct Col. Gratiot, of the Engineer Corps, to pay me the money for the certificates, which I held against the Government, and to recognise me as owning the residue of the portion I have referred to, of the E. Mix contract, and to retain the money due Mix, until the Government was reimbursed the advance thus made to me; previous however to this advance, I was required, by Mr. Calhoun, to give bond with two securities for the faithful performance of the contract. As it regards any participation of Mr. Calhoun in the Mix contract, I know nothing, I always discovered in the conduct of that gentleman, strong desire to protect the interest of the United States, as well as to do individual justice.

Question by Mr. Ingersoll. Do you know of any persons, besides those you have named, who were at any time interested in the contract? If yea, state who those persons are, and when, and how, they became interested.

Answer. Robert C. Jennings of Norfolk, was said to own a part and delivered stone; by what authority I have no knowledge.

Question by Mr. Ingersoll. Do you know when, and how, Major Vandeventer became interested?

Answer. I have already spoken as to this point in my general statement; I have no knowledge on this point but what I have there stated.

Question by Mr. Ingersoll. State what you know of the letter from E. Mix to "Hancock," published in the Alexandria Phoenix Gazette?

Answer. During the last Fall, Col. Charles Gratiot, of the Corps of Engineers, issued proposals for sixteen thousand perches of stone, to be delivered at Fortress Monroe and Castle Calhoun, during the year 1827; for which I became with others a bidder. On receiving the bids by Col. Gratiot, it appeared that Elijah Mix was the lowest bidder by twelve cents in the perch; of which fact he obtained a certificate of Col. Gratiot, as I understood. As Col. Gratiot had uniformly said, that the stone which I had previously furnished the Government, being the Susquehannah stone, as well as all the officers and masons with whom I had conversed on the subject, together with the circumstance, as I thought, of the unfair character of Mr. Mix, and that as my material was fifty odd cents in the perch better than that of Mix, I told Col. Gratiot that I should apply to the Secretary of War to give me the contract. I immediately came on to Washington, and stated to the Secretary my claims for the contract, over those of Mr. Mix; that although Mr. Mix's proposal was twelve cents in the perch lower than mine, that yet my stone being twenty-five per cent. or fifty odd cents a perch better stone than his, of which I produced him, the Secretary, certificates signed by high officers of the Government, as well as masons, it clearly shewed that my proposition was, by eight thousand dollars,

or thereabouts, better for the Government than Mr. Mix's; and, in the course of other conversation with the Secretary of War, I did state to him, that I thought there was some respect due to the morality of the country, and did then, also, state to him, that I had heard Mr. Mix had committed acts in the city of New York, that would shew to him (the Secretary of War) that he, Mix, was unworthy of a contract; the Secretary replied, that he would investigate the subject, and that, if found true, he should "hold him in utter abhorrence." The night previous to this conversation with Gov. Barbour, the Secretary of War, sitting at supper at Williamson's Hotel, I was asked by Mr. Edward Wier, what had brought me to the city of Washington; I stated to him I had come here to get a contract from the Government, in which Mr. Mix was concerned; he observed, with respect to Mr. Mix, there was a gentleman at the table, by name Major Satterlee Clark, who could give me much information relative to Mix. With Mr. Clark I had but a very slight acquaintance, but, being introduced to him by Mr. Wier, I stated to him the object of my visit to Washington, and asked him what information he had in his possession relative to improper conduct of Mr. Mix.

He replied, that he, Clark, formerly wrote in the New York papers, under the assumed name of "Hancock," and while writing under that name, he received a letter from Mr. Mix, the same letter which he, Clark, afterwards handed to the Secretary of War; that he, Clark, although not friendly to Mr. Calhoun, did not believe the charges contained in that letter, against Mr. Calhoun, and therefore would publish nothing, in any of the papers, relative to them, because he believed Mr. Mix a base man, and would not reply to his letter in any manner, or have any thing to do with him; that he determined, on his arrival at Washington, as soon as his health would permit, to lay the letter before the Secretary of War; he thought it was due to the Government, and to the present Secretary of War, that he should know it, for if he, Mix, was base enough to calumniate Mr. Calhoun, and charge him with bribery and corruption, that, if Mr. Barbour gave him another contract, he might say the same thing of him, (Mr. Barbour.) For those reasons, and those alone, he would, at ten o'clock the next day, submit the original letter to Gov. Barbour, which letter, he subsequently told me, he did submit to the Secretary. On the night he told me he had this letter, I asked him if he would give me a copy; he said he had no objection to my taking it; in consequence of which, I did take a copy, for my own satisfaction, and with no view, whatever, of making it public. Mr. Clark also told me that he had sent a copy to this city, many months since, from the State of New York, and presumed the contents of the letter could no longer be a secret. I think, the next day after Mr. Clark had shown the letter to the Secretary of War, at Williamson's tavern, a gentleman came in, a perfect stranger to me, whose name or person I never heard of or saw before; he commenced a conversation with Mr. Clark, which conversation I did not hear; both gentlemen, shortly afterwards, approached near me in the room, and Mr. Clark introduced the gentleman to me, by the name of "Major Thornton," whom, I supposed at the time, by calling him Major, was an officer in the army. Thornton immediately began

to converse with Mr. Clark, and told him that he had heard that he, Clark, had in his possession a letter written by Elijah Mix, while he wrote in the name of "Hancock," in the New York papers, which letter, he (Thornton) would be glad to see. Clark told him that he had lodged the original letter with Mr. Barbour, the Secretary of War, otherwise he would let him see it. I observed to Major Clark, that the copy which he had suffered me to take, the night previous, was in my pocket, and at his service. He (Clark,) then observed to me, "let me have it." Major Thornton immediately observed, "let me see it."

I replied to him, that, as I had got the copy from Mr. Clark, I was not willing to let him see it, unless by Major Clark's permission. Clark replied, that he had no objection to his seeing it, as it could not be longer a secret; that he had sent a copy, many months before, as I have before observed, to the city of Washington. In consequence of which permission from Clark, I handed the copy to Maj. Thornton, whose objects and views for seeing it, being a perfect stranger to me, I did not at that moment know. After getting possession of the copy, he went with it to an adjoining room, and was gone but a short time. During his absence, I asked Major Clark who that gentleman was. He stated to me that he had formerly been an officer in the army; that he did not know, but believed, he edited one of the Alexandria papers. I immediately replied to Clark, and during the absence of Thornton, that I was fearful he intended to publish it; that, if so, it met with my decided disapprobation. On Thornton's return to the room, I expressed to him, that I hoped he would not publish it, and bid him to recollect that I had nothing to do with publishing it, and that my name should have nothing to do with it.

Question by Mr. Campbell. Have you any knowledge of any person being a partner in the Rip Rap contract, whose name was to be kept secret?

Answer. I have not.

Question by Mr. Williams. How much did you give for the portion of the contract which you held?

Answer. On twenty thousand perches, I paid to Major Cooper's agent forty cents per perch; and fifty cents a perch for all I delivered above twenty thousand perches.

Question by Mr. Floyd. Was there any person in company with Thornton when he came to Williamson's hotel, or when he came to you?

Answer. There was no person but Clark, when he came to me. I know nothing as to any person coming to the tavern with him. Major Haughton told me that he had informed Thornton that Clark had such a letter. In a conversation with Major Vandeventer, at his office, on or about the day of the publication of Mix's letter in the Phoenix Gazette, he acknowledged to me that he had heard of this letter some months previous; that he had called upon Mr. Mix relative to the said letter; that Mix acknowledged that he had written such a letter to the author of "Hancock;" that it answered his then purposes, and he did not then care a damn about it.

Question by Mr. Floyd. Did you ever pay, or agree to pay, to Satterlee Clark, any thing for the copy of the confidential letter E. Mix

wrote to the author of "Hancock," or for publishing that letter in the Phœnix Gazette of the 28th of December last?

Answer. I never did pay, or agree to pay, to the value of a single cent, for the copy of that letter, or for its publication, and never thought of such a thing. Upon the subject of this question and answer, I have received a letter from Major Vandeventer, which I herewith exhibit. (See it, marked K.)

Sworn and subscribed, this 19th day of January, 1827.

HOWES GOLDSBOROUGH.

Exhibit I, accompanying testimony of Howes Goldsborough.

NEW YORK, *Dec. 26th*, 1821.

GENTLEMEN: I have delayed the acknowledgment of your favor of the 6th of August last, in expectation that the information it afforded me, I should have been able to effect a settlement with Major Maurice, before this time; but, to my utter astonishment, and I fear, my great injury, it will now be long delayed, and perhaps ultimately lost. I have therefore thought proper to address you, and say, that I am disposed to sell you all that part reserved to myself, on fair and honorable terms, for cash, and assign the whole to you, the nett proceeds of which, when the delivery is completed, will amount, agreeable to my calculation, to about $10,000; that is, the 20,000 perch at the 40 cents, will be $8,000, the remaining number of perch at 50 cents, I think will be about $2,000; making in all, as above stated, $10,000. Now, what will you give me in cash, and take the whole to yourselves?

You are pleased to observe, that I may think myself well off that I have got rid of it. I should have been better pleased if I had not meddled with it, or if I could say I had realized any benefit from it, which has not yet been the case; but, on the contrary, am in a fair way of losing nearly $7,000.

I will esteem it a particular favor if you will consult yourselves on this subject, and inform me, as soon as convenient, on what terms you are disposed to meet this proposition, and you will oblige

Your respectful and unfortunate humble servant,

SAM COOPER.

MESSRS. HOWES GOLDSBOROUGH & Co.

Exhibit K, accompanying testimony of Howes Goldsborough.

January 2, 1827.

DEAR SIR: To-day an affidavit was voluntarily handed to me by a respectable citizen of Georgetown, which details a long and varied conversation of Mr. Mix, in which, among other things, he calumniates you, in saying, "It is in the mouth of every person in Washington, that Goldsborough had given $1,000 to Clark for the letter, alluding to the letter handed to Governor Barbour." As I shall be obliged, in defence of myself, to use this affidavit to show the calumnious character of this man, I promptly apprize you of it, and

tender the assurance of my utter disbelief of every thing mentioned in it, as will every body else who may see it.

In haste, your friend,

C. VANDEVENTER.

HOWES GOLDSBOROUGH, Esq.
Havre de Grace.

No. 27.

Testimony of G. T. Rhodes.

G. T. Rhodes, Chief Clerk in the Engineer Office of the War Department, appeared before the Committee, was sworn, and testified as follows:

I have no knowledge of any act going to implicate Mr. Calhoun, in any manner whatever, in connection with the subject before this Committee. I entered the Engineer Department as the principal Clerk in the year 1819, and have continued in that capacity till the present time.

Question by Mr. Ingersoll. When was the contract of E. Mix, which is dated 25th July, 1818, recorded in the Department, and by whom?

Answer. When it was recorded, I do not distinctly remember. I think it was in 1822. My reason for so thinking, is the fact, that the bond book, and, probably, the contract book, were procured about the same time; and I find from vouchers in the office, that the bond book was procured in the last quarter of 1821. I judge that both books were procured at or about the same time. The bonds and the contracts, according to my recollection, lay in the Engineer Office for some time after I entered it, and were of course not recorded before I came into the office. I recorded the contract alluded to in the question.

Question by Mr. Ingersoll. When did you first see that contract?

Answer. Probably a short time after I entered the office. I have no distinct recollection as to the time.

Question by Mr. Ingersoll. Here is a bond (cancelled) signed by E. Mix, George Cooper, Samuel Cooper, and James Oakley, for the delivery of one hundred thousand perches of stone, dated 5th August, 1818. Do you know who made the memorandum of its being cancelled, which appears on the back of this instrument, and when was it made?

Answer. The memorandum is in my hand writing. I would remark, by way of explanation, as to my agency in the endorsement on this bond, that the bonds, contracts, and other papers appertaining to the Engineer Department, were in a state of confusion, at least not arranged with any method, until some time after I came into the Engineer Department. It became my duty to arrange those papers, or some of them; and, judging from the face of the bond, which is evidently erroneous, I made the endorsement, probably with a view to a memorandum, not recalling at this time, that I had any specific authority for so doing. The error referred to, as appearing upon the face of this bond, and just stated, consists in re-

citing "one hundred thousand perch of stone," instead of one hundred and fifty thousand perches of stone, the quantity contemplated by the contract to which the bond intended to refer. In answer to that part of the question which refers to the time at which the memorandum or endorsement in question was made, I have to state, that I have no distinct recollection; but suppose I made it at the time I took up the loose bundle of papers in which it was contained, for the purpose of regularly filing them away.

Question by Mr. Ingersoll. Do you know who drafted that bond?

Answer. I do not; it is a hand writing entirely unknown to me.

Question by Mr. Ingersoll. When contracts are made, are the forms of the required bonds furnished in blank at the Department?

Answer. Since I have been in the Department, the bonds relating to contracts made by the Engineer Department at Washington, have been drawn up in that Department, not by any specific form, but in a way adapted to the nature of the obligations contracted under them.

Question by Mr. Ingersoll. Have you examined the envelope enclosing the cancelled bond? if yea, in whose hand-writing are the following words, in pencil—"containing a cancelled bond for $20,000?"

Answer. I have examined the envelope; the endorsement in pencil is in my hand-writing. I cannot recollect when it was made.

Question by Mr. Ingersoll. Here is another bond, signed by E. Mix, Samuel Cooper, and James Oakley, for the delivery of one hundred and fifty thousand perches of stone, also dated 5th of August, 1818. Do you know when this was received at the Department?

Answer. I do not.

Question by Mr. Ingersoll. Did you consult with any person in the Department about cancelling the bond for 100,000 perches?

Answer. Not that I recollect.

Question by Mr. Ingersoll. Was the envelope enclosing the cancelled bond, and directed to "Messrs. Samuel Cooper and James Oakley, New York," ever forwarded to those persons?

Answer. I should say not, as I found the other day the envelope containing the cancelled bond in an old file of papers, in which it appears to have been lying from the time in which it was placed there.

Question by Mr. Williams. Do you know whether any order was given, by the Secretary of War, for cancelling the original bond?

Answer. I have no specific recollection on the subject, but, from the fact of my endorsement, it must have been understood that competent authority rested in the Engineer Department for so doing.

Question by Mr. Williams. Who was the person in whom this competent authority rested at the time?

Answer. In the Chief Engineer, or his assistant at the time. Colonel Armistead, or General Macomb, was Chief Engineer at the time.

Question by Mr. Ingersoll. Who were the Clerks in the Engineer Department, from 25th July, 1818, till the period when you entered the Department?

Answer. Lt. George Blaney was acting as an aid or assistant to General Swift till 17th April, 1819, and continued attached to the office till 1st March, 1820. John R. Beall was a clerk in the Department from, say, 1st January, 1818, till 18th April, 1820. Dean Wey-

mouth was also in the office, though not regularly a clerk, from ——— till March, 1819, and probably some time afterwards.

Question by Mr. Ingersoll. Where are those persons now?

Answer. Captain Blaney is charged with the superintendence of a fort under construction in North Carolina; John R. Beall, I believe, is residing in some part of the State of Maryland. I do not know where Dean Weymouth resides.

Question by Mr. Ingersoll. In whose hand writing is the bond for one hundred and fifty thousand perches; and state, if you know the hand writing of the memoranda on the outside?

Answer. I do not know in whose hand writing the bond is; of the memorandum in these words, "Elijah Mix bond $20,000, to deliver 150,000 perch of stone at the Rip Rap Shoals, Hampton Roads, 5th August, 1818," I am ignorant. The second memorandum, in these words, "Recorded B. B. page 15," is in the hand writing of George A. Bibby, deceased.

Question by Mr. Williams. Can you account for the difference between the contract which stipulates for 150,000 perch of stone, and the original cancelled bond which provides only for 100,000, and the difference of parties?

Answer. I cannot.

Question by Mr. Williams. There appears to be a difference between the endorsement on the cancelled bond, and the entry in the record book, the latter stating that the bond was "cancelled by order of the Secretary of War, by a new bond, of the same date," the former omitting to state that order of the Secretary of War as a reason for cancelling the bond; can you explain this?

Answer. The endorsement on the cancelled bond is in my hand writing, and is explained, so far as it is explicable by me, in my answer previously made to the question in relation to it. The entry in the record book is in the hand writing of George A. Bibby, and the remark "by order of the Secretary of War," made by him, must be presumed to have been made under competent authority existing either in the Secretary of War, the Chief Engineer, or his representative.

Question by Mr. Wright. Was the endorsement on the bond made by you, made before or after the record in the bond book, and the entry in the margin of the book opposite the record of the bond?

Answer. I do not know, Sir; can't tell.

Question by Mr. Wright. Were there no other bonds connected with contracts in the Engineer Department found by you when you came into the office, then those recorded? If yea, why were they not recorded?

Answer. When I came into the Department, there were no bonds on record. All those bonds available were afterwards recorded, to the best of my knowledge.

Question by Mr. Wright. Have all the bonds connected with contracts in the Engineer Department, since the record of the Mix bond, been recorded in the bond book? and if not, why have any been omitted?

Answer. I believe they have all been recorded; if any have been omitted, of which I am not now certain, they must be unimportant local bonds, taken by agents superintending operations under the directions of the Engineer Department.

Question by Mr. Wright. Why were not the bonds you found unrecorded, entered in the record book in the order of their dates?

Answer. They should have been so entered; probably any irregularity of that sort is ascribable to inattention, though the order of time cannot be accurately kept, because they do not come into the office in the order of their dates.

Question by Mr. Wright. How does it happen that nearly all the bonds recorded in the bond book before the year 1826, relate to contracts connected with the works at Old Point Comfort, the Rip Raps, and Dauphin Island; were there no other works under contract with the Engineer Department, at that time in progress?

Answer. Because, as it is presumed, there were no other bonds received at the Engineer Department. Anterior to 1826, there were other works in progress, namely, Fort Diamond, at New-Yort, Fort Delaware, at the Pea Patch Island, Fort Washington, on the Potomac, the work at Mobile Point, and those at the Rigolets and at Chef Menteur, Fort Adams, Fort Hamilton, two forts in North Carolina recently commenced. In relation to Fort Delaware, Fort Diamond, and Fort Washington, Fort Adams, Fort Hamilton, and the works in North Carolina, no bonds, I believe, were taken, those works being entrusted to the local Engineers, who, I believe, made no contracts of any importance. Bonds were taken in reference to the works at Mobile Point and the Rigolets, including Chef Menteur.

Question by Mr. Wright. Did you make the memorandum in pencil mark, on the 23d page of the bond book, containing the words "handed in to Second Comptroller's Office, 22 May, 1823. G.T.R." if yea, how came you by the original bond, and how do you account for the entry in the next page made by Mr. Bibby, that he delivered that bond, among others, to the Chief Clerk of the Comptroller's Office. the 12th November, 1821?

Answer. I made the pencil memorandum. I cannot answer the latter portion of the question in a satisfactory manner, but would suggest, by way of a possible mode of accounting for the discrepancy in the entries referred to, that the original bond to which the pencil mark is attached, had been withdrawn from the Comptroller's Office for temporary reference, and returned to said office at the time stated in the pencil mark.

Question by Mr. Wright. Were all the contracts made with the Engineer Department since you have been in the office, or found by you unexecuted when you came into office, entered of record on the contract book: if not, why were any omitted?

Answer. All the original contracts, except those that were fulfilled or abrogated, by which I mean to express the idea that they were unavailing; those made by C. W. Wever, Superintendent of the Cumberland Road, and possibly some contracts of minor importance, were so recorded. Where copies were received, in some cases, they were recorded, and in others, an abstract of their contents was entered in the margin of the contract book; those of Mr. Wever having been thus referred to in the margin.

Question by Mr. Wright. Do you know who wrote the words "advertised" and "not advertised" in pencil mark on the record book of contracts shewn to you? If yea, name the person, and state why those words were written, and what they mean.

Answer. The words "not advertised" (in pencil) were written by Capt. J. L. Smith, and the word in pencil "advertised" is also in the hand writing of Captain Smith. They were written no doubt, to ascertain whether or not those contracts were advertised with a view to furnish information of that character, that is, whether advertised or not.

Question by Mr. Wright. Have you knowledge of any contract made by the War Department while John C. Calhoun was Secretary of that Department, in which he was a party in interest concerned, or in the emoluments and profits of which, he, in any manner, participated?

Answer. I have none.

Sworn to and subscribed, this 20th day of January, 1827.

G. T. RHODES.

Elijah Mix's second examination.

No. 28

JANUARY 20TH, 1827.

Elijah Mix, again appeared before the Committee and was further examined and testified as follows:

Question by Mr. Floyd. Are the papers now shown you, those you enclosed to the Committee on the 13th of the present month?

Answer. They are.

Question by Mr. Floyd. Is not the paper now shown you, marked "Paper No. 1," being one of the papers exhibited with the previous question, the paper you had with you and declined to give up to the Committee during your first examination?

Answer. It is.

Question by Mr. Floyd. Are the other two papers enclosed by you at the same time to the Committee, and now again shewn to you, both copied from the original at the same time?

Answer. They were copied at different times, probably a month separate from each other, and, as near as may be, the substance of the letter lost at the War Department. They were copied previous to the writing of the letter to Hancock; the less of that letter was one of the reasons for writing the letter to Hancock.

Question by Mr. Floyd. What time was the paper marked No. 1 copied?

Answer. I cannot pretend to say.

Question by Mr. Floyd. At what time were the two copies made?

Answer. I have already stated that they were made before I lost the original at the War Department, probably a month or two before that event.

Question by Mr. Floyd. Where were the different copies taken, No 1, No. 2, and No. 3?

Answer. I think they were all taken at my house, it is, however, probable, one might have been taken at the War Department when I sent the original to the Secretary of War; of this I am not certain.

Question by Mr. Floyd. Can you designate that one?

Answer. No, I cannot, because I am not certain of the fact; they were taken at times when I wished to disclose to the Secretary a subject of which I thought he was entirely ignorant. I was oppressed at the time, and was not very particular in making either of the copies; as an instance of which oppression, I now exhibit to the Committee an original paper, (marked No. 4.) being the letter I wrote and sent through the Post Office to the Engineer Department, recognising Goldsborough as interested in my contract, and which was brought back to me by Captain Smith, with alterations written in the body thereof in pencil, and I was informed by Captain Smith, that the letter must conform to these alterations before it would be received by the Department; these alterations made a difference against me of 40 cents a perch on 34,000 perch of stone.

Question by Mr. Wright. Was the letter now shewn to you, marked L. signed by you?

Answer. Yes.

Question by Mr. Wright. In whose hand writing is the body of that letter? where was it written? was any person present at the writing and signing of that letter? and, if so, name them?

Answer. Capt. John L. Smith, of the Engineer Corps: it was written at my house in Georgetown—Samuel Cooper and Major Vandeventer were present at the writing and signing of the letter, and absolutely coerced me in the signing of the letter, by stating that I should lose my whole contract if I did not sign it: the letter says, "I have no objection to his being recognised by the Government as the owner thereof, and to their giving orders for payment to be made to him, or to such persons as he may authorize to receive it for him, without further authority from me for the deliveries that have already been, or that may hereafter be made thereon." By the papers which I now herewith also exhibit, marked M, it will be seen that he, Mr. Goldsborough, had delivered, prior to the 21st December, 1820, 5,566 perch of stone on my contract, for which he received payment, except for fifteen hundred perch: for which, I refused that payment should be made on my account, which was the cause of the letter being thus worded on the 13th April following.

Question by Mr. Floyd. Did he deliver the 5,566 perch of stone on that part of the contract which was still yours, or on that part which you had sold to Vandeventer, and which Vandeventer sold to Cooper, and which Cooper sold to Goldsborough?

Answer. He delivered the stone after Vandeventer had resold that part of the contract to me, and given me a bill of sale for it, which bill of sale I exhibited to the Committee on my former examination dated the 19th Oct. 1819.

Question by Mr. Williams. Do you know any thing of an original bond relating to your contract, which was cancelled by the substitution of a new one? if yea, is the paper now shown to you, that original bond?

Answer. This is the original bond.

Question by Mr. Williams. Why was this bond given to ensure the delivery of 100,000 perch, if the contract was made for the delivery of 150,000 perch of stone?

Answer. I never knew till now, that the bond was for only 100,000 perch of stone; I supposed it was for 150,000, and presume the difference was occasioned by an error in writing the bond.

Question by Mr. Williams. State the time, place, and all other circumstances attending the execution of the two bonds?

Answer. The first bond was first presented to me for signature, at the time Major Vandeventer brought on the advance of $ 10,000, and, as near as I can recollect between the 8th and 10th of August, 1813. The other bond, was executed in the Fall of 1820. I was in New York; it was sent on to me with a request that I would get Mr. Oakley again to sign it—I did not know for what purpose. I went to the Recorder of the City in company with Mr. Oakley, where the bond was executed, Mr. Oakley taking the oath prescribed as to his sufficiency.

Question by Mr. Williams. At what time, and in what place, did you sign the articles of agreement or contract now exhibited to you? And in whose hand writing are those articles?

Answer. I signed it on the day and date mentioned in the paper, and in the Engineer Department. The writing is that of Major Vandeventer.

Question by Mr. Williams. Did you write to Major Vandeventer from New York, between the 25th of July, 1818, and the 7th of August, of that year? if yea, relate what you communicated to him on the subject of this contract.

Answer. I wrote to Major Vandeventer immediately after I arrived in New York, but don't recollect any thing of what I therein said on the subject of the contract.

Question by Mr. Sprague. Have you any letter or memorandum which would enable you to fix the time of the execution of the second bond?

Answer. Yes, I have at home a letter of Major Vandeventer's, which will enable me to ascertain the date of the execution of the second bond.

The witness then, intimating that he might have the letter in the house, retired and, in a short time, returned, and presented to the committee the letter marked N, saying that he had found it in his pocket.

After which the Committee adjourned till Monday.

MONDAY, JANUARY 22, 1827.

Mr. Mix's examination was resumed as follows:

Question by Mr. Floyd. Why did you make this erasure in this letter of Major Vandeventer to you of the 17th of October, 1820, and what words are they which you have so blotted, and when was the erasure made?

Answer. I made it because I was requested to put out every thing which related to any person as concerned in the contract other than Major Vandeventer. The erasure was made prior to the investigation of 1822. I don't recollect what are the words blotted out.

Question by Mr. Floyd. By whom was you requested to make the erasure?

Answer. By Mr. Vandeventer. He requested me to give up the letter, together with other letter of his. I refused to do so, and he then requested me to erase, in the manner I have stated.

Question by Mr. Floyd. You said, on your first examination before this Committee, that you had delivered to them all Major Vandeventer's letters relating to the contract. How is that, your present examination, you produce this other letter of the 17th of October, 1820?

Answer. It will be recollected that I stated that I produced all the letters of Major Vandeventer to me that I knew of at the time.

Question by Mr. Floyd. Did you not give Major Vandeventer a second bill of sale for a fourth of your contract, upon the assurance that the first was lost?

Answer. I never gave Major Vandeventer but one bill of sale, which was in April 1819.

Question by Mr. Campbell. Was the second bond executed about the time you received Major Vandeventer's letter last referred to?

Answer. I think it was executed about that time.

Question by Mr. Floyd. Have you had any conversation, or any communication in writing, with any person touching the evidence you were giving, or were to give before this Committee?

Answer. It is probable I might have made some communication to some persons on the subject. I recollect, in a conversation with Maj. Vandeventer, he stated that he had seen the letters which I had presented to the Committee, and that they were of no importance, either directly or indirectly, except one, which he did not describe.

Question by Mr. Campbell. Please to say what were the words erased from the letter of the 17th October, 1820?

Answer. I can't now say what they were.

Question by Mr. Campbell. Was not the bill of sale given by Vandeventer to you on the 15th October, 1819, for one-fourth of the contract, canceled by that of the 19th of the same month, and was not the last bill of sale intended as a substitute for the first?

Answer. No, it was not. I had letters to prove fully that he sold both quarters to me, which letters were burned at Capt. Smith's, at his request, as I have heretofore detailed; he also wished me to burn the bills of sale, which I refused to do. The first quarter he sold me, as he has stated before the Committee in 1822, dated on the 19th of October, and was on condition of paying the debts, and is truly dated; the other was sold to me subsequently, and upon which I was to pay him the $12,000, and was antedated to the 15th of October.

Question by Mr. Floyd. Do you recollect holding conversation with no other person except Major Vandeventer, respecting your examination before this Committee?

Answer. I can designate no other at present. It is probable I may have conversed with others; their names, however, do not now suggest themselves to me.

Question by Mr. Williams. At what time, and how was Mr. Jennings first admitted to participate in your contract; and by what authority did he hold his share, and receive his part of the money?

Answer. I have answered this question in my first examination. I recognised Mr. Jennings, for the first time, in June 1821, in consequence of a letter from the Engineer Department, dated in March, 1821, stating that Goldsborough would be recognised, and the other quarter equally good, which other quarter I understood to mean Jennings. Previous to June 1821, Jennings had made deliveries of stone,

but I receipted for them, gave Jennings the receipts, and he drew the money from the disbursing officer.

Question by Mr. Williams. Did you consider yourself as coerced to make payment to Jennings?

Answer. Yes, I considered the orders I received occasionally from the Engineer Department as coercing me to make payment to Jennings.

Question by Mr. Floyd. Was General Joseph Swift interested, at any time, in your contract?

Answer. Not to my knowledge.

Question by Mr. Floyd. Did you ever state or intimate to Major Vandeventer that General Swift was interested in your contract?

Answer. I think it very probable I might.

Question by Mr. Wright. Look at the papers now shewn to you, marked A, No. 1, No. 2, (*a*) No. 3 (*b*), and state if the signatures "Elijah Mix," thereon written, were written by you?

Answer. The signature on these papers is mine.

Question by Mr. Wright. In whose hand writing is the exhibit A, shown to you?

Answer. I cannot tell; I think it is Samuel Cooper's.

Question by Mr. Wright. Look at the letter of Vandeventer of the 17th of October, 1820, which you have exhibited, and say what were the words in that letter obliterated by you?

Answer. I stated before that I did not know; I can't pretend to designate the words.

Question by Mr. Wright. To what place was the letter of C. Vandeventer to you of the 17th of October, 1820, directed to you, or where did you receive it?

Answer. It was directed to me in New York, and I received it there.

Question by Mr. Wright. Did you, while in New York, shortly after you received the letter of the 17th October, 1820, take any steps in relation to the bond spoken of? if so, state what steps you took.

Answer. I went immediately and got the bond executed. I allude to the last bond given on the contract.

Question by Mr. Wright. Why was that bond dated 5th of August, 1818?

Answer. I did not know before that it was so dated. I thought it was dated at the time it was executed. The bond now shewn to me is the bond executed at the time I have mentioned.

Question by Mr. Wright. What difficulty existed at the date of the letter of the 17th of October, 1820, about the bond, which you were desired to remedy, by attending to the bond?

Answer. I don't know the difficulty alluded to.

Question by Mr. Wright. What did you understand Vandeventer to mean by the clause in the letter of the 17th of October, 1820, "This furnishes another proof of great circumspection on your part?"

Answer. I don't know what he intended, nor do I know what he meant by "circumspection."

Question by Mr. Wright. Was the bond sent by you, after the receipt of the letter of the 17th October, 1820, to Washington? If yea, to whom did you send it?

Answer. I did not send it; after I signed it, it was left in the hand of Major Cooper, and I did not afterwards know what became of it.

Question by Mr. Wright. How came the first part of the letter, containing the superscription, torn off? and by whom and for what purpose was it torn off?

Answer. I don't know.

Question by Mr. Wright. Have you any other letters from Vandeventer or the Secretary of War, or other papers concerning your contract? If yea, produce it.

Answer. I have no letters to produce.

Questions by Mr. McDuffie

Question. Which of the three papers presented is the most correct copy?

Answer. I don't know which of them.

Question. Why did you take three copies?

Answer. This is a question I have already answered. Because, at three different times I was about to present the letter to the Secretary of War, and did not until the time I lost it.

Question. You state that, in the Fall of 1820, the second bond was sent to you with a request that you would get Oakley to sign it again: by whom was it sent?

Answer. It was presented to me by Major Cooper, in New York.

Question. Was the bond already signed by yourself and the sureties when presented to you?

Answer. No, certainly, it was not. I signed it, after it was presented to me, before the Recorder.

Question. Have you a distinct recollection of signing the second bond in the Fall of 1820, and of seeing Mr. Oakley and Major Cooper sign it at the same time?

Answer. I have a distinct recollection of signing it, but not in 1820; the only reason I have for supposing it to be that time, is the letter of Major Vandeventer of the 17th October. I recollect seeing them sign it; but won't be positive it was in 1820.

Question. Do you not know that the object of carrying the bond to the Recorder in 1820, was to have the sureties sworn and approved, and not to have the bond then executed?

Answer. I do not know what was the cause of its being brought to me; all I know on the subject is, that the bond was presented to me with a request that it should be again executed. On the bond being presented, I called on Mr. Oakley, who was my surety, and he went with me to have it executed, and being duly sworn, the Recorder signed it accordingly. I don't recollect particularly about it.

Question. Was there a second bond executed and signed by you a few weeks after the execution of the first in August, 1818?

Answer. I do recollect signing two bonds; what was the cause of it, I don't recollect. These two bonds were signed about that time, I now recollect, because George Cooper's name was in one of them; that the other had to be executed.

Question. Did you ever make any contract with Jennings, by which he was to have a fourth or any part of your contract?

Answer. No: I never made any contract, to my recollection, except giving him authority to the Engineer Department, to deliver something like 20,000 perch of stone.

Question. Why did you give him that authority?

Answer. The causes already stated must answer. I gave it in consequence of receiving the letter from the Engineer Department, of the 24th of March, 1821, wherein Col. Armistead says, "the other fourth equally good," alluding to that quarter which Jennings claimed of the contract.

Question. Had you not, previous to the receipt of Col. Armistead's letter, authorized Mr. Jennings to deliver stone, and receive money under your contract?

Answer. Yes, I had, but not in his own name; he acted as my agent, and delivered it at $2.75 cents, and $2.50 cents per perch.

Question. Did you personate Walter S. Conkling, and in his name swear to the affidavit now shewn to you, dated 14th May, 1822, and sworn before C. Tompkins?—(see O.)

[The witness objected to answer this question: Whereupon the parties were required to withdraw, that the committee might take the matter into consideration; and, after deliberating thereon, the parties were requested to return, and the chairman instructed to inform the witness that he was not bound to answer any question which went to criminate himself; which was done. The witness then refused to answer the question.]

Question. You state that you considered the orders occasionally received from the Engineer Department, as coercing you to make payment to Jennings, can you produce any one of these orders, or state by whom they were given?

Answer. I cannot produce the orders; they were verbal orders, given by Col. Armistead. I don't know that they could be considered orders; they were, properly speaking, requests.

Question. Did any person, other than Jennings and Vandeventer, ever purchase or contract with you for a part of your contract?

Answer. Yes. Captain Brown contracted for a small quantity, five or six thousand perch. I don't recollect any other person.

Question. As all the money on that contract was drawn from the Treasury in your name, can you produce the receipts of those to whom you paid money as holding under you?

Answer. No. I did not draw all the money. Major Cooper, Goldsborough, and Jennings, have drawn money, and there is some which remains due me.

Question by Mr. Floyd. How much do you think is yet due you?

Answer. There is thirty odd thousand dollars due me.

Question by Mr. Floyd. You say that the Secretary of War did recognise Mr. Goldsborough, as a party in your contract. Did he not do so upon the receipt and authority of your letter of April 15th, 1821, requesting him to recognize him as a partner?

Answer. He was recognised previous to the date of my letter, and made deliveries as may be seen by his own papers.

Question by Mr. Clarke. You have said in an answer to an interrogatory propounded to you, that there were two bonds executed, one shortly after the other in the year 1818. Do you mean the bond which is now shewn to you, for the delivery of one hundred and fifty thousand perch of stone, and which, in a former part of your testimony, you say was executed in the Fall of the year 1820, as one of those bonds, which you said was executed in 1818?

Answer. I can't say; but from the face of this bond, I should say it is the one executed in the year 1820.

Question by Mr. Clarke. Were there three bonds, to which you were a party, executed for the fulfilment of that contract?

Answer. Yes, sir. I think there was.

The testimony of Mr. Mix was about to be closed, whereupon he requested that the conclusion should be suspended, till he should have an opportunity to take counsel as to the propriety or impropriety of answering Mr. McDuffie's question, to which he had heretofore refused to answer. The Committee took the request into consideration, and decided that Mr. Mix should be allowed until ten o'clock to-morrow, to determine whether he would answer the question aforesaid.

TUESDAY, JANUARY 23d, 1827.

Mr. Mix again appeared before the Committee, and announced his determination to answer the interrogatory propounded by Mr. McDuffie, yesterday, in the words following: "Did you personate Walter S. Conkling, and, in his name, swear to the affidavit now shown you, dated 14th May, 1822, and sworn before C. Tompkins?" (See O.)

Answer. No, I did not.

Further questions by Mr. McDuffie

Question. Do you know C. Tompkins, of Richmond, in Virginia?

Answer. No.

Question. Did you ever see a man by the name of Tompkins, formerly of Richmond, Virginia?

Answer. Not to my knowledge. I might have seen him, but did not know him.

Question. Did you make an affidavit, in Richmond, Virginia, in the Spring of 1822?

Answer. No, not to my recollection. I might have made an affidavit respecting some land I purchased, within twenty-seven miles of Richmond, in the year 1822; but I think I purchased that land in the Fall of that year.

Question. Are you certain that you never saw the paper now presented to you, purporting to be the affidavit of Walter S. Conkling, (see O.) and that you never made an affidavit containing the substance of the one just referred to?

Answer. I am perfectly certain I have seen it, or a copy of it, two or three times, as it was shown to me by Major Vandeventer, with a threat that he would use it against me, if I made any disclosures against him. I then told him that he might publish it as soon as he pleased; and, if he did, I would publish a paper of his, dated in 1813, while an Assistant Commissary General, wherein he defrauded the United States of six thousand dollars, and divided it with a man now living; and, while a hostage in Canada, he drew two thousand dollars of that very money. I never made, to my knowledge, an affidavit, in any shape, containing the substance of the one shown me.

Question. Did you ever acknowledge, to Lieut. Mix, of the navy, or Major Vandeventer, that you did make an affidavit, in the name of Walter S. Conkling?

Answer. No, never.

Mr. Mix here stated to the Committee as follows: Major Vandeventer called upon me between my first and second examination, and requested me to look for, and see if I could find, that letter, (meaning the letter I had shown to the Vice President.) I then looked for it, and, on the next day, called at the War Department and told him I had found it. He begged me not to speak of it there, as we were overheard and watched; that he would call on me in the evening; which he did; and, after soliciting me for some time to let him erase the names, or cut them out, I consented, and he took his knife, and cut them out. This took place at my house, in Georgetown. It was at the earnest request of Major Vandeventer, that I consented to this transaction. He promised to be friendly to me hereafter, and to do every thing he could, to appease the Vice President towards me.

Question by Mr. Campbell. Can you now say what words be cut out of the letter?

Answer. No, Sir, I cannot say what the words were.

Question by Mr. Floyd. Did you expect to be examined a second time, before this Committee?

Answer. No. I did not. I supposed the committee had discharged me in full, as I asked the question whether I was further wanted.

Question by Mr. Floyd. On what day was it you called on Major Vandeventer, at the Department of War, to inform him that you had found the letter marked s. c. t.

Answer. I can't pretend to name the day; it was after my first examination. I don't say it was the letter containing s. c. t. it was the letter I had shown to the Vice President he asked for.

Question by Mr. Floyd. Your motives being pure and good towards Major Vandeventer, why did you not permit the letter to be destroyed, rather than keep it thus mutilated, to be given to the committee?

Answer. It was not my intention to have given it to the committee, but supposing that the charges would come before the House of Representatives, and it might be necessary for me to produce it, as I had spoken of it in my first examination.

Question by Mr. Floyd. Have you heard of, or inquired for, Lt. Mix, of the Navy, within these twenty four hours?

Answer. No, I have not.

Question by Mr. Floyd. Have you had any conversation, correspondence, or other communication, with Satterlee Clark, touching the administration of the War Department, whilst Mr. Calhoun was Secretary of that Department, other than the confidential letter you wrote to him as the author of "Hancock," which was published in the Phoenix Gazette of the 28th of December last?

Answer. In the months of May and June last, he dined with me twice, in New York, at the National Hotel, and frequently importuned me for communications on the subject of Mr. Calhoun's administration of the War Department, and whether I had letters and papers to give him. I stated that I should return to Washington, and would probably bring them with me when I returned to New York.

He frequently called on me to ascertain whether I had done so or not. This is all the communication I have had with him to my recollection.

Question by Mr. Floyd. Have you had any conversation, correspondence, or any other kind of interchange of opinions, since he and yourself have been in this District, this Winter?

Answer. I don't know of any other intercourse with him this Winter, other than using some harsh expressions to him for publishing the letter in the Phoenix Gazette.

Question by Mr. Floyd. Have you had any conversation, consultation, or correspondence, with any person, concerning the publication of the papers you have produced to this committee?

Answer. I don't know that I have; I don't recollect particularly.

Question by Mr. Floyd. Were you ever advised to publish these papers as the proper course to be pursued to bring all things to light? if you have, state who the person or persons were who advised you?

Answer. I do think that Satterlee Clark once or twice advised me to publish the papers, though I am not confident; if he ever did so, it was when we met in New York. I have been occasionally advised as I think, to publish things, but don't recollect by whom.

Question by Mr. Floyd. Have you heard of, or inquired for, or caused any inquiry to be made, concerning Lieutenant Mix, of the Navy, since you were before the committee on yesterday?

Answer. No, I have not in any shape or form whatever.

Question by Mr. Williams. Do you know any thing of a Mr. Walker, as an original partner in your contract?

Answer. No, I never heard of his name before, to my knowledge.

Question by Mr. Williams. Did you ever inform any person that "Walker" was the name of the individual who was not to be known in the contract?

Answer. No; never.

At this stage of the examination, the witness, by direction of the committee, returned to his residence for the purpose of getting the letter herein before referred to, as the one shown to the Vice President; and, having returned, he produced to the committee two letters. (See letters marked P, and Q.)

Question by Mr. McDuffie. What were the words that have been cut out of the second line of the letter of the 3d of August, 1818. (marked P.) from Major Vandeventer to yourself?

Answer. I cannot say positively what they were; it is the same letter I showed to the Secretary of War since he was Vice President; in that space was the word ———, upon the reading of which, he asked me what it meant; and I answered, I thought it explained itself.

Question by Mr. McDuffie. What was that word?

Answer. I cannot pretend to say.

Question by Mr. McDuffie. What were the words that have been cut out of that letter in the two last lines of the first page?

Answer. I do not know.

Question by Mr. Campbell. Was it in this communication the letters "s. e. c. t." were written?

Answer. I believe it was, but I won't say I am certain.

Question by Mr. Campbell. What became of the scraps cut from this letter?

Answer. I do not know.

Question by Mr. Campbell. On what day, and at what hour of the day, did Major Vandeventer cut the words from this letter? Please state as near as you can.

Answer. I do not recollect the day. I know it was between my first and second examination. They were cut out late in the evening, say between 8 and 9 o'clock.

Question by Mr. Floyd. What was the word cut out from the beginning of the second line of the second page?

Answer. I believe it was the same as that cut out from the second line at the first page.

Question by Mr. Floyd. Were there then no word or words lost in the second line of the second page by that cutting?

Answer. As near as I can come to it, it was the same as that cut from the second line of the first page.

Question by Mr. Williams. What is the name of the man now living, by whom, you say, you can prove that Major Vandeventer cheated the United States out of six thousand dollars, in the year 1813?

Answer. I could designate the man, but can't now remember his name; I have often seen him in New York; he was formerly a soldier, and was Major Vandeventer's clerk at the time alluded to. He lives in New York City.

Question by Mr. McDuffie. What was your motive for permitting Vandeventer to mutiliate the letter in question?

Answer. I have already stated. Friendly feelings toward him and his family, and a promise, on his part, to use his influence with the Vice President in my favor, and an attempt to get the last contract which was taken from me, restored to me by the Secretary of War, were the motives.

Question by Mr. McDuffie. Why, then did you not give it up to him, and what was your motive for retaining it?

Answer. I have already stated, that, if the inquiry should be brought up in the House of Representatives, and I should be forced to produce the letter, I could have it to shew.

Question by Mr. Williams. Do you know any thing of the transaction by which you say Major Vandeventer cheated the United States out of six thousand dollars, in 1813?

Answer. I know as much as this, that he employed this man, to go into market and price the articles he wanted for the army, and would furnish him money to buy them; then add to the bill any thing he thought it would bear, and divide the excess with his man.

Question by Mr. Floyd. Do you know this of your own knowledge?

Answer. It was reported to me and I was satisfied with the report, and I threatened him to communicate it to the War Department in 1816, in the presence of Peter B. Van Buren, who was a partner of mine, in business, in New York, at that time.

Question by Mr. McDuffie. Who reported it to you?

Answer. It was reported to me in the first instance by his first wife.

Question by Mr. McDuffie. Did Vandeventer ever acknowledge it to you?

Answer. No.

Question by Mr. McDuffie. How then do you know it, except from the information of others?

Answer. I knew it by a paper which I held of his, and which I think, I have now, but do not know exactly at this time where to lay my hand upon it.

Question by Mr. McDuffie. What did that paper contain?

Answer. I don't know at present.

Question by Mr. McDuffie. What paper was it?

Answer. It was an account current, or a copy, made out against the United States.

Question by Mr. Floyd. In whose hand writing was that account?

Answer. Part of it was in Major Vandeventer's, and part of it in that of his clerk.

Question by Mr. Floyd. You say it was good feeling toward Major Vandeventer which induced you to let him mutilate this letter. Did you not think the production of this letter so mutilated, much more likely to injure Major Vandeventer, than if in its entire form?

Answer. No, Sir, I do not; I think in the other state it would have injured one he esteems very highly as a friend; in the present state it injures no one.

Question by Mr. Floyd. How do you know that it would have injured one he esteems, when you cannot recollect the words which have been cut out?

Answer. I think to the eyes of the world it would have borne strongly on a person whom I suppose has been a friend to him; because, when Mr. Calhoun read that letter he seemed very much offended.

Question by Mr. Floyd. Are you in the habit of friendly intercourse with Major Vandeventer?

Answer. I am not at present; I have been heretofore, but have not been so for the last eighteen months.

Question by Mr. Floyd. You were informed by the committee when you first appeared before them, that they wished you to produce all the papers you had in your possession touching this contract, so far as embraced in this investigation; why did you not then produce these letters, marked P and Q?

Answer. I produced all the papers that I knew I had at that time, in relation to the contract, but have since found these two letters, as also the letter dated 17th October, 1820.

Question by Mr. Floyd. When did you find them?

Answer. Soon after my first examination.

Question. Are you and Major Vandeventer in the habit of free conversation at this time, or has *all* intercourse ceased for eighteen months, as stated in your answer just now?

Answer. I spoke to him yesterday, and have been in the habit of seeing him five of six times since the publication of the letter to "Hancock." He called on me, wishing to know, what steps I intended to take; I told him I intended to tell the truth on the subject, as far as I knew it; he told me, I had better throw myself in the mercy of the committee, and tell them I knew nothing.

Question by Mr. Floyd. Have you had any other conversation with Vandeventer, and was any body present?

Answer. Yes, Sir. I had a conversation with him in the War Department, in the presence of one of the Clerks, (Mr. Davis, I be-

lieve.) After the conversation was over, he asked Mr. Davis to take notice of what I said. I then stated to Mr. Davis, that it was not worth while, for I had not seen the letters for some time, as I could not pretend to say what the letters stated relating to the publication.

Question by Mr. Floyd. What letters do you mean?

Answer. All the letter before the Committee.

Question by Mr. Floyd. Was this the last conversation you had with Major Vandeventer?

Answer. No. I saw him yesterday, and repeatedly, as I have stated.

Question by Mr. Floyd. Were these letters the subject of conversation with him, or did you see him without conversation with him?

Answer. I conversed with him on the subject of the contract, independently of the letters.

Question by Mr. Floyd. Had you any particular conversation, in regard to any of these letters?

Answer. On the subject of the letter of the 3d of August, 1818, (marked P,) he was very desirous to have it destroyed.

Question by Mr. Campbell. Why did Major Vandeventer, in his letter of the 3d of August, 1818, express so much anxiety to have the contract closed for fear your bid might be lost, since you and General Swift had several days before, made a contract? did he ever explain this matter to you?

Answer. No, he never did: but, I suppose, he alluded to having the bonds given, as General Swift would not consider the contract closed till that was done.

Subscribed this 23d day of January, in the year of our Lord 1827.

ELIJAH MIX.

No. 29.

Paper No. 1, in E. Mix's second Examination.

[PRIVATE.]

To J. C. Calhoun:

April 1st, 1821.

SIR: I have this morning settled all points with Mr. Mix, and he has consented to be guided by the Secretary, in the transfer to Messrs. G. & Co. the one-fourth of the contract, agreeable to your wishes; he has only to return to Washington, and will then be directed by the Secretary. He would not have holden out thus long, had he been acquainted with the consequences to *all concerned*; but all will now, I trust, be settled, as he has promised. On the subject of my going abroad, I cannot answer until this concern is settled; and on my arrival at Washington, I shall be prepared to give the Secretary a final answer.

C. VANDEVENTER.

Mr. E. MIX,

At Mrs. Mann's Boarding House, New York.

I have but this evening learned that you leave town in the morning, and have above stated to you a part of a private communication made this morning to the Secretary, and I expect you will be guided by his orders, or all will be lost; you cannot know the consequence provided you hold out longer, and thereby oblige the Secretary to take it from

you by consent. In this matter you will enable me to accept of a situation above alluded to, and save the Secretary deciding much against your interest. Major C. has sold to G. & C. at 40 cts. which will nett a profit of $18,600.

C. VANDEVENTER.

Paper No. 2, in E. Mix's second Examination.

[PRIVATE.]

To J. C. Calhoun:

SIR: All is settled with Mr. Mix, and he has promised to be directed by the Secretary, and transfer, without further opposition, to Goldsborough & Co. one-fourth of the contract. He would not have holden out thus long, had he known *all concerned*, but has only to return to Washington, and will then and there transfer to the order of the Secretary, without opposition, one-fourth of his contract. I have fully stated to him *all*, and the views which the Secretary has taken of the subject; and that *all* will be lost if he does not comply with the Secretary's wishes. On the subject of my foreign visit, I will answer fully on my return to Washington, and this contract put to rest.

C. VANDEVENTER.

Mr. E. MIX,
At Mrs. Mann's Boarding House.

I have but this moment learned that you leave in the morning, and have above stated to you part of a private correspondence with the Secretary, and hope you will, without opposition, transfer the one-fourth, as the Secretary shall direct; the event cannot be longer stayed, and if you wish to preserve all, you will, without opposition, comply with the Secretary's wishes. In this matter all shall be settled in Washington, whither I shall come in a few days, and probably accept of the situation alluded to above. Yours,

C. VANDEVENTER.

April 1st, 1821.

Major C. has sold for 40 cts. to Goldsborough, which will nett to the company $13,600.

Paper No. 3, in E. Mix's second Examination.

[PRIVATE.]

To J. C. Calhoun:

SIR: I have this morning settled all with Mr. Mix, and he will, without opposition to the Secretary, transfer to Goldsborough & Co. one-fourth of his contract. He would not have holden out in opposition to the Secretary's order, but did not know all the concern. I have made him fully acquainted with all the consequences provided he does not consent to the Secretary's wishes, and have no doubt but all will be as you wish. On the subject of my foreign mission, I will fully answer the Secretary on my arrival in Washington, whither I expect to be within a few days.

C. VANDEVENTER.

Mr. E. MIX,
At Mrs. Mann's.

I have but this moment learned you leave town in the morning, and have above communicated to you part of a letter I have wrote to the Secretary, and hope you will be directed by him, and fully comply with our wishes, which will enable me to accept the situation above alluded to, and settle all trouble in the Department. Major C. has sold to Goldsborough & Co. for 40 cts. which will net $13,600.

Yours. VANDEVENTER.

Exhibit No. 4, accompanying Elijah Mix's second Examination.

GEORGETOWN, 13*th April*, 1821.

SIR: Mr. H. Goldsborough having purchased from a Mr. S. Cooper the undelivered part of one-fourth of my contract, I have no objections to his being recognized by the Government as the owner thereof, and to their giving orders for payment to be made to him, or to such persons as he may authorize to receive it for him, without further authority from me for the deliveries that have already been, or they may hereafter be, made thereon, at the contract price; provided the responsibility now attaching to me, for the due fulfillment of the whole contract, be so modified, as to transfer from me to him so much thereof as will apply to the portion withdrawn, as above stated, from my jurisdiction; and provided, also, the Government will release me from obligation to liquidate one-fourth of the $10,000 advanced by them on the contract, holding him liable therefor. The above I will consider to be binding on me, whenever I shall receive a notification of its acceptance by the War Department.

Letter to the Secretary at War.

GEORGETOWN, 13*th April*, 1821.

SIR: Mr. H. Goldsborough having purchased from Mr. S. Cooper the undelivered part of one quarter of my contract, I have no objection to the Department giving orders for his receiving the amount of two dollars and sixty cents per perch, on his becoming responsible to the Government for the punctual fulfillment of his proportion of the contract; the Department to receive the remaining forty cents until the full amount of five thousand dollars, advanced to the contract by the Department, be paid up; and on the commissioned officer acknowledging the payment of the sum of five thousand dollars, the balance be retained in the hands of the officers of Government, until all claims against this half of the contract are settled.

I have the honor to be, Sir,
With the highest respect,
Your very obedient humble servant,
ELIJAH MIX.

Hon. J. C. CALHOUN,
Secretary at War, Washington.

[A great portion of the last of the foregoing letters is erased by a pencil mark passing over the words. It is also interlined by words

written in pencil, the most of which are illegible. It cannot therefore be printed so as to show the alterations made in pencil, and to which Mr. Mix refers in his second deposition.—S. B.]

Exhibit M, accompanying Elijah Mix's second Examination.

HAVRE DE GRACE, *October 31st*, 1821.

SIR: On an examination of Major Maurice's books, on the first day of April last, we find there remained of Rip Rap stone for us yet to deliver, (besides what we delivered last year on account of this,) seventeen thousand nine hundred and seventy perches of stone. It being our proportion at that time yet to deliver on the E. Mix's contract, agreeably to the orders of the Secretary of War, which quantity of stone we claim as our right, exclusive of all other deliveries made previous to that date, either by Major Cooper, or any other person for us.

We are, respectfully,

HOWES GOLDSBOROUGH & Co.

Colonel GRATIOT,
Fort Monroe, Virginia.

A true copy.

C. GRATIOT.

ACCOUNT OF DELIVERIES OF STONE AT THE RIP RAPS, BY H. GOLDSBOROUGH & CO. ON ACCOUNT OF E. MIX'S CONTRACT, DURING THE MONTHS OF JULY AND AUGUST, 1820

When delivered	Vessels' names and masters	Quantity delivered		When delivered	Vessels' names and masters	Quantity delivered	
		Perches	Feet			Perches	Feet
July 10	Leander: H. Hayden	62	14	July 25	Harmony: Goodrich	68	22
12	Agnes: A. Whittlesey	70	6	21	Mary Elizabeth: S. Traverse	45	15
	Sarah F. Hollingshead: John Ireland	56	17	28	Essex: H. Harrington	59	1
					Six Sisters: James Clarridge	46	19
13	Sea Serpent: Samuel Ely	59	1	25	Friendship: Geo. Stinchcomb	67	22
	Friendship, Jun'r: J. Johnson	54	6	31	Lady's Delight: J. Colfer	64	14
	Defiance: A. Shipman	77	0	27	Edward and Margaret: W. Simmons	36	12
	Hope, Jun'r: S. Stratton	52	7				
	Belvidevira: J. Parer	44	5	27	High Flyer: Thomas	32	22
14	Harmony: E. Sterling	68	22	28	Stranger: W. Jones	42	24
15	Victory: McCullum	70	19		Mary Ann Jane: James North	54	10
17	Leander: H. Hayden	63	14	27	Harriet: William Jones	67	7
	Rambler: M. Anderson	85	6	22	Commerce: Trope	20	5
20	Independence: Rt. Hamilton	65	9	23	Mary: Thomas Handy	42	14
	Patty Washington: Job North	58	16	22	Commerce: S. Phillips	22	18
	Commerce: John Brooks	96	16	Aug. 8	Mahala: S. Harrington	57	10
13	Harriet: White	50	20	3	Commerce: John Brooks	63	1
	Superior: Lord	10	0		Patty Washington: Job North	61	19
	Paragon: R. Jones	10	12		George Washington: W. Tucker	65	14
14	Louisa: C. Barlowe	70	0	4	Flight: Cullumber	34	22
22	Superb: Fisher	65	6		Independence: M. Navy	42	14
21	Hound: J. Williams	65	1	3	Leander: H. Hayden	62	4
	Boxer: Shaw	67	0	10	Mary and Eliza: Ab. Cater	45	1
24	Leander: H. Hayden	62	14	16	Defiance: A. Shipman	77	
25	Friendship, Jr.: Johnson	49	10		Victory: McCullum	76	
	Sea Seapent: Samuel Ely	59	1		Rambler: M. M. Anderson	35	5
	S. F. Hollingshead: J. Ireland	56	17		Sea Serpent: Samuel Ely	59	1
26	Defiance: A. Shipman	77	0		George Washington: William Tucker	65	14
27	Victory: McCullum	61	13	21	Rebecca: C. Creighton	44	4
	Rambler: M. Anderson	85	6				
26	Hope, Jun'r: S. Stratton	49	13		Total	3,280	13

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Abstract account of stone delivered at the Rip Raps, by Howes Goldsborough & Co. during the months of July and August, 1820.

	Perches	*Feet*
Deliverances in March, April, and May, as per abstract	2,285	17
Deliverances in July and August	3,280	18
	5,566	05

Of the above quantity of five thousand five hundred and sixty-six perches and five feet, delivered by us at the Rip Raps, payment has been refused for the quantity of fifteen hundred and nine perches and twenty-four feet of stone, alleged to be an excess above the quantity that Major Cooper had a right to deliver this year, and which we delivered on account of his sub-contract, in consequence of his promise to us, to purchase of Mr. Mix five thousand perches over and above his original purchase of one-fourth of Mr. Mix's original contract, so as to enable us to deliver nine thousand perches this year; which promise had not been complied with.

21st *Dec.* 1820.

HOWES GOLDSBOROUGH & CO.

Exhibit N, accompanying deposition of E. Mix. Second Examination.

DEAR SIR: I have received, to day, an anonymous letter from Norfolk, stating that a combination has been formed at Norfolk, to pursue the investigation commenced last session, respecting your contract. Mr. Tazewell, General Taylor, and others, are mentioned as associating in effort for this purpose. It is stated that a statement of their views has been sent to the Metropolitan of this city, and then to be published at Philadelphia. I barely mention this, that while you are at New York, you may attend to the bond. Every point should be in order, to shew it as truth requires, and then you need not apprehend the result. [erasure] and myself will be implicated, and as many others as may be necessary for the purposes of malice. If this publication be made with all the rancor that is threatened, I shall, myself, demand to be heard before a Committee of Congress, and then their wishes may be gratified, if they only wish a fair investigation. This furnishes another proof of great circumspection on your part. The old story of extravagance is alleged, as proof of improper proceedings, &c. &c.

The mail is about starting. Attend to the bond. Maria and family are well.

Yours truly,
C. VANDEVENTER.

Capt. ELIJAH MIX.
October, 17*th*, 1820.

Paper O, referred to in a question propounded by Mr. McDuffie to Elijah Mix, Esq. second examination, January 22, 1827.

This day, Walter S. Cronkling, personally appeared before me, a Justice of the Peace for the city of Richmond, and made oath, that,

some time in November, in the year 1817, while he was staying at the Union Hotel, in the said city, that he there became acquainted with a certain Samuel Stilwell, of the city of New York, who, at that time, was very ill, and who stated to him, that he had materially injured one E. Mix, by making a note, purporting to be drawn by the said Mix, and having obtained the endorsement of Hone and Towns; this he had prepared for the special purpose of injuring the said Mix's reputation, as well as to produce some difficulty in the said Mix recovering from him eight or ten thousand dollars, which he acknowledged justly to owe the said Mix; he also mentioned that he had, at one time, proposed to the said Mix, that, if he would dismiss the suit, which he had instituted against him, that he would then publish this fraudulent transaction, and thereby remove the stain which it had left upon his character.

C. TOMPKINS.

Richmond, May 14th, 1822.

Exhibit Q. Second Examination of Elijah Mix.

September 19th, 1818.

DEAR SIR: I have received yours of the 16th instant, and really sorry that you meet with obstacles, and experience delays in getting your vessels measured. Why does not the Agent attend at once to it? or does he intend to put you to all trouble and expense possible? If he does, you must put on your best managing suit, and flatter him out of his designs to put you to trouble. It is very important to have it ascertained how much the vessels each will carry; and, unless you induce Mr. Maurice to fix it, we may lose a great deal, or the United States must lose. Mr. Maurice cannot suppose you to throw away your time and money for his convenience. By all means, represent the injury it is to you to be thus delayed; that you cannot fulfill your contract without his giving you all the facilities which the United States are bound, by their engagements, to afford you; and that it is to avoid any dissension hereafter that you are desirous to get your vessels gauged, and the amount they will carry fixed, as well as the manner of getting receipts for what you deliver. Be prudent, patient, and accommodating, on your part, and you will have a fair claim to demand like treatment.

The want of hands must be remedied. Where is Mr. Jennings with the hands he said he could get you? I have written to New York for 8 or 10. When you receive the sloop Sisters, you can acknowledge the arrival, and ask him to send as many hands as you want.

Yours truly,
C. VANDEVENTER.

(MS. torn) shall endeavor to get him to go down to Old Point. I have just seen Col. Armistead, who says that the best way to ascertain the quantity each vessel will carry, is to load them as deep as you think best, and go to Old Point Comfort, and put each load out on the beach by itself, and leave it there, having it piled and measured, as it can be used at Old Point as well as on the Rip Raps.

This, if you have not already fixed the mode, will obviate all difficulties: thus you will know what each vessel will carry.

C. V.

Capt. E. Mix.

Exhibit P. Second Examination of Elijah Mix.

My Dear Sir: I have shown your letter, of the 30th ultimo, to the (MS. cut,) who directs me to inform you that he does not wish any stone from New York; that it will not do: and that he does not understand the last paragraph, where you say "there is a person now in New York who has chartered two vessels to carry stone to Old Point," as there is not one engaged to deliver stone at Old Point from New York. It is most important that you engage very secretly your vessels, either by purchase or on freight, and leave New York as soon as possible; and, for God's sake, do no suffer yourself to speak of the (MS. cut,) except to the men who are to be (MS. cut.) As to any Agent in New York, we want none: In a word, the (MS. cut.) is at a loss how to construe your letter; because, as you yourself say, the idea that we can afford to pay $1 a perch for transportation will (erasure.) be secret, and come back as soon as possible, for we are losing much by del (MS. cut,) 4 or 5 vessels on a short credit. Send them round, and come on and close the contract, before a lower bid may be made. If a lower bid be made (erasure) may be lost. I feel anxious to have the contract closed. Mr. Jennings is expected here daily, and it will be important to us that you both are here together.

Again: be secret in your operations, and do not let the prospect which is before us, be lost, (here 2½ lines of MS. are erased.) Engage no vessels to deliver stone at Old Point from New York. If you can (MS. cut,) a few which you could afterwards (MS. cut,) stone from York to Old Point, do so, and leave New York as soon as possible.

All well. Get the security in a bond for $20,000.

Yours truly,

C. VANDEVENTER.

August 3, 1818.

Capt. Elijah Mix, *New York.*

No. 30.

Second Testimony of Major Vandeventer.

Major Christopher Vandeventer again appeared before the committee by their order, and was further examined, and testified as follows:

Question by Mr. Ingersoll. Is the letter now shewn to you, addressed to E. Mix, dated 17th October, 1820, and marked N, in your hand writing?

Answer. Yes.

Question by Mr. Ingersoll. Do you know what word has been erased from the 15th line of the 1st page, and by whom the erasure was made?

Answer. I cannot swear positively to the words that are erased, but I can give my impressions as to what they are: I have no doubt

the words may have been "the General," or they may be "the Secretary;" the whole letter could best have its explanation, by referring to the time and circumstances under which it was written. It was at a time of high political excitement, when a great deal was said respecting the disbursement and administration of the War Department. The circumstances under which it was written are pretty generally explained in the context of the letter; at this time I had received an anonymous letter from Norfolk, stating that a new attack would be made on this contract, and that the names here mentioned, had associated for that purpose, and that the attack would be made in the Metropolitan of Georgetown. In the Spring preceding the date of this letter, that is, in April, 1820, there had been an investigation into this contract by a Committee of the House of Representatives, during which, as I was called before the Committee, I had occasion to examine into the state of facts in relation to this contract, as they existed in the Engineer Department. I then discovered that the second bond had not attached to it the certificate of the Recorder of New York, which he had affixed to the first. Thinking that that might be a cause for blame, and believing, also, that the movement was wholly political, and intended, as I supposed, to visit censure upon the Secretary of War, on account of my connection with the contract, and feeling, also, great pain that he should be harassed for an act of mine which I had reason to believe he did not approve, I was desirous of removing even this informality in relation to the bond, and wrote this letter to Mix, in order to induce him to obtain from the Recorder the accessory certificate, to comply more fully with the forms of office; for, after all, it was required merely by the forms of office, as the sureties in the second bond were the same as in the first, to which the certificate was attached. These were the motives for writing this letter, as far as I can recollect. I did not make the erasure, nor do I know by whom it was made, for I have never seen this letter from the day of its date to the moment it was now handed to me. I will repeat that I cannot swear positively what name has been erased. My present impression is, that it may be "Swift." It is proper to state to the committee that I early had the impression from Mix that General Swift was indirectly concerned in the contract; that I labored under that impression, up to the time of the investigation in 1822, when General Swift deposed that he was not, nor had he been, directly or indirectly, concerned in this contract; believing this deposition, it effaced from my mind all impressions of the contrary, and I then perceived, with great pain, and so stated to Gen. Swift, the injury which I had done to his character, when laboring under a different impression. I should have stated before to the committee what I now state, in relation to General Swift, had I not considered that it was mere suspicion, and which had been done away by his deposition. The committee will readily perceive that this erroneous impression under which I labored and acted on, in my correspondence with Mix, has enabled him, by obliteration, to create the mystery which is apparent on the face of these letters.

Question by Mr. Ingersoll. Did you send the bond to New York, in 1820, to have Mr. Riker's certificate attached to it?

Answer. No; I have no recollection of it.

Question by Mr. Ingersoll. Was any certificate ever given by Mr. Riker, as to the bond you have just alluded to?

Answer. Not that I know of.

Question by Mr. Ingersoll. How long after the execution of the first, was the second bond executed?

Answer. I could not be exact as to time, but I think it could not have exceeded September or October following.

Question by Mr. Ingersoll. Had you conversed with Mix about procuring Mr. Riker's certificate, before you wrote the letter of 17th October, 1820?

Answer. I don't recollect that I did. It is apparent to my mind that this letter had reference solely to the certificate of the Recorder, when I speak of the bond, and it is also apparent to me, as I have stated, that the whole letter was written in reference to the political excitement of the day.

Question by Mr. Ingersoll. If you have previously said nothing to Mix about procuring the certificate, how did you suppose he was to take your meaning, when in the letter you argued him to attend "to the bond?"

Answer. I wrote upon the presumption that he already knew that the certificate was not attached to the bond.

Question by Mr. Ingersoll. When the second bond was executed, why was it dated back to the 5th August, 1818, instead of bearing the true date?

Answer. I do not know, but presume it was that the first bond should be surrended up, and that but one bond should be filed with the contract. That, however, is mere presumption.

Question by Mr. Ingersoll. Were advances made by the Department to Mix before the execution of the second bond? and, if so, to what amount?

Answer. They were: the advance of $10,000, if I recollect, was made on the receipt of the first bond, on the recommendation of the Chief Engineer.

Question by Mr. Ingersoll. Why was the bond ever accepted at the Department, when it describes a contract for 100,000 perches of stone only, and names George Cooper and Mix as the contractors—the contract being for 150,000 perches, and Mix sole contractor?

Answer. I do not know that it ever was accepted by the War Department; it being defective, I presume it never was.

Question by Mr. Ingersoll. If the first bond was never accepted, why were advances made to Mix, after its receipt?

Answer. The advances were made, as usual in all such cases, upon the recommendation of the Chief Engineer. No money is remitted from the War Department, but on the recommendation or requisition of the Chief of the subordinate Department, who is charged with the disbursements of that branch of the appropriations.

Question by Mr. Ingersoll. How many bonds were given for that contract?

Answer. I have never seen but the two.

Question by Mr. Williams. What authority had you for taking on to New York the advance of 10,000 dollars.

Answer. Having determined to go to New York, as I before explained, to give assistance to Mr. Mix, he requested me to bring with me any advance which might be made, if any, and I accordingly, if I

recollect, took a sealed letter from the Treasurer, containing the draft for the advance, which I handed to Mix at New York.

Question by Mr. Williams. What assistance were you to give Mr. Mix?

Answer. I have before stated to the Committee, that it was to assist him to get his securities, and to enable him to procure an outfit for the execution of his contract!

Question by Mr. Ingersoll. Is the letter now shown you, addressed to E. Mix, dated third August, 1818, and marked P, in your handwriting?

Answer. Yes.

Question by Mr. Ingersoll. Do you know what were the words cut out of this letter, or who cut them out?

Answer. I do not recollect, but I presume that the word cut out in the second line of the first page is "General," referring, for the reasons I have stated, to General Swift. Those cut out in the two bottom lines of the first page, I do not know what they are, but presume that those in the second line from the bottom of the page may be "business," or some such word—it would make sense if that were relied on. The words cut out from the second line of the second page, I presume to be the same as those cut out in the second line of the first page. I do not know who cut out the words.

Question by Mr. Ingersoll. Was the contract drawn up and signed at the time you wrote that letter?

Answer. Yes. There is a part therefore of this letter at variance with that fact, for the contract was signed on the day of its date. I feel the more confident in that fact as calling on that day at General Swift's office, on my way home from the War Office, I found him and Mr. Mix about concluding the contract, that the General had drawn out a rough draft of it which he requested me to copy, which I did, and witnessed their signatures.

Question by Mr. Ingersoll. Why then did you express your anxiety in that letter to have the contract closed, lest a lower bid might be made.

Answer. I obviously allude by that phrase to the completing of the bond; and the phrase of "lower bid be made" was unquestionably used to expedite his exertions to procure the bond—the other parts of the letter relating to business, obviously is a reply to his of the 30th.

Question by Mr. Ingersoll. Can a contractor be underbid after he has signed articles of agreement with the agent of the Government, and while he is procuring bonds?

Answer. No. But my allusion to that contingency was manifestly to stimulate him to forward his bond: if bond be not furnished within reasonable time, it is usual to take the next lowest bid.

Question by Mr. Ingersoll. Your letter bears date nine days after the contract: did you consider that Mix was endangering the contract by not sending the bond at that time?

Answer. I cannot say that he was, as no lower bid was ever made: but if he had not furnished bond within a reasonable time he would have been in danger of losing the contract.

Question by Mr. Ingersoll. Why was you anxious that the contract should be completed, and the bond given, if your interest was only a

verbal lien to indemnify you against your responsibilities for Mix?

Answer. Mr. Mix's situation, with a large family, without business and means to support them, and his family, at the time, being at my house, naturally created a strong desire that he should not fail in this undertaking.

Question by Mr. Ingersoll. Will you produce the anonymous communication which you say you received before writing the letter to E. Mix, of the seventeenth of October, 1820?

Answer. I have not got it; it was destroyed, I presume, with my other papers, by the arbitrators, as before mentioned.

Question by Mr. Ingersoll. Is the letter now shown you, dated September 19, 1818, addressed to E. Mix, and marked Q, in your handwriting?

Answer. Yes.

Question by Mr. Ingersoll. Do you know what words have been torn out of the third page?

Answer. I do not.

Question by Mr. Wright. Is not the first of the two words obliterated in your letter of the seventeenth October, 1820, "The?"

Answer. It is probable that it is.

Question by Mr. Wright. Does not the send of these words obliterated begin with the capital letter S, and end with the letter t—and is there any appearance of any intermediate letter extending above and below the line, like a letter f?

Answer. That seems to be the fact. The first letter seems, in a stronger light than when I looked at it before, to be an S, or the top part of it, and the last a t, as far as the obliteration will allow of making out any letter. There does not appear to be any letter like an f.

Question by Mr. Wright. Are you not now able to say, distinctly, what were the words obliterated in that letter?

Answer. I am not; but my impression is that it was "Swift," or "the General," for the reasons I have stated before.

Question by Mr. Wright. Whence arises your impression, that the obliterated words were "the General," or "General Swift," if the first letter of the second word is S, and there is no appearance of a letter f?

Answer. If it be "Swift," the first and the last letters only had been written, and the same if it be "General," the first and the last letters only were written.

Question by Mr. Wright. Would you, if writing of General Swift, write "the Swift."

Answer. I should be more apt to write "the General," if writing of him.

Question by Mr. Wright. Why did you obtain Mr. Calhoun's frank on your letter to Mix, of the 19th of September, 1818, and did you inform him it was a private letter of yours?

Answer. It was sometimes the case that the Secretary's frank was put on private letters, as it appears to have been in this case, and without his being informed of its being a private letter. I might say that it is almost a custom of all who have franks to give them on private letters.

Question by Mr. Wright. Do you know of any other instance of a person having the right to frank, using it for letters other than his own?

Answer. I believe the fact, although I might not be able to specify name and time.

Question by Mr. Wright. Are there any other instances of your having obtained the Secretary's frank on your private letters to Mix, concerning Mix's contract?

Answer. I believe there may be.

Question by Mr. Wright. Had you any conversation with Mr. Calhoun in relation to the letter of J. Lewis & Co. to him, dated 21st June, 1821, a copy of which is now shown you, and marked R? If yea, relate it.

Answer. I do not recollect any particular conversation with the Secretary in relation to this letter, and all the knowledge I have of it consists, I believe, in reading the reply of the Secretary of War to it.

Question by Mr. Wright. Had you any conversation with Mr. Calhoun about any charges made by Jacob Lewis & Co. against you, as connected with the Mix contract?

Answer. No; and the only information I had in relation to the subject was the reading the Secretary's letter to Lewis, in which he tells him to make specific charges.

Question by Mr. Wright. Had you any conversation with Mr. Calhoun on the subject of the meaning of the following passage in the letter last alluded to, to wit: "The company were not aware that they should have to contend with the father, two sons, and a Gist, [word not legible,] the latter the private contract points out?" if yea, relate it, and state, also, who you understood are alluded to in said letter, in the words quoted, and who you understood the words "a Gesl. the latter the private contract points out," to mean?

Answer. I do not recollect to have had any conversation with Mr. Calhoun in relation to the passage quoted in the question; but taking together, the letter itself, as before me, and my recollection of the replies of the Secretary, the writer doubtless meant, by "the father, two sons," Major Cooper, myself, and Mix; who the other is, I am as unable to decipher as others who have examined it. I come to this conclusion, also, from having heard that Commodore Lewis had charged that we were concerned in the Rip Rap contract.

Question by Mr. Wright. How long after the second bond was executed before it was delivered in the War Department, and to whom was it delivered?

Answer. I cannot state, as it is a matter of detail appertaining wholly to the Engineer Department.

Question by Mr. Wright. Was the second bond ever shown to the Secretary of War?

Answer. I cannot state that it was, or was not.

Question by Mr. Williams. Was it ever in the power of the Chief Engineer to obtain advances for contractors by recommending that they should be made before the bonds from said contractors had been duly executed and filed in the War Department?

Answer. The Secretary of War always reposed such confidence in the Chiefs of the Bureaus, especially when he first came into office,

as to make advances when recommended by those chiefs; that if the fact had been stated that a bond was incomplete, and there would be danger in making any advance, he would not have authorized it.

Question by Mr. Williams. Did you state to the Secretary that the bond was incomplete before the advance of the $10,000 was made?

Answer. No. I had no conversation with the Secretary respecting the advance or the bond. I never understood that the Chief Engineer said any thing to him respecting the bonds being incomplete at the time of the advance.

Question by Mr. Williams. From whom did you receive authority to obtain the draft for $10,000 from the Treasurer?

Answer. After I understood from the Chief Engineer that an advance of $10,000 had been made on the contract, I think I went to the Treasurer's office to inquire whether it had been remitted, and was told that it had not been, and stated to him that I was requested by Mr. Nix to bring the remittance to him at New York, whither I was then going. He then gave me the letter to which I have alluded, or shortly after, on the same day, sent it to me, I don't now recollect which, and I carried it with me to New York and delivered it to Mix.

Question by Mr. Williams. Did the Chief Engineer or the Secretary of War issue the order for this advance of $10,000? and at what time was it issued?

Answer. I have stated that this advance was made on the recommendation of the Chief Engineer to the Secretary of War, and that the warrant issued, I think, about the 8th of August, and that the advance was made on the same day on which it was recommended.

Question by Mr. Williams. Did you receipt for this draft?

Answer. I received a sealed letter which I was told contained the draft. I never gave any receipt for the draft.

Question by Mr. Ingersoll. Was any contract ever made by E. Mix, or by E. Mix and George Cooper, for the delivery of 100,000 perches of stone, being the quantity named in the first bond.

Answer. Not to my knowledge.

Question by Mr. Ingersoll. You say that you do not know when the second bond was delivered at the Engineer Department, but that you believe it was executed in the Fall of 1818; why do you believe that it was executed at the time you have mentioned?

Answer. I found this belief upon the general recollection that the subject was repeatedly alluded to at that period, and that after General Swift left the office, which, I think, was in October, I heard no more on the subject, and I, therefore, conclude the bond was there when he left the office. More accurate information on this point may be had by reference to the sureties themselves.

Questions by Mr. McDuffie.

Question. Did you ever write to the Secretary of War, Mr. Calhoun, a letter, containing the substance of either of those now presented to you? (See Nos. 1, 2, 3, of Exhibits accompanying E. Mix's second deposition.)

Answer. I did not write at all to the Secretary at that period, as I recollect, and at no time did I write to him any part of the papers now shewn to me.

Question. Did you ever request Elijah Mix, to permit you to erase or cut out any words in the letter now presented to you, dated 3d of August, 1818? and if yea, did you so cut out the words, which appear to be cut out?

Answer. I never requested permission to cut them out, I did not cut them out, and never saw the letter from the time of writing it till it was shewn to me to-day.

Question. Have you, within the last three weeks, been at the house of Elijah Mix? if yea, what induced you to go, and what conversation had you with Mix?

Answer. I was there on the 15th of this month, at his urgent solicitation through Captain Smith. On meeting him, I demanded to know what he wanted of me; he began his reply by professions of friendship and good will, and terminated it by disclosing the object for which he wished to see me, to wit: To ascertain whether I had requested to have his brother and Major Cooper summoned before the Committee; not giving him the full satisfaction that he wished, he began to threaten with disclosing more letters to the Committee, to deter me from requesting the attendance of those gentlemen; discovering his object, I immediately left his house, and I was not in it, the whole time, as long as it has taken to relate what past; I met him the night before last in the street, he being in his gig, drove furiously up to me, and demanded whether I had laid any letter from his brother to me, on the subject of the Richmond, affidavit before the Committee; and telling him, I had informed the Committee of the fact, he replied that he would make me "Smell Hell" for it. He then drove off from me as furiously as he had driven up to me.

Question. Did you ever converse with Mix relative to what he was to testify before the Committee, and advise him to throw himself upon the mercy of the Committee, and state that he knew nothing?

Answer. On the first morning of my attendance here, in obedience to the summons of the Committee, I was shown by Mr. Carr, into the room of the Sergeant-at-Arms. A short time after going into the room, Mix was shewn into it. He commenced conversation by saying that he had been very anxious to see me; that he had called at my room at the Department, for the purpose, to say that he had got himself into great difficulties by his letter to Major Clark; that he knew he had not any thing to substantiate his charges, and that he was at a loss what course to pursue. I replied to him, that his course was a plain one, to state the truth throughout. I never did advise him to throw himself on the mercy of the Committee, and to state that he knew nothing; or give him advice of any sort.

Question. Did you ever converse with Mix at the War Department on the subject of the letter of the 3d of August, and state in that conversation that you would probably be over heard, and, therefore, that you would go to his house with a view of conversing on the subject?

Answer. No. The only conversation I ever had with him at the War Office, was in the presence of Mr. Davis, which has been detailed to the Committee.

Question. Had you ever any conversation with Elijah Mix on the subject of peculations, committed by you on the Government, while you were in the Quartermaster's Department, or in any other Department, in which you admitted that you had committed such peculations,

or in which Mix threatened you, that he would publish the fact of your having done so?

Answer. I think it is, perhaps, twelve months past or more, that Mix once made an allusion to the subject in the way of a threat, and which I met by a most positive denial and defiance, and a threat of prosecution on my part, if he ever dared to make the charge. He knew it was false, and made it only as a threat, as he has a great many other things. I now take the opportunity to state to the Committee, if it be within the range of its powers, my request that this subject be fully investigated and examined. I would point out to the Committee, that the abstracts of my accounts are filed in the Auditor's office.

Question by Mr. Floyd. Had you a clerk in your service in 1818, who was a soldier?

Answer. Yes; an enlisted soldier, whose name was James McGowman.

Question by Mr. Floyd. Where does he now reside?

Answer. I believe he is dead. The records in the Adjutant General's Office will probably show the fact.

Question by Mr. Wright. Did you know any thing of Captain Smith's certifying to the Committee in 1822, a copy of the second bond, including a certificate from Richard Riker, approving the security?

Answer. I do not

Question by Mr. Wright. In whose hand writing Is the words "bond and contract, Elijah Mix, 150,000 perch stone for Rip Rap Shoals, Hampton Roads," endorsed on the back of the first bond on Mix's contract?

Answer. I believe it to be General Swift's.

Question by Mr. Wright. Are these words written on the back of the bond in the way such endorsements were in the year 1818, usually made in the office where bonds are accepted?

Answer. I do not know.

Question by Mr. Wright. In whose hand writing is the body of the second bond in the Mix contract?

Answer. I think it is in the writing of Major Cooper, but would not be positive.

Subscribed this 24th day of January, 1827.

C. VANDEVENTER.

Mr. Vandeventer to Mr. Floyd.

WASHINGTON, *January 24th*, 1827.

SIR: Allow me to correct my statement to day, in relation to the christian name of McGowan: it is Owen, and not James.

I have the honor to be,
Your most obedient servant,

C. VANDEVENTER.

Hon. JOHN FLOYD,
Chairman of the Select Committee
on the Vice President's letter, &c. &c.

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Exhibit R. accompanying Major Vandeventer's Second Examination

[Private.]

Hon. J. C. Calhoun,

Sir: We have the honor to transmit to you a synopsis, by which it will appear, that the affairs of Jacob Lewis & Co., are rendered desperate, by the studied management of the Engineer Department.

The enclosed statements of annual deliveries, are certainly inexplicable; but alone goes to show that the company are on the wide road to *infallible ruin*, and nothing but your interference can prevent its being *immediate*.

Most, if not all, of the named vessels had been measured, perched, and marked, under the inspection of *Captain Smith's brother, while Inspector at Old Point Comfort*, in the years 1819 and 1820. Compare the receipts for deliveries with 1821, when the vessels were loaded to the same marks, and it will be found, Sir, that the difference made is incomprehensible if the mode of measurement is insisted on as correct.

It is known to me as a nautical man, that all vessels constructed for burthen, will carry a perch to a ton; (that is to say,) a vessel of 90 tons will carry 90 perches. The sloop Halcyon has carried 15 perches more than her tonnage. The Naval Commissioners will confirm my assertion, or Mr. Homan, who is an old sailor, and knows these things, that all flat burthensome vessels, in rivers, will carry at least one perch for ton. All the captains of the freighting vessels declare it, and leave the employ in consequence of short measurement, and other difficulties that are thrown in their way.

The quarrymen have quit their quarries in consequence of hearing of the exaction respecting Rip Rap stone, which is contrary to justice; the nature of the Rip Rap contract, contrary to custom, and, in our opinions, contrary to judgment.

We have seen the massive works of Europe, such as Sherbourg, and many others, where fortifications have been built in the water, upon (*Pierre Perdu:*) we have have always observed that the stone to be from the size of an orange to a barrel. Diamond Fort, at New York, has for its foundation, stone of every size, in the same manner; but, it is necessary to observe, that Major Vandeventer's father furnished the stone.

But, Sir, suppose that stone of 150 lbs. were really preferable, which every man will deny who is acquainted with such work, have the Engineer Department, from custom and the nature of the contract, a right to make the exaction? Ought they not to make another contract, specifying the kind of stone, &c.? Instead of which, after we have got out a vast quantity of what was *agreed* to be Rip Rap stone, we are told they are not the kind; they must be of 150 lbs. weight, and our vessel sent back with the cargo to Havre de Grace. This circumstance, after what has happened before, has ruined the company's credit again. We have on the shores $15,000 in Rip Rap stone, as fine for its purpose as ever was seen, and it might all have been delivered. The men who have quarried it, call on us to take it away as we had agreed to do; and do not hesitate to say, that they will sell it if we do not, as they have determined to go away; but it is necessary that the stone

go to Old Point to be measured, (we had agreed to pay according to receipts,) before we can settle accounts. Judge, therefore, Sir, of the embarrassed situation in which we are placed. While writing this, there are six quarrymen in our presence, who boldly declare, that they will sell the stone, and murder the man who shall attempt to prevent the delivery of them. Pray, how are we to act, Sir, under such embarrassments? In vain do we tell them that justice will be done to them; their answer is, that they cannot stay here and starve; they have *nothing*, and justice travels too slow, and is often impeded by malice and intrigue.

It may be asked, why does the Engineer Department wage hostilities against J. L. & Co.? What interest can the Department have, or any of the Corps, in so doing? In answer, it must be told, that this feeling commenced from the moment the contract was taken by J. Lewis & Co. The company were not aware that they would have to contend with the father, two sons, and *a* [word illegible] *the latter the private contract points at.* If they had, they would not have been so hardy as to have taken the field. However, it was not long before we discovered that the father was in Washington, and had put in his proposals for the group, and they supposed they had the contract; and they became outrageous when they found their disappointment. The first attempt then was to discourage us. General Swift went to Doctor Le Barron, and endeavored to prevail on him to give up the contract, that he would be ruined, and that we had taken it too low, &c.; although these gentlemen were *within a half a cent of us.*

Swift said there were persons ready to take it off our hands. Major Vandeventer said the same. The father went to our bondsmen and endeavored to discourage them, and advised them to prevail on us to give up the contract, that there were persons stood ready to take it off our hands. Finding all would not do, the next thing was to destroy us by every possible means. Swift used his influence, for although an *imbecile* he had cunning enough to make great friends with the officers.

Vandeventer, from his situation, had great power in many ways. Mix, this unprincipled fugative, he stuck at nothing; he offered a quarter of a dollar more per perch than we were giving. The men employed by him were in the habit of hailing vessels in our employ, and telling the captains not to work for J. L. & Co., that [they] would never be paid. Every obstacle was produced at Old Point Comfort. Colonel Armistead's brother, a Sutler, was in the habit of saying, that J. L. & Co. would be ruined, they had better give up the contract; there are persons ready to take it off their hands, &c.

The measures, when the captains found fault, always were in the habit of saying, tell J. L. & Co. they had better give up the contract, *there are persons ready to take it off their hands.*

There were no landing places prepared, to give that facility in landing the stone *which by contract we were entitled to.* A fleet of our vessels were sent back with their cargo. All these circumstances combined, must inevitably have produced our ruin, had not your timely intervention prevented it.

After finding all attempts to ruin us proved abortive, then other expedients were thought of. We received information that Colonel Armistead had entered into a contract with a Messrs. Pomfrey &

Baker, of Georgetown, which those persons said was part of the contract of Jacob Lewis & Co. It was hinted to us that this was an understanding between the Col. and those persons who General Mason will tell you are base characters.

In a few days I received a letter from Col. Armistead, which confirmed by suspicions, the substance of which you will find in my answer thereto, herewith enclosed. I heard no more of the business. The next thing I hear is, requiring our captains should transport the stone thirty or forty yards from the sides of the vessel, then put them on a high pile. This was calculated to drive all the captains away. The next thing was refusing to receive the cargoes, as marked by Mr. Smith, and marking them over again, to our great *prejudice*. The cap sheaf is that of requiring that all Rip Rap stone should be 150 lbs. *I presume avoirdupois.*

It is remarkable that they took from the deck load *only* of the vessel they sent back, six perches of building stone, at Point Comfort, yet refused the cargo for the Rip Raps, which must have been half fine building stone, although sent down for Rip Raps. This answered their great purpose; the vessel was freighted, and belonged to a person who had three others: all of them he withdrew, in consequence of it, from our service, and none others will come into it, and if they should they run but one trip.

We will undertake to prove, that Col. Armistead was concerned with the mason, at Old Point, in the contract for brick. We know not who is concerned with him in building the work, but when we are left in the wide field of conjecture, we have a right to draw our own inferences.

We have related all these facts with simplicity and freedom, in the same manner that we should have done *viva voce*. For their *correctness we pledge ourselves, when called on.* We conclude by supplicating your immediate interposition.

While writing this, we are handed a copy of a letter from Colonel Gratiot, which we take to be a quiz; however, it goes to show the spirit of the times. I herewith enclose it for your perusal.

We have the honor to assure you of our high consideration and profound respect.

Havre de Grace, 21*st June*, 1821.

J. LEWIS & CO.

No. 31.

Testimony of Robert C. Jennings.

Robert Cary Jennings, of Norfolk, in the State of Virginia, appeared before the Committee, was sworn, and testified as follows:

I became interested in the early part of the delivery of stone under the Mix contract, and continued to make deliveries for nearly a year, and during which time I experienced many difficulties in obtaining pay for my deliveries, through Mr. Mix's objections, which difficulties the papers herewith submitted will explain. (See exhibit S, being a letter or report of General Macomb to Governor Barbour, Secretary of War, dated 10th March, 1826, with five enclosures.)

By applying to the Engineer Department, then under the command of Colonel Armistead, I was enabled to obtain partial payments. Notwithstanding the right, which it will be seen by these papers, that I had to payment for my deliveries of stone, I continually experienced difficulties and embarrassments in getting my money, which were thrown in the way by Elijah Mix. The Department withheld from the avails of deliveries made by me two thousand five hundred dollars, being the one-fourth part of an advance made to Mix in the commencement of his contract, although I never received any part of said advance, and that sum is to this day lost to me. Finding Mix so unprincipled a man, and so many difficulties being thrown in my way, I, at one period, actually abandoned my portion of the contract, but was, from the interference of Colonel Armistead, induced to resume it. The first year I did not clear my expenses under the contract, but, from the fall in the price of labor, and the increased facilities of transportation, it afterwards became profitable.

Question by Mr. Floyd. Do you know the names of all the persons who were at any time in the Mix contract?

Answer. Major Vandeventer, I understood, was interested. My information after this is derived from Mix. Major Cooper was probably interested. I do not think it worthwhile to detail information received from Elijah Mix; for I have almost invariably found the fact to be the reverse of whatsoever I have been told by him. Mix never hinted to me, nor had I the remotest cause to suspect, that Mr. Calhoun was concerned in this contract; and I was utterly astonished at hearing Mr. Calhoun's name coupled with such a vile monster as Mix. Mix stated to me that General Swift had patronized him. I don't know that General Swift ever received a cent under this contract; but I understood Mix to say, that General Swift had an interest in the contract. Major Vandeventer's part was afterwards sold out to a Mr. Goldsborough, at forty cents a perch, subject to losses which Mix had previously charged against Vandeventer, and the latter could not have realized any considerable sum under his portion of the contract.

Question by Mr. Floyd. Have you any knowledge of Mr. Calhoun's being interested in any contract made with the Department of War, whilst he was Secretary of that Department, or in the profits of which he participated?

Answer. I have no such knowledge, nor have I any suspicion of any such thing.

Question by Mr. Williams. Do you know whether Major Vandeventer sold the whole or only a part of his interest in the contract to Major Cooper?

Answer. I don't know. As well as my recollection serves me, the whole of the interest of Vandeventer and Cooper was sold to Goldsborough.

Question by Mr. Williams. In what manner, from whom, and at what time, did you first obtain your interest in the contract?

Answer. I obtained my interest under Mix, and was to receive the full contract price. I can't specify the month I became interested; it was about the time of the commencement of the execution of the contract.

Question by Mr. Ingersoll. Were you in Washington at the time Mix made the contract?

Answer. I was not; and it was some time afterwards before I came to Washington; perhaps some months afterwards.

Question by Mr. Williams. When and where did you engage with Mix to become a partner in the contract?

Answer. At Norfolk. Mix came there to see me. I don't recollect the time. I saw Mix at Hampton, York, and Norfolk.

Question by Mr. Williams. Did he propose it to you, or you to him?

Answer. He proposed it to me.

Question by Mr. Ingersoll. Did Mix consult with you about making the contract before he made it?

Answer. I don't know whether he did or not?

Question by Mr. Ingersoll. Was your agreement with him for the one-fourth in writing or not?

Answer. It was not in writing.

The witness states, in explanation, that he did receive a small sum, only a few hundred dollars, of the advance of $10,000 made to Mix, but that he delivered stone to the amount thereof.

Question by Mr. Williams. Do you know whether any money drawn from the Treasury in the name of Mix, was paid to any persons other than Mix? if yea, state the names of those persons.

Answer. I do not know of money being drawn from the Treasury in the name of Mix, and paid to any other person.

Sworn and subscribed, this 29th day of January, 1827.

R. C. JENNINGS.

Exhibit S, referred to in testimony of R. C. Jennings, with five enclosures.

ENGINEER DEPARTMENT,
March 10, 1826.

SIR: Mr. Robert C. Jennings, who claims to be the owner of one-fourth of the contract between the Government and Mr. E. Mix, for the delivery of stone for the fortifications at Old Point Comfort and the Rip Raps, apprehends from the import of a letter, recently received by Colonel Gratiot from Mr. Mix, that it is the intention of the latter, to deprive him of the right of ownership in the said fourth of the contract, adverted to, with which he considers himself to be legally vested, and appeals to the Government to protect him in those rights, against any attempt of Mr. Mix to deprive him of them, should any be made.

He founds his claim to be considered the owner of the fourth of the contract alluded to, upon a letter from Mr. Mix to Colonel Gratiot, dated the 15th of June, 1821, in which the latter is authorized to pay Mr. Jennings for all stone he may deliver, on account of his (Mix's) contract, until the quantity so delivered, shall amount to 19,800 perches, the quantity remaining to be delivered upon the sub-contract between him (Mix,) and Jennings, and upon a letter from Mr. Mix to the Chief Engineer, dated the 18th of July, 1821, in which is repreated, in substance, the authority contained in the letter to Colonel Gratiot of the 15th of June preceding.

He founds his appeal to the Government, for the protection desired by him, upon the fact of the authority vested in the Government, by the letter above stated, being unreserved, and therefore, irrevocable

without the consent of the Government, and upon the fact of his having been indirectly recognized by the Government, in the rights claimed by being required, as the owner of one-fourth of the contract, to refund one-fourth of an advance of 10,000 dollars made by the Government to Mr. Mix, to assist him in carrying on the contract.

A letter from Mr. Mix to the Secretary of War, dated the 15th of June, 1821, authorizes the recognition of Mr. Jennings by the Government, as the owner of one-fourth of his (Mix's,) contract, upon the acceptance by the Government of security to be furnished by Jennings, for the faithful execution of the same, and the release of Mix's securities, to the amount corresponding therewith. A letter from Mr. Mix to the Chief Engineer, dated the 19th of March, 1822, recalls the authority, conveyed in his letter of the 15th of June, 1821, above stated, to pay Jennings for deliveries to the extent of 19,800 perches. Another letter from Mr. Mix to the Chief Engineer, dated the 1st of April, 1822, states that he had been informed by Colonel Gratiot, that he had been ordered by the Engineer Department, to recognize Mr. Jennings as the proprietor of one-fourth of the contract; asks for a copy of the orders alluded to by Colonel Gratiot, and states that he had never given any authority upon which they could have been predicated; also, stating that he requested that Mr. Jennings might be recognized as his agent, for the delivery of a certain number of perches under his contract, agreeably to conditions and arrangements understood between them.

The arrangement proposed in Mr. Mix's letter of the 15th of June, 1821, was never carried into effect: Mr. Jennings never having furnished the security required by Mr. Mix, to be substituted for his. The letter of Mr. Mix of the 19th of March, 1822, was not acted on, before it was superseded by that of the 1st of April following. The orders of the Engineer Department, alluded to in the latter, directed deliveries to be received from Mr. Jennings, but the payment for them to be withheld until the dispute between him and Mr. Mix should be settled. They were dated the 28th of March, 1821, and the dispute was settled in June following.

Mr. Jennings exhibits a letter to him from Mr. Mix, dated the 7th of March, 1825, containing a copy of a letter from Mr. Jennings, addressed to the Chief Engineer, dated the 18th of July, 1821, stating he was ready to furnish security for the sum of 5000 dollars, for the faithful performance of his fourth of the Mix contract, whenever the same should be demanded of him by Mr. Mix, which letter Mr. Mix states, he had transmitted to the Chief Engineer, and calls upon Mr. Jennings to furnish the security to which it adverts. It is proper to observe, that the letter of Jennings, which Mr. Mix states had been sent to the Engineer Department, was never received.

Mr. Jennings states, that he always has been, and is now, ready to furnish security for the faithful execution of his fourth of the contract and requests he may be permitted to do so, and be recognized as the owner of the fourth of the contract, independently of Mr. Mix, if the Government does not now, so recognise him under the authority furnished by Mr. Mix's letter, dated the 15th of June and 18th of July, 1821.

Respectfully submitted,

ALEX. MACOMB,

Major Gen. Chief Engineer.

The Hon. J. BARBOUR, *Secretary of War.*

P.S. Since the foregoing was written, Mr. Jennings has mentioned a fact not before known, which it may be proper to include in this statement. He states, that the letter of Mr. Mix, of the 15th of June, 1821, in which the Government is authorized to recognise him as the owner of one fourth of the contract, upon his furnishing security to their satisfaction for 5000 dollars, to release one fourth of the amount of the original security was never seen by him, until he saw it in this office yesterday, nor ever heard of before.

Respectfully submitted,

ALEX. MACOMB,

Major Gen. Chief Engineer.

GEORGETOWN, 15*th June*, 1821.

Col. C. GRATIOT,

SIR: All differences between myself and Mr. Jennings, as relates to my contract, being settled, you will please cause him to be paid for all stone, which he may deliver, until they amount to nineteen thousand eight hundred perch, which will agree with his contract with me, exclusive of all deliveries heretofore made by him.

I have the honor to be,

with true respect, your ob't serv't,

ELIJAH MIX.

There is no objection to the acknowledgement of Mr. Jennings, as an agent for Mr. Mix.

ALEXANDER MACOMB,

Maj. Gen. Chief Engineer.

Engineer Department, July 20*th*, 1821.

A true copy.

J. T. RHODES.

July 20*th*, 1821.

GEORGETOWN, *June* 15*th*, 1821.

SIR: The Engineer Department, will please recognise R. C. Jennings, as a sub-contractor for nineteen thousand, eight hundred perch of stone, in a proportion of one-fourth of the whole, on his giving bonds to the Department, that shall release me from the proportion that the above quantity bears to the whole contract made by me, with the Department, in July 1818, for one hundred and fifty thousand perch of Stone, for the Rip Raps and Old Point Comfort; the above proportion to be subject all restriction relating to the contract.

I have the honor to be,

Sir, your ob't servant,

ELIJAH MIX.

J. C. CALHOUN,

Secretary of War.

Gen'l MACOMB,
Com'dt of the Corps of Engineers.

Mr. Robert C. Jennings, has to deliver, on account of one-fourth of my contract, 19,800 perch of stone, exclusive of all deliveries heretofore made, except those from the first of this year; and you will please direct payment to be made to Mr. Jennings, or order, accordingly; his deliveries bearing one-fourth full proportion to my whole contract.

I have the honor to be,
Your most obedient servant,
ELIJAH MIX.

Georgetown, July 18th, 1821.

GEORGETOWN, *April* 1, 1822.

SIR: I am informed by Col. Gratiot, that, in the month of March, 1821, he received orders from the Engineer Department to recognise Robert C. Jennings as the proprietor of one-fourth of my contract for the delivery of one hundred and fifty thousand perches of stone at the Rip Raps and Old Point Comfort.

As I have never given Mr. Jennings such authority, you will much oblige me by giving me a copy of such orders as relates to the subject—as I have never consented to a transfer of any of my rights in this particular to Mr. Jennings—I have myself requested that Mr. Jennings might be recognised as my agent for the delivery of a certain number of perches on certain conditions and arrangements understood between us.

I have the honor to be, Sir,
With respect, your ob't serv't.
ELIJAH MIX.

Gen. ALEXANDER MACOMB,
Engineer Department, Washington.

GEORGETOWN, *March* 19, 1822.

SIR; On the 15th June, 1821, I gave Mr. R. C. Jennings permission to sign certificates for me as my agent for nineteen thousand eight hundred perch of stone, being a part of my contract with the Engineer Department to deliver at the Rip Raps and Old Point Comfort, one hundred and fifty thousand perch of foundation stone.

I have to request that if any orders have been issued from your Department relating to the above agency, that they may be countermanded, if such orders go to give him permission to sign for me; as no stone delivered by him after this date will be considered as a part of my above contract.

I have the honor to be, Sir,
Very respectfully, your ob't serv't,
ELIJAH MIX.

Gen. ALEXANDER MACOMB,
Engineer Department.

No. 32.

Testimony of Colonel Towson.

Colonel N. Towson, Paymaster General of the Army of the United States, appeared before the Committee, was sworn, and testified as follows:

Examined by Mr. McDuffie.

Question. What office do you fill in the War Department?

Answer. That of Paymaster General.

Question. When were you appointed?

Answer. I was first appointed in the Fall of 1819. I remained in the Department till 1821, and was re-appointed in 1822.

Question. What are the duties of your office?

Answer. To cause the troops to be paid their pay proper; the officers their subsistence, forage, and allowances for servants; to make the Paymasters render their accounts with promptitude, and to examine them previous to turning them over to the accounting officers of the Treasury Department.

Question. What sum is annually disbursed through your Department, and by how many subordinate officers?

Answer. The annual disbursements are about one million of dollars. There are fifteen Paymasters attached to the Department.

Question. What was the condition of your Department when you came into it, and what was its condition when Mr. Calhoun left the War Department in March, 1825.

Answer. The payment of the troops, when I came into the Department, was very much in arrears, and the accounts of the Paymasters for the advances were also behind. When Mr. Calhoun left the Department the troops were promptly paid, and the accounts promptly rendered, as will appear by the reports of the Department submitted to Congress.

Question. On what does a perfect administration of your Department depend?

Answer. It depends on paying the troops promptly, and in accounting for the money entrusted to Paymasters for that purpose—in a judicious selection of officers of the Department, and in the regulations and rules for their government.

Question. What was the amount of defalcations the four or five years preceding 1822, and what has been the amount of defalcations since?

Answer. I think the defalcation for the first period is between 250,000 and 350,000 dollars; the latter, that is since 1822, is about 14,000 dollars. I believe there has been but two instances since 1822.

Question. What two instances are those?

Answer. One was the case of Paymaster Albright, who is a defaulter for something less than one thousand dollars; the other is Major Satterlee Clark, who is a defaulter for something over $13,000. The former was ordered to be cashiered by a sentence of a Court Martial; the latter was dismissed by order of the President of the United States.

Question. What disposition has been made of the case and accounts of Satterlee Clark?

Answer. The account of Satterlee Clark was reported for suit to the Agent of the Treasury Department; suit was brought in the District Court of New York; the case has been tried; but the Attorney for the United States has been instructed to move for a new trial.

Question. What were the causes of the dismissal of Clark from the Department, and what agency had Mr. Calhoun in that dismissal?

Answer. Major Clark was dismissed for not accounting for the public money advanced to him, within the time limited by law. Mr. Calhoun's agency in it was, communicating my report of the fact to the President, and instructing me, under the orders of the President, to furnish Major Clark with a copy of my report, and to inform him that, if he did not render his accounts against a given day, which he directed me to fix, that the provisions of the law requiring his dismissal would be enforced against him. I know of no other agency which Mr. Calhoun had in the dismission of Major Clark.

Question. What claims has Clark set up as an offset against his defalcations?

Answer. The claims he presented to the accounting officers of the Treasury Department did not pass through my office, but I have understood them to be for a commission on disbursements made by him on account of fortifications, previous to the last war, when he was performing the duty of Quartermaster. A second item in his account was, for commissions upon his disbursements as paymaster, during the latter part of the war. He claimed two and a half per cent, I think, which amounted to upwards of thirty thousand dollars, and was founded on the pretext that he was not an officer of the Pay Department at the time the disbursements were made. He was appointed a Regimental Paymaster when he was a subaltern in the line. After the passage of the law passed during the war, authorizing the appointment of District Paymasters from citizens, he asked permission of the Paymaster General to resign his commission in the line of the Army, and to be put upon a footing with the District Paymasters: his resignation as Lieut. was accepted, and he continued to perform the duties of Paymaster, and to receive the usual compensation for them. He now contends that the resignation of his commission as Lieutenant necessarily involved that of Paymaster, and that, not being reappointed, he was, of course, nothing more than a citizen.

Question. Are not these claims founded upon services anterior to settlements with Clark, in which they were not presented?

Answer. Yes. I never knew of his presenting them till after his dismission, and do not believe that he did. In addition to my answer to the previous question, I will state that he also claims the difference between the compensation of a Major of cavalry and a Major of infantry. This I think he is entitled to; it amounts to something more than seventeen hundred dollars; but the accounting officers and the Attorney General have given a different opinion. There are one or two small items in his account that, I think, under some circumstances, might be allowed to him. There is another item for a per diem for travelling, other than to and from Courts Martial; if Major Clark is entitled to this, all officers who have been in service since the passage of the law, in the year 1792, are equally entitled—those who are allowed forage to one dollar, and those who are not allowed forage

to one dollar and twenty-five cents for every thirty miles travel; it never has been claimed by, or allowed to, any officer.

Question. When did he receive the money which remains to be accounted for?

Answer. In the early part of January, 1824. Under the orders of the Department it should it have been accounted for within two months, and might have been within one month from the time he received it; but it was not at the time of his dismission, more than six months from the date of the receipt.

Question. At what time was he dismissed?

Answer. He was dismissed on the 5th of August, 1824. The time limited by law for him to settle his accounts, to prevent dismission, expired on the 12th of July.

Question. Did you furnish Mr. Monroe last Spring, through the Vice President, with a copy of your report to him while President, relative to Major Clark's dismissal, and have you now a copy of that report? State any conversation you may have had with Clark on the subject.

Answer. I did furnish Mr. Monroe with a copy of that report, and have a copy of it in the office; it is very full and explanatory of the causes which led to his defalcation. Some time after the report was made, Major Clark called at my office, and handed me a paper, in which he complained of unfairness on my part towards him, in not furnishing him with a full statement of the charges on which the President ordered him to be dismissed. I told him that, from the language of the paper, I did not consider myself under any obligation to give him the information, but that, as I perceived he had written it under wrong impressions, as to facts, and making allowance for the state of his feelings, I would overlook the offensive matter in the communication. I then informed him that the report of which he complained was not made till after he was dismissed: the report upon which he was dismissed merely stated that he had failed to comply with a law in rendering his accounts; it also stated, that on a settlement of the last accounts rendered by him, there appeared to be a balance in his favor; and that it was reported he had been sick. I have since ascertained that, at the time that balance was stated, he had borrowed a considerably larger sum, in his character of Paymaster, from the Ontario Branch Bank.

Question. Can the expenditures of your Department be much diminished by good administration? How much have the expenditures been diminished by the present system, compared with that which formerly existed? and in what does the superiority of the present system consist?

Answer. The expenditures of the Department consist of fixed allowances. A good administration will prevent defalcation. I don't know that the expenditures can be lessened in any other way. The advantages of the present organization have decreased the amount of defalcation from between three and four per cent. on the disbursements to something less than one-third of one per cent. The accounts now undergo an examination in the Pay Department, particularly on military points, before they are transmitted to the Treasury Department for final settlement. An important improvement, also, was, the

changing of Paymasters from Regimental to District Paymasters, and requiring them to account for advances made to them previous to furnishing them with a second supply. All these improvements or changes were introduced since the year 1820.

Question. What was the general character of Mr. Calhoun's administration of the War Department, as to the industry, energy, and integrity, with which he devoted himself to the public service?

Answer. I do not think it could be better.

Question. What was the character of his administration as to the rigid and impartial enforcement of responsibility upon subordinate officers?

Answer. Mr. Calhoun was uncommonly vigilant; he caused frequent reports to be made to him by the heads of the different bureaus, and held frequent conversations with them on the subject of their departments, particularly as it related to the fiscal concerns, and took prompt and efficient measures to correct any abuse in disbursements.

The witness here, in reference to that part of a former question propounded by Mr. McDuffie, in which he is directed to state the conversation which passed between witness and Satterlee Clark, further stated, that Satterlee Clark said that the President could not do otherwise than dismiss him under the law, but complained that he appointed a successor so soon. To a question put to him, why he had not candidly stated his circumstances to me, and what were the causes of his defalcation, he said he had borrowed a sum of money of the Utica Bank to purchase his father's estate, and that the bank had applied the deposit of his public money to the payment of that debt. When the President called upon me for a report in Clark's case, he said that Clark had denied the receipt of any intelligence that he was to be dismissed until it took place; but I have a letter acknowledging the receipt of my report, and informing him that he would be dismissed on the 21st July, and he was not dismissed until the 5th of August, five days after the time I had limited him to. I also informed him that the feelings of the President and of the Secretary of War towards him was most kind and friendly; and that, in appointing his successor, they acted upon information given by me, and upon my opinion, that he had misapplied the public money; that if blame attached to any person for his dismission, other than himself, it was to me.

Question by Mr. Williams. Have not other officers of the Army besides Major Clark, in settling their accounts, made claims upon Government which have been rejected by the War Department? If yea, state the names of those officers.

Answer. It is the case with a great many officers. I can't specify particulars.

Question by Mr. Floyd. Do you know of Mr. Calhoun's having engaged in any contract with the Department of War, whilst he was Secretary of that Department, or in the profits of which he participated?

Answer. I do not, nor do I believe he did in any.

Question by Mr. Floyd. Do you recollect of any items in any officers' accounts which will form a parallel case to that of Major Satterlee Clark, which have been rejected?

Answer. I do not, except in relation to the charge for disbursements on fortifications, and I know of none exactly parallel in that.

Sworn and subscribed, this 29th day of January, 1827.

N. TOWSON.

In explanation of the question, "On what does a perfect administration of your Department depend?" the witness asked leave to amend his answer so as to read, On salutary laws and regulations for its government, rigidly enforced. "On a prompt and accurate settlement of accounts when rendered. A judicious selection of Paymasters, and their dismission, when found unworthy."

The witness further said, that Major Clark, subsequent to his dismission, presented vouchers to the Second Auditor, to be passed to his credit, but withdrew them before they were examined. I am not certain that they did not form part of his claims submitted to the Court in New York, but believe they did not. They would, probably have reduced the sum for which he was sued, some four or five thousand dollars.

Question by Mr. McDuffie. What is the character of Major Vandeventer for honor and veracity?

Answer. I have known Major Vandeventer since 1813. I know nothing personally that should impeach either, and have never heard of any circumstance except that growing out of his connection with the Mix contract, of which my impressions have been that he was unfortunate, perhaps imprudent, but not criminal. They have never impaired my confidence in Major Vandeventer's integrity.

N. TOWSON.

No. 33

Testimony of General Jessup.

General Thomas S. Jesup, Quartermaster General of the Army of the United States appeared before the committee, was sworn and testified as follows:

Questions by Mr. McDuffie.

Question. What office do you fill, and when were you appointed?

Answer. I hold the appointment of Quartermaster General of the Army; I was appointed some time in May, 1818.

Question. What are the duties of your office?

Answer. I have the general superintendence of the officers of the Quartermaster's Department; their specific duties are to furnish the transportation for the Army, fuel, forage, stationery, to furnish quarters, either by erecting them or otherwise, that is those not connected with fortifications; to superintend the construction of all roads made by troops or made in part by troops; to receive the arms and supplies from the Ordnance Department, distribute them to the Army and to the militia—receive all subsistence stores that are to be transported, and to deliver them at the points whence they are to be forwarded; to receive the supplies of clothing and camp equipage from the Purchasing Department, and distribute them to the Army; to receive the medical supplies, and distribute them also.

Question. In what do you consider the perfection of the administration of your department to consist?

Answer. Promptness in furnishing supplies, and in the strict accountability of all officers and agents of the Department.

Question. Are not the expenditures of your department of a description peculiarly liable to be diminished or increased by good or bad administration?

Answer. They are.

Question. What was the condition of your department when you came into it, and what was its condition on the 4th of March, 1825? state fully.

Answer. The condition was as bad as that of any department could be when I took charge of it in 1818. There was no efficient accountability for money, and nothing that could be called accountability for property. The losses to individuals from the inefficiency of the department, as well as to the Government, was understood to be considerable. Practices prevailed in different parts of the country not only injurious to the service but extremely injurious to the national character, one of which was, that agents frequently made purchases, received the receipts of claimants, and, in place of paying the money, gave their own "due bills," by which they were enabled to receive a credit at the Treasury, and withhold the sums due to claimants. I mention this as one of the many abuses that then existed, and which was promptly corrected. It was also, understood, unofficially, that agents of the Department were in the habit of furnishing supplies, or in fact, of contracting to furnish supplies; and also, of purchasing claims on the Government, to correct which, the regulation I hold in my hand was recommended to the War Department, and was adopted. This regulation is in the words following, (the number 993, is that by which it is distinguished in the printed regulations of the Department.)

"993. No officer or other person employed in the Quartermaster's Department shall be concerned, directly or indirectly, either for himself or others, in any contract with any Department of the Government; nor in the purchase of any claim on the Government, whether of a soldier or a citizen, nor in the purchase or sale of any article of military supply, except on public account."

As far as they could be ascertained, all abuses were promptly corrected, and a strict accountability of all officers and agents enforced.

Question. Was there any record of the proceedings of your department, or any means of ascertaining the amount of its expenditures before 1818, and is there any under the present organization?

Answer. I don't know of any record of the Department; the accounts of the agents were received at and deposited in the Treasury Department previous to the present organization. There is now a record kept of all the transactions of the Department; all estimates, either for supplies or money, are deposited in the office of the Quartermaster General. If, when received, the estimate is approved, the article is furnished. I, however, exercise the right of judging of the propriety of furnishing any article, and, if any be not approved, I strike it out.

Question. What are the advantages of an administrative examination of accounts; and was there any such examination of the accounts of your department previous to the new organization?

Answer. The advantage of such an examination, if made by practical soldiers, is, that they are able to determine whether the service or the nature of the case require the supply. If it is found that supplies are required by officers, not warranted by the nature of the service, the abuse can be immediately corrected. Previous to the present organization of the Department, I believe there was no such examination.

Question. How many disbursing officers are attached to your Department?

Answer. There is, generally, one at every post in the Union, either a regular or temporary agent. The number of officers of the Quartermaster's Department, exclusive of myself, is twenty-four: the law, however, authorizes the employment of officers of the Subsistence Department at posts where there are no Quartermasters. The number of both, that is, the whole number of disbursing officers, varies, generally, from forty to fifty. Besides disbursing officers, every officer of the Army who receives supplies of the Quartermaster's Department, or clothing, or camp equipage, renders accounts for the same, quarterly, to my office.

Question. What sums do you annually disburse through the agency of those officers?

Answer. The appropriation for the Quartermaster's Department, is disbursed by the officers of that Department; besides which, we disburse, occasionally, for other Departments; the amount, annually, exceeds, altogether, 300,000 dollars.

Question. What was the amount of the defalcations of your Department, for the year preceeding March, 1825?

Answer. I don't remember any in that period.

Question. What was the amount of defalcations for three years preceeding the time you came into office?

Answer. 'Tis a question I cannot possibly answer; it can only be ascertained by reference to the Treasury Department.

Question. What are the savings in your Department, including that on clothing, effected by the improvements since 1818?

Answer. It is almost impossible to answer this question positively, the circumstances in no two years are exactly the same; every exertion has been made to secure a perfect and rigid accountability, and measures have been adopted to get supplies at the lowest rate, by inviting a fair competition, and to make every one account for whatsoever he receives.

Question. In what respect has the new organization improved, with regard to the accountability of officers for the public property, and what was the situation of public property before the adoption of the new organization?

Answer. Every officer who receives property, whether for his own command, or for distribution to other commands, is held strictly accountable for its application; if any part of it be lost or injured by neglect, or furnished to persons not entitled to receive it, the damage, whatever it may be, is charged to his personal account, and he is compelled to pay for it; by a system of reports, in regard to stores, I can generally tell if property be lost, between which two military posts it is lost, and the officer who forwards the supply is made to account for it, or is compelled to make the person, by whom it is forwarded, account for it.

Question. What was the situation of the Pay Department, as regards the prompt and regular paying of the troops, previous to the new organization, and what the character of the supplies of the Army?

Answer. In the Summer of 1816, I commanded the Military Department, including Louisiana, Mississippi, and a part of Alabama; part of my command, I found, had been two years without pay, no part of it, I believe, had been less than five or six months without pay. The Quartermaster's Department was without funds or credit, there were no supplies, and, in order to furnish the necessary supplies for the troops, I was compelled to put my own notes into bank to procure endorsers, and raise money in that way; two letters, which I wrote to the Secretary of War, at that time, one dated 19th June, and the other, 8th July, will shew the state of the Department, and the embarrassed situation in which I was placed, better than I could now express it. I borrowed those letters from the files of the War Department, and have had copies made of them, which I herewith exhibit, (see exhibit T, *a* & *b*.) The supplies were generally bad; the supply of blankets, particularly, for the hospital, was so bad that I was confident the Secretary of War could not believe, from any representation I could make, the extent of the abuse that was practised upon the public. I therefore sent him a blanket, in a letter; it was not larger, when folded, than a common package of muster rolls.

Question. What is your opinion of Mr. Calhoun, as an administrator of a Department?

Answer. I approved, generally, of his administration of the Department. I very often, on particular points, differed in opinion with him. I found him, so far as regards my own Department, ready to support me in the most efficient measures, either for its improvement or its administration.

Question. What is your opinion of his official and private integrity?

Answer. So far as his conduct came under my observation, I considered he was, in his acts, governed by proper motives. I considered that I had some reason to be dissatisfied with him, personally, and for the last three years of his administration of the War Department, had scarcely any other than official intercourse with him; but I believe, that during the whole time of his administration of the War Department, there were as few errors committed, as ever were committed, in the same period, in any Department; and I further believe the Department was as ably administered, as it was possible, under the circumstances, to administer it.

Question. What is your opinion of the new organization of the Army of the United States, compared with the organization of any other army, of which you have any knowledge?

Answer. I consider the organization as decidedly good; and decidedly better than that of any foreign army. We require a more efficient organization in this country, than is required in any other country; in Europe, for instance, the civil power being entirely subservient to the military, any defect, in the organization of any army, may be made up by calling upon the civil authorities for aid; in this country, the military can derive no other than voluntary aid, from the civil power; it must, therefore, have such an organization, as will enable it to move independently of any other power. The principles of the

present organization were contained in two reports, from my office, to the War Department.

Question. What is the character of Major Vandeventer, for honor and integrity?

Answer. I always disapproved of Major Vandeventer's connection with a contract with the War Department; but, as a neighbor and a gentleman, I have always respected him. It may be proper for me to add, that there is nothing, save a sense of propriety, to prevent officers engaging in contracts. I believe mine is the only Department, in which they are excluded; and that exclusion is by regulation, and not by law.

Question by Mr. Clarke. Is the improved organization of the War Department, about which you have been speaking, the effect of congressional legislation? or is it the effect of arrangements, made by the head of that Department, unconnected with such legislation?

Answer. The offices were created by law; but the chiefs of the different branches of the staff, attached to the War Department, were stationed at this city by the authority of that Department. The regulations for the government of the several Departments are authorized by law, but prepared under the direction of the Secretary of War.

Question by Mr. Clarke. Is the new organization of the Army, the effect of Congressional legislation, or not?

Answer. It is the effect of Congressional legislation.

Question by Mr. Williams. Are the officers of the Pay Department of the Army, under martial law? if yea, were they so formerly? and state the effect resulting from those different regulations,

Answer. I believe they are now; but don't remember whether they were formerly. It is necessary that all Departments of the Army, be subject to martial law; if any Department be not so subject, there would be no means of enforcing a proper performance of its duties.

Question by Mr. Williams. Has, or has not, the introduction of the commissariat, in the place of the contract system, been productive of great benefits, in the operations of the Army?

Answer. I believe it has been productive of great benefit. It is proper to add, that previous to the establishment of the Commissariat Department, the Army seldom was supplied with good provisions. The supplies are now always of good quality, and, it is believed, furnished at a much cheaper rate than formerly.

Question by Mr. McDuffie. Had Congressional legislation any agency in producing the new organization further than to give to the Department legal power to execute the system which the Secretary recommended to Congress?

Answer. As well as my memory serves me, a report was made by the Secretary of War on the reduction of the Army, in obedience to a resolution of the House of Representatives. A bill was reported to that House, materially different from the plant of reduction proposed by the War Department; the present organization was, I believe, the result of one or more conferences between the Secretary of War and the Military Committee of the Senate, or some of its members. The bill which passed the Senate, and afterwards received the sanction of the House, I put into form, at the request of Col. Williams and Col. Trimble, from memoranda furnished by them.

Question by Mr. McDuffie. How far did the bill which was passed differ from the recommendations of the Secretary of War, and in what particulars?

Answer. Without having reference to the law and to the report, it would be impossible to answer positively, but I believe the principal difference consisted in this that the Secretary recommended two Major Generals and four Brigadiers: the Committee of the Senate, one Major General and two Brigadiers. I don't remember whether there is any difference in the details. The report itself, compared with the law, will best ascertain that fact.

Question by Mr. McDuffie. Was not the act of 1818 for the organization of the staff, passed in conformity with the recommendation of the Secretary?

Answer. I believe that act was the result of the combined efforts of the Secretary and Colonel Williams of the Senate. I conversed with both of them at the time, and knew that it was in accordance with their opinions.

Question by Mr. Floyd. Have you knowledge of Mr. Calhoun's being interested in any contract made with the Department of War, whilst he was Secretary of that Department, or in the profits of which he participated?

Answer. I have not.

Sworn to and subscribed, this 30th day of January 1827.

TH. S. JESUP,
B. Gen. and Q. M. Gen.

Exhibit T, (a,) accompanying General Jesup's deposition.

NEW ORLEANS, *June 19th*, 1826.

SIR: The embarrassment occasioned at this post by the want of funds, has compelled me to take the responsibility of ordering the Quartermaster General to draw on you for such sums as may be necessary to meet the incidental expenses of my command. Major Wolstoncraft, is acting as Quartermaster General: and I have limited his drafts to five thousand dollars per month. That sum, I am very sensible is too small, but will it enable us to obtain such supplies as cannot be purchased on credit. The want of funds increases our expenses, perhaps twenty per cent, there has been so little punctuality in discharging the debts of the public in this quarter, that the people have lost all confidence in the Government and its Agents: and those who would be willing to supply us on moderate terms, were they certain of receiving their pay in a reasonable time, charge for all articles which we are compelled to purchase from them, in proportion to the supposed risk.

Nothing less than the absolute necessities of the service, and the entire prostration of public credit here, would have compelled me to the course which I have adopted. I therefore flatter myself that the drafts of Major Wolstoncraft, (not exceeding the sums to which I have limited him,) will be paid. I shall hold myself accountable for the proper application of the money.

Whilst on the subject of funds, I consider it my duty to represent to you the situation of the soldiery of this Department, as well those

recently discharged, as those now in service; many of the former have been unable to obtain an adjustment of their accounts; they are distant from their homes, and have not the means of returning. Their situation is truly deplorable, nor is that of the soldiers now in service much better. It is true they received their clothing and rations, but many of them have been two years without pay; some of them one year, and none of them less than five or six months. The rations furnished by the contractor, even when of the best quality, is not suitable to this climate; of course the pay of the soldier is almost necessary to his existence. If he were regularly paid, as the law contemplates, he would be enabled to obtain many comforts which are now denied him; and those scenes of dissipation, which invariably succeed a six months' payment would be avoided. I do not attach blame to any individual or Department, but I must be permitted to say, there has been a failure of duty somewhere, and it is to ascertain where that failure lies, that the present appeal is made.

With sentiments of the highest respect,

I have the honor to be, Sir,

Your obedient servant,

THOMAS S. JESUP,

Col. Commanding 8th Military Department.

The Hon. Wm. H. Crawford,

Secretary of War, Washington.

Exhibit T, (b) accompanying General Jesup's deposition.

New Orleans, *July 8th*, 1816.

Sir: Finding it impossible to dispose of bills on the War Department at a discount of less than ten per cent, and the public service requiring an immediate supply of money, I have been compelled to apply to the banks for relief. The Bank of Orleans is the only one from which we have been able to obtain a cent. The Directors have consented to furnish us with such sums as the exigencies of the service may require, on joint notes, signed by Major Wolstoncraft and myself, binding us individually as well as officially. We have pledged ourselves that the amount borrowed shall be paid out of the first moneys furnished this department for the service of the present year; at all events, our notes must be taken up in sixty days. We have, already, borrowed five thousand dollars for the purpose of discharging the accounts of the month of June, and we shall find it necessary to borrow an equal, if not a greater sum, for the present month.

In addition to the supply of this department, we are frequently called upon to make large purchases for the department East of us, particularly of medicines and hospital stores; and the Quartermaster is obliged to furnish transportation for troops, stores, clothing, &c. destined to that department.

My situation is truly unpleasant and embarrassing. The depression of public credit rendered necessary the responsibility which I have assumed; I, therefore, flatten myself that a sufficient sum will be

placed at my disposal to enable me to meet my engagement with the bank.

The troops have been a long time without pay; some of them more than two years.

I have the honor to be, sir,
Your obedient servant,
T. S. JESUP,
Col. Commanding 8th Military Dept.

The Hon. W. H. CRAWFORD,
Secretary of War, Washington.

No. 34.

Testimony of General Brown.

General Jacob Brown, of the United States' Army, appeared before the Committee, was sworn, and testified as follows:

Examined by Mr. McDuffie.

Question. Have you been familiar with the state of the Army since the late war?

Answer. I have endeavored to be so.

Question. Was the condition of the Army improved during the administration of Mr. Calhoun, and in what respect?

Answer. The Army was improved, and has been improving since the peace. The army had not the organization which, as military men, we thought it ought to have, till after the peace. The improvements that were called for were admitted by military men. There was but one sentiment, they were so self-evident; and the officers of the Army thought themselves peculiary happy in having a chief of the War Department who would listen to their reasonings and understand them. The most obvious improvements was in the organization of the Staff, particularly of the Staff of the Department itself. There was the Quartermaster General, who was principal disbursing officer, whose duty it was to superintend all the expenditures under his Department, to see the same faithfully accountable only to the chief of the War accountable to him, he being accountable only to the chief of the War Department, but who paid out no moneys whatsoever himself, and, not having the handling of money, was not liable to become corrupted. The great object of such an organization was to make some individual responsible for all things appertaining to a particular branch of business. The same observations apply to the Medical Department. Previous to the present organization, there was no head of that branch of the public business; there was no Surgeon General; the War Department had to deal separately with every Surgeon of the Army; much trouble and difficulty was experienced in doing so. Now the Surgeon General, who is the head of the Medical Department, controls that branch, and the War Department looks to him only. The consequence has been that the expenditures of that branch were reduced about fifty per cent in the course of two or three years.

Question. Was it not a general principle adopted in the new organization of 1818, that the officer who controlled the disbursements should have no agency in making them?

Answer. Yes, as far as it could be done; that was the object in view. These improvements had suggested themselves to the officers of the Army they communicated them to Mr. Calhoun, who perceived their importance and utility, and adopted and embodied them, and was the organ, if I may so call it, of making them known. I have never understood, nor do I believe Mr. Calhoun claimed any great merit or applause for his agency in the business, as he was actuated by a great desire to further the public good. In carrying these impovements into operation, that is, in getting the Staff bill through Congress, much credit is due to Col. John Williams, then a Senator from Tennessee, and Chairman of the Committee on Military Affairs, in the Senate of the United States.

Question. Do you not regard it as the first qualification of an Executive Chief to avail himself of the peculiar talents of all the subordinate officers, and combine the results of their experience for the public service?

Answer. To this question I answer, yes.

Question. What was the relative state of the supplies as to their quality and the regularity of their distribution, at the time Mr. Calhoun took charge of the War Department, and at the time he left it?

Answer. They were greatly improved in quality, and the promptness of distribution was much greater. One principal branch of supply, that of subsistence, was formerly by contract, per ration, it is now found by the Commissariat system, which is considered by military men a great improvement. We felt much indebted to Mr. Calhoun for his adoption of the principle of this change or improvement. It was of vast consequence, and again I must express my sense of the services of Col. Williams in effecting the passage of the act authorizing the adoption of Mr. Calhoun's propositions. This change was in direct opposition to the opinion of civil gentlemen, or politicians, and it was with great difficulty they could be brought into the measure.

Question. Was not the adoption of the Commissariat system urged upon Congress by Mr. Calhoun, in an argumentative report?

Answer. I think it was.

Question. What was the relative condition of the army as to its moral and discipline, at the commencement and at the end of Mr. Calhoun's administration?

Answer. I answer, greatly improved during the time; greatly improved by general and rigid responsibility. We should also make due allowance for the effect produced from the Military Academy, as a great many officers have been admitted into the army from that school; it turns upon the army no unworthy man, that is, he is not unworthy when he comes among us; he may become unworthy afterwards, but he comes there pure. If that school continues for ten years longer, it will furnish the army with a set of officers not surpassed, or equalled in the world.

Question. What have been the character and effect of the rules and regulations adopted during Mr. Calhoun's administration, and how far has their tendency been to substitute fixed rules for official discretion?

Answer. To the first part of the question I answer good. The general tendency has been to substitute fixed rules for official discretion, and the effect has been happy.

Question. What is your opinion of Mr. Calhoun as an administrator of a Department?

Answer. I answer good.

Question. What is your opinion of him as to public and private integrity?

Answer. I entertain no doubt as to his integrity.

Question. Was the general economy of the military disbursements improved during Mr. Calhoun's administration, and in what degree?

Answer. They were improved; and, as it bore upon the expenditures of the army, as such, greatly.

Question. What is the character of Major Vandeventer as to honor and veracity?

Answer. I know nothing against Major Vandeventer; his general character is good.

Question by Mr. Floyd. Do you know of any contract made with the Department of War, whilst Mr. Calhoun was Secretary of that Department, in which he was interested, or in the profits of which he participated?

Answer. I do not; and I will go further, and say, that I never even heard it suggested by any man who is entitled to be listened to, that he was so interested, or that he did so participate.

Sworn and subscribed, this 30th day of January, 1827.

JAC. BROWN.

No. 35.

Testimony of Doctor Lovell.

Dr. Joseph Lovell, Surgeon General of the Army of the United States, appeared before the Committee, was sworn, and testified as follows:

Examined by Mr. McDuffie.

Question. What office do you fill, and when were you appointed?

Answer. I am Surgeon General of the army, and was appointed in April, 1818.

Question. How long had you been in the army before, and in what capacity?

Answer. I entered the army in the Spring of 1812, as a Regimental Surgeon, was appointed a Hospital Surgeon in 1814, I believe, and continued in that situation till April, 1818.

Question. What is your opinion of Mr. Calhoun as the administrator of a Department; and of the general character of his administration, for industry, ability, and devotion to the public service?

Answer. In all my official communications with him, I had the highest opinion of him in those respects.

Question. What is your opinion of Mr. Calhoun, as to public and private integrity?

Answer. Precisely the same as my answer to the preceding question.

Question. What was the state of the Medical Department of the Army before the establishment of your Department; and what have been the improvements in the economy, regularity, and excellence of the supplies, and the health of the soldiers?

[This question being objected to by Mr. Campbell, on the ground of it irrelevancy, it was decided by the Committee, that the witness do not answer the question.]

Question. What was the principle of responsibility introduced by Mr. Calhoun, in the new organization of the Department, with regard to the examination of accounts? Explain the importance of it, as relates to your Department.

Answer. The principle I suppose to be referred to, is, that, in general, purchases should be made but on the order of the Head of the respective Departments; and all accounts should be first transmitted to them, and audited by them. The effect on my Department, was a reduction of the average expense, from about $95,000, to about $39,000, and of holding each surgeon responsible for all property under his charge. The supplies continued the same in quantity, and the aggregate number of the army was also the same.

Question. In what consists the difference between an administrative examination of accounts, such as is referred to in the last question, and the examination made by the Auditors of the Treasury, under the old system?

Answer. The Auditors simply ascertain the fact, that the article had been purchased, without reference to the necessity of the purchase, or to the price, except in cases where the quantity and price were excessive, that is, beyond the ordinary quantity and price. The examination, in my Department, has reference to both those points: thus, an Auditor would not inquire whether a surgeon wanted one pound of medicine or ten pounds, but simply into the fact of his receipt of it.

Question. Was, or was not, Mr. Calhoun remarkable for his vigilance, in having all irregularities corrected in the subordinate departments?

Answer. Yes, he was, and promptly. He required quarterly reports from every Department, giving a minute detail of all its concerns.

Question. Do you, or do you not, think your Department was very much improved during Mr. Calhoun's administration, as to its economy, and the regularity of the supplies; and, also, as to the health of the soldiers?

Answer. I know it was, in all these respects, from the reports of the Surgeons, and from those of the inspecting officers.

Question. How long have you known Major Vandeventer, and what is his character for honor and veracity?

Answer. I have known his since 1818; I have always had a high opinion of his character, both for honor and veracity; and, in proof of it, I signed for him the only paper involving pecuniary responsibility of any considerable amount, that I have ever signed. I will add, it was his statement, which, if true, made the paper a mere form; and, if false, involved me to a considerable amount.

Question by Mr. Floyd. Do you know of Mr. Calhoun's being interested in any contract made with the Department of War, while he was Secretary of that Department, or in the profits of which he participated?

Answer. I do not; nor did I ever hear it suggested while he was in the Department.

Question by Mr. Williams. Do you know who were the partners in the Mix contract, at any time?

Answer. I know of no other one than Major Vandeventer.

Sworn and subscribed, this 31st day of January, 1827.

JOS. LOVELL,
Surgeon General, U.S.A.

No. 36

Testimony of Col. John E. Wool.

Col. John E. Wool, Inspector General of the Army of the United States, appeared before the Committee, was sworn and testified as follows:

Questions by Mr. McDuffie

Question. What office do you fill, and when was you appointed?

Answer. I fill the office of Inspector General of the Army, and was appointed on the 29th of April, 1816.

Question. What are the duties of your office?

Answer. Inspectoral; and extend to the inspection of all departments of the Army, save one, that is the Corps of Engineers.

Question. Have the discipline and moral of the Army been much improved during Mr. Calhoun's administration?

Answer. Yes. The discipline of the Army as well as the moral of the Army were much improved during the administration of the War Department, by Mr. Calhoun.

Question. Was there any great improvement made during that time, in the preservation of the public property?

Answer. A very considerable improvement was made.

Question. To what do you ascribe these improvements generally?

Answer. To an efficiency that was imparted to the various Departments; forming systems for the different Departments, which did not exist before; giving to the Department's heads that were responsible for enforcing the regulations, &c.

Question. Has the quality of the supplies been much improved, as also, the regularity of their distribution?

Answer. Very great, indeed. The supplies furnished the army previous to the organization of the commissariat, will bear no comparison with those now furnished.

Question. What is your opinion of Mr. Calhoun as an administrator of a Department?

Answer. I consider him a very able and efficient administrator.

Question. What is your opinion of him as to public and private integrity?

Answer. From any intercourse I had with Mr. Calhoun, I have no reason to suppose that he was otherwise than a man of perfect integrity, both in private and in public.

Question by Mr. Williams. Do you know the names of the partners in the Mix contract? Have you ever had any conversations with

those partners? if yea, state the names of those partners, and the conversations you have had with them.

Answer. I know nothing, of my own knowledge. In a conversation I had with Major Vandeventer, I asked him how he came to be engaged in that contract; he replied, that, at the time he did engage in it, he was not aware of the impropriety of doing so, and regretted his connection with it very much; he also stated, that he relinquished it as soon as he could do so.

Question by Mr. Floyd. Have you knowledge of any contract made with the Department of War, whilst Mr. Calhoun was Secretary of that Department, in which he was interested, or in the profits of which he participated?

Answer. I have no such knowledge.

Sworn to and subscribed, this 31st day of January, 1827.

JOHN E. WOOL,
Inspector General U.S. Army.

The witness, upon a reading of his testimony, asked leave to frame his answer to the question—

"To what do you ascribe these improvements?"

To read—

"To a better organization of the army than had previously existed; to uniform systems of instruction; to a better and more systematic arrangement of the Executive and Administrative Departments; giving to each a chief, who was responsible for the faithful execution of the laws and regulations prescribed for the government of his Department; thereby imparting to all departments an efficiency that could not fail to improve the condition of the army."

Col. Wool was further examined, as follows:

Question by Mr. Clarke. Were or were not the Quartermaster General's Department, the Department of Commissary General of Subsistence, the Paymaster General's Department, the Surgeon General's Department, the Department of Commissary General of Purchases, the Ordnance Department, and the Engineer Department, all established by acts of Congress? and, if yea, what better organization, improving the condition of the Department of War, was introduced by the late head of that Department?

Answer. Yes; these Departments, I believe, were created by act of Congress; no other organization was introduced by the late head of the War Department, than such as was authorized by acts of Congress.

JOHN E. WOOL,
Inspector General U.S. Army.

No. 37.

Testimony of General Macomb. Second Examination.

General Macomb appeared before the committee, was sworn and testified as follows:

Question by Mr. McDuffie.

Question. What office do you fill, and when were you appointed?

Answer. I fill the office of Chief Engineer; I was appointed the 1st of June, 1821.

Question. What are the duties of your office?

Answer. The duties of my office are explained in the general Army Regulations, under the head of "*Engineer Department, art. 67,*" by which I am to direct and regulate the duties of the Corps of Engineers, and those also of the Topographical Engineers, and am also, charged with the inspection and correspondence of the Military Academy; these duties comprehend the reconnoitring and surveying for militray purposes, and for internal improvements: together with the collection and preservation of topograhical and geographical memoirs, and drawings referring to those objects; the selection of sites, the formation of plans and estimates, the construction, repair, and inspection, of fortifications, and the disbursement of the sums appropriated for the fulfilment of those objects, severally, comprising those of the Military Academy; also, the superintendence of the execution of the acts of Congress, in relation to internal improvements, by roads, canals, the navigation of rivers, and the repairs and improvements connected with the harbors of the United States, or the entrance into the same, which may be authorized by acts of Congress; with the execution of which the War Department may be charged.

Question. Was or was not Mr. Calhoun vigilant in enforcing regularity and promptitude in the details of the subordinate departments?

Answer. He was exceedingly vigilant and prompt in regulating the details of the subordinate department, especially that of the Engineer Department.

Question. Was he or was he not strict and rigorous in controlling the fiscal operations of your department?

Answer. He was; upon all occasions he inquired into the concerns of the department; relating to money transactions, he was so particular, as to have the individual accounts frequently brought before him, for his inspection and examination, to see whether the officers were prudent and economical in the purchases and other expenditures; and also, whether I kept a strict control over the fiscal affairs; he desired that I would be very particular in the smallest accounts, to check every sort of extravagance, and to make all the officers explain when I had the least suspicion, that a due regard to economy had not been observed by them: for, says he, "if you take care of the small things the greater will take care of themselves;" this was his common remark. He would always remind me of the necessity of great care in the expenditure of the public money, for that great vigilance was necessary in that particular, to sustain the character of the Engineer Department.

Question. What is your opinion of Mr. Calhoun as the administrator of a Department?

Answer. I have always had a very exalted opinion, since I became acquainted with Mr. Calhoun, of his great talents and tact for administration, as he appeared to understand every thing that was

submitted to him for consideration, almost intuitively; and therefore was capable of despatching much business in a short time, and did despatch much business in a short time.

Question. What is your opinion of his official and private integrity, and of the singleness of his devotion to the public service?

Answer. My opinion of his official and private integrity, has been founded upon the perfect honesty and fairness with which he dealt with me, and every body with whom I saw him or knew him to act, in his official and private capacity; and I have always been much impressed with the idea that he devoted himself fully to the public service.

Question. What directions did he give you, as to exposing and correcting the errors of your Department?

Answer. In giving me instructions to comply with the frequent calls of Congress for information, which had reference to the Engineer Department, he directed me to make my reports as full as possible, to answer those calls; and, if any errors should have been committed by the Department in the execution of the duties assigned to it, to expose those errors, as it was better that they should be known at once, than be drawn out by compulsion; and that always to avoid such errors in future, as may have been committed, however trifling

Question. Was there any considerable improvement made by Mr. Calhoun in the organization and details of your Department, and in the economy of its disbursements?

Answer. The Engineer Department, when its direction was committed to me, appeared to have been in the progress of gradual improvement, from the date of its establishment at Washington, by Mr. Calhoun. Its condition continued to improve while Mr. Calhoun was Secretary of War: the organization, as well as the administration, of the duties of the bureau at Washington was improved, and the effect was improvement in those respects to the duties of the officers and others under its direction and control. The improvement consisted chiefly in the promptitude with which business was attended to, and the substitution of specific for general information. The extent of improvement may be illustrated by the fact, that when Mr. Calhoun entered upon the administration of the War Department, it was difficult to procure minute and accurate information, even by the means often resorted to, of requiring the personal attendance of officers at the Seat of Government; but now, owing to the system established of preserving the public documents of every description in the Engineer Department at the Seat of Government, every information possessed by the several members of the Engineer Department, including the officers and agents, can be promptly obtained. As it regards the economy of the disbursements, the most rigid attention was paid, and could not be otherwise, under the regulations which have been established to ensure a correct and economical application of the public money.

Question. About what sum is annually disbursed through your Department?

Answer. Taking the last four years, commencing with 1823, about 500,000 dollars; in 1824, between 6 and 700,000 dollars; in 1825, between 7 and 800,000 dollars; and, in 1826, upwards of one million.

Question. What have been the defalcations since 1823; and what were they for three years previous to that time?

Answer. I do not know that there have been any defalcations since 1823. Previously to that year, I think there was a defalcation on the part of one of the Agents, for a sum which I cannot now recollect, but I suppose it to be about 15 or 16,000 dollars.

Question. Did Mr. Calhoun make any improvement in the system of fortifications?

Answer. Mr. Calhoun established a Board of Engineers for fortification, with a view to examine all the points of defence along the seaboard, including the Gulf of Mexico; which Board, having reconnoitred the seaboard before mentioned, selected the positions to be fortified; but, previously to the projection of the plans, directed that the Topographical Engineers should make minute surveys, and present topographical delineations of the country and positions on which the fortifications were to be erected; and, having formed a general system of defence, the Board of Engineers were directed to transmit to the Engineer Department that system, dividing the same into classes, shewing the fortifications that ought immediately to be commenced, and those that might be deferred to different periods; classing them into first, second, and third, with their reasons for the works, estimates of the expense, the number of men to defend them in peace and war; all to be laid before him, for his approbation.

Question. Did Mr. Calhoun make any considerable improvement in the condition of the Military Academy?

Answer. He did. He formed the regulations which are known under the head "Military Academy, article 78," of the Army Regulations, which is, undoubtedly, a great improvement upon those in force previously.

Question. What is the character of Major Vandeventer for honor and integrity?

Answer. I have known Major Vandeventer for many years, and always considered him as an honorable and upright man, and he bore that character both in and out of the Army.

Question by Mr. Ingersoll. Do you know who directed the bond for 100,000 perches, on the Mix contract, to be cancelled; or who directed the entry to that effect, to be made on the margin of the bond book?

Answer. I know nothing more than what is on the face of the record.

Question by Mr. Ingersoll. Did you examine the two bonds before making out your report to the Committee, in 1822?

Answer. Not that I recollect.

Question by Mr. Williams. Have you any knowledge of two instruments of writing, purporting to be articles of agreement between J. G. Swift and Elijah Mix?

Answer. None.

Question by Mr. Williams. Have you any knowledge of the persons concerned in the Mix contract, or any one whose name was not to be mentioned as a partner? If yea, state the names of those persons, and any conversations you many have had with them, or him, on that subject.

Answer. I have no knowledge upon the subject of this question, other than that I gave in my former examination.

Question by Mr. Williams. What was the name of the man that proved a defaulter, to whom you have alluded; and where did he reside at the time of his defalcation?

Answer. It was Major Maurice, who was Agent for the fortifications at Old Point Comfort, and the Rip Raps; and he resided, I believe in Norfolk.

Sworn to and subscribed, this 31st of January, 1827.

ALEX MACOMB,
Major Gen. Ch. Eng.

No. 28.

Testimony of Col. I. Roberdeau

Col. Isaac Roberdeau appeared before the Committee, was sworn, and testified as follows:

Examined by Mr. McDuffie

Question. What office do you fill, and how long have you filled it?

Answer. I am Brevet Lieutenant Colonel, and Topographical Engineer, having charge of the Topographical Bureau. My orders to repair to Washington, are dated on the first of August, 1818. I arrived in that month, and entered, with other officers, on duty, projecting the defences of Chesapeake bay. The Topographical Bureau was not established until 1819, because the building now occupied as the War Office, was not, until then, finished; and the place used by the Engineer Department was too confined for such purpose.

Question. What are the duties of your office?

Answer. They are prescribed by the 914th article of army regulations, in these words: "An officer of Topographical Engineers shall be stationed at Washington, and, besides performing such other duties as may be assigned to him, shall be charged, under the Chief Engineer, with the safekeeping and preservation of the instruments, books, charts, maps, plans, surveys, topographical reports, descriptive and military memoirs, &c. belonging to the Engineer Department; and shall be responsible, not only for their good preservation, but for their arrangement, which shall be such as to admit of the most ready reference." And, in article 915, the officers of Engineers are to make quarterly returns of the instruments, books, &c. of the United States, in their possession; and the officer in charge of the Topographical Bureau, will make a consolidated semi-annual return of the same, which will be deposited with the proper Auditor, with the view of their being severally charged to the officer who may have them in his possession. These duties have been strictly adhered to; but, in the original formation of the Bureau, it was contemplated to annex other, and equally important duties, such as to abridge and make a critical analysis of all memoirs on similar subjects; also, to connect separate maps, charts, and surveys; to form statistical tables, showing the resources, of all kinds, that the country can afford the army; itinerary tables, respecting the concentration of the militia on points of rendezvous, so that the orders for the movement of a detachment, and

those for their supplies, should exactly correspond, and the line of march of certain given points distinctly marked; that no undue expenditure of public property be incurred, at the same time that adequate supplies are furnished.

Question. What was the condition and organization of the Topographical Corps, and of your Bureau, when you were appointed to your present office? and what when Mr. Calhoun left the War Department, in March, 1825?

Answer. When I was appointed to my present office, the Topographical Engineers belonged to the General Staff of the army, as they now do; they were distributed among the general officers, who directed their operation, and to whom their reports were made. At that time there was no central office, in which to preserve their records, or the results of their labors; the consequence of which was, that much was lost to the Government. In 1818, they were all, or nearly all, placed under the command of the Chief of the Corps of Engineers, under whom they continue to be. Previously to this time, the attentions of the corps were confined chiefly to a few military reconnoissances; subsequently, they embraced the various objects which come under the heads of military defence, of hydrography, and internal improvement. The Topographical Bureau did not then exist. It was formed by Mr. Calhoun, when the building for the War Office was finished, and the Department removed to it, in 1819. The constant attention of Mr. Calhoun, during his administration, to this branch of service, and the large and valuable additions made to it, of original, and other documents, placed it in its present condition.

Question. Were there any maps, books, or records, formerly, and are there now?

Answer. On the information of the Bureau there were few of these; the number of maps, charts, &c. was about 65; and a few atlases, containing maps of different parts of the world. Now, there are more than 1180 maps, plans, drawings, and engravings, &c. on the register: and more than 300 projections and drawings of fortifications, and other plans of defence. This does not include the drawings and reports for internal improvement, and many others which are in a state of preparation for the Bureau, and not on the Register; so that it may be safely asserted, that there are, at present, at the disposal of the Bureau, nearly 2,000 charts, plans, &c. of various kinds.

Question. What were the public instruments, and how were they taken care of formerly, and where are they now kept and preserved?

Answer. There were no public instruments, at this time, belonging to the Corps, excepting a very few, in the hands of individual officers. The instruments and books for the survey of the coast, were received at the Engineer Department, in 1819. I believe, they were placed in my charge by Mr. Calhoun, in February, 1820, who subsequently ordered that they should be charged to me, in the Second Auditor's books, which was done, and they continue so to be. They are in good preservation. Previously to the administration of Mr. Calhoun, I know not of any returns, or accounts, being given of instruments: now, the returns are quarterly made to the Bureau; and semi-annual consolidated returns from it, reported to the proper Auditor, agreeably to regulation.

Question. What is your opinion of Mr. Calhoun, in the administration of a Department?

Answer. It is a question of delicacy; but my opinion on this subject may be known, by the replies already made to other questions: these facts clearly show the conduct of his administration, so far as I have been concerned in it.

Question. What is your opinion of his public and private integrity?

Answer. My opinion of the private worth and integrity of Mr. Calhoun, is unqualified, and which must regulate his public life also.

Question. What is the character of Maj. Vandeventer, for honor and veracity?

Answer. The character of that gentleman for honor and veracity, I have never known to be doubted, by those who personally knew him.

Question by Mr. Floyd. Have you knowledge of any contract made with the Department of War, while Mr. Calhoun was Secretary of that Department, in which he was interested, or in the profits of which he participated?

Answer. I have not.

Question by Mr. McDuffie. Was Mr. Calhoun vigilant in enforcing regularity in the subordinate departments?

Answer. He was very much so.

Question by Mr. Williams. Have you any knowledge of the persons concerned in the Mix contract, or of any one whose name was not to be mentioned as a partner? If yea, state the names of those persons, and any conversations you may have had with them or him, on that subject.

Answer. I have no knowledge whatever on this subject.

Sworn to and subscribed, this 31st day of January, 1827.

I. ROBERDEAU,
Lt. Col. and Top. Eng'r.

No. 39.

Testimony of Colonel Gibson.

Col. George Gibson, appeared before the Committee, was sworn, and testified as follows:

Questions by Mr. McDuffie.

Question. What office do you fill, and when were you appointed?

Answer. I am Commissary General of Subsistence, and was appointed in April, 1818.

Question. What are the duties of your office?

Answer. My duties are, to make contracts, under the Secretary of War, for subsistence stores, to supervise the accounts of the Department on their way to the Treasury, and to give a general direction to my assistants in their purchases.

Question. What is your opinion of Mr. Calhoun, as an administrator of a department?

Answer. I have the very highest opinion of Mr. Calhoun, as the head of a Department?

Question. Was he vigilant and rigorous in enforcing regularity in the subordinate departments?

Answer. He was.

Question. What is your opinion of his public and private integrity?

Answer. I have the highest opinion of both his public and private integrity.

Question. Was there any considerable improvement made by Mr. Calhoun, during his administration, in the organization of your Department, as to the economy of supplying the Army, and the excellence of the supplies?

Answer. I believe there were great improvements. The ration is now much better than under the old system, and I think it is furnished cheaper. The ration formerly was very bad indeed.

Question. At what time did Mr. Calhoun put a stop to advances in your department?

Answer. He first spoke to me of it in 1820, and in 1821 I introduced into my advertisement for proposals that no advances would be made.

Question by Mr. Floyd. Have you knowledge of any contract made with the Department of War, whilst Mr. Calhoun was Secretary of that Department, in which he was interested, or in the profits of which he participated?

Answer. I have no knowledge of any such contract.

Sworn to and subscribed, this 31st of January, 1827.

GEO. GIBSON, *C. G. S.*

No. 40.

Testimony of Colonel Bomford.

Colonel George Bomford, of the United States' Army, appeared before the Committee, was sworn, and testified as follows:

Examined by Mr. McDuffie

Question. What office do you fill, and when were you appointed?

Answer. The office of Colonel of Ordnance. I came to that office, permanently, in 1820; I occasionally discharged the duties, temporarily, in the absence of Colonel Wadsworth, before that period.

Question. What are the duties of your office, at this time?

Answer. It is to provide, to inspect, to distribute, and to preserve, all the varieties of Ordnance and Ordnance Stores, embracing small arms of every description, and ammunition.

Question. What is your opinion of Mr. Calhoun, as an administrator of a Department?

Answer. My opinion is that he was a very able and efficient administrator of the War Department.

Question. Was he prompt and rigorous in correcting the irregularities of the subordinate Departments?

Answer. As far as my Department was concerned, and to the best of my knowledge, he was, strictly, so.

Question. What is your opinion of Mr. Calhoun as to official and private integrity?

Answer. I have the highest opinion of Mr. Calhoun on both these points.

Question. Were the organization and condition of your Department much improved during Mr. Calhoun's administration of the War Department? and in what respect?

Answer. I consider the Department was improved generally at all points, throughout all its ramifications, and particularly on the strict accountability of its officers to the Department, and in receiving all the accounts of the disbursing officers, in the first instance, in order that they might be strictly and critically examined before they went to the Treasury for adjustment. Prior to Mr. Calhoun's administration of the War Department, the accounts of disbursing officers went directly to the Treasury.

Question. What has been the annual saving in your Department, as far as you can estimate it, effected by the improvements made during Mr. Calhoun's administration?

Answer. I will premise by saying that this is a difficult question to answer with precision; but, in making some estimates during the past year, upon the probable results and saving by the improved organization and increased accountability of the Department, and making allowances for the variation in the prices of materials and labor, the saving amounted to from ten to fifteen per cent. on the disbursements, which are from six to nine hundred thousand dollars a year; for instance, the muskets are now fabricated for twelve dollars each, and are of a very superior quality to those manufactured in 1817 and 1818, which cost fourteen dollars each.

Question. What has been the amount of defalcations in your Department since the improved organization was introduced?

Answer. There has been no defalcations since that period.

Question. Has any improvement been made in the preservation and care of the public property?

Answer. There have been many improvements made in the manner of preserving the public property, since the commencement of Mr. Calhoun's administration of the War Department.

Question. Was there any improvement made in the quality of the arms during that time, and how was it effected?

Answer. There was many improvements made in the quality of the arms, but the most important was in constructing Hall's patent rifle, which Mr. Calhoun particularly patronized. This arm has been proven by a series of experiments, and tested by five months' firing at the school of practice. The result has been that it is in the ratio of two to one, when compared with any other rifle in the country. It has also been proven, by a series of experiments that it is in the ratio of three to two when compared with the best muskets.

Question. When was the management of the lead mines transferred to the War Department, and what improvement did Mr. Calhoun make in their management and productiveness?

Answer. The lead mines were transferred to the War Department in 1821; Mr. Crawford, at the time of the transfer, stated that they had produced nothing to the public Treasury; the tythe which the public received during the last year, was between two hundred and thirty-three and two hundred and thirty-four thousand pounds of lead. The regulations by which the mines are now conducted were adopted by Mr. Calhoun, in the year 1822.

Question. What is the character of Major Vandeventer for honor and veracity?

Answer. I have been long acquainted with Major Vandeventer, and I never had any reason, in any of my communications with him, to doubt either the one or the other.

Question by Mr. Williams. Have you any knowledge of the persons concerned in the Mix contract, or of any one whose name was not to be mentioned as a partner? If yea, state the names of those persons, and any conversations you may have had with them, or him, on that subject.

Answer. I have no knowledge whatever in relation to this question.

Question by Mr. Williams. At what instance or recommendation were the lead mines transferred from the Treasury to the War Department?

Answer. At the instance of Mr. Crawford, the Secretary of the Treasury, who recommended the transfer of that branch of business to the War Department, as that of the Treasury had no efficient aid to apply to their superintendence.

Question by Mr. Floyd. Have you any knowledge of any contract made with the Department of War, while Mr. Calhoun was Secretary of that Department, in which he was interested, or in the profits of which he participated?

Answer. I have no knowledge whatever of any such contract; and I have too high an opinion of Mr. Calhoun to believe he could ever have been induced to participate in any contract.

Question by Mr. Williams. Had you ever any conversation with Mr. Crawford as to the propriety of establishing the heads of bureaux at this city, before he left the War Department?

Answer. I had some general conversation with Mr. Crawford on that subject, who remarked, that he intended, whenever the current business of his office would permit him, to establish a better system for the government of the War Department, as he found the present one too diffuse.

Sworn and subscribed, this 31st day of January, 1827.

GEORGE BOMFORD,
Br. Col. on Ordnance Service.

No. 41.

Testimony of General Swift.

General Joseph G. Swift, of the city of New York, appeared before the committee, in obedience to their summons, was sworn, and testified as follows:

Examined by Mr. McDuffie.

Question. Had you ever a conversation with Col. Armistead, in which you stated that you were interested, or about to be interested in the contract commonly called the Mix contract?

Answer. No; I never had any such conversation with Col. Armistead.

Question. Had you ever any conversation with Col. Armistead, in which you stated that you had asked Mr. Calhoun's permission to become interested in that contract?

Answer. No; I have had various conversations with Col. Armistead, but none of that sort.

Question. Have you ever had conversation with Col. Armistead on the subject of your being interested in any contract? if yea, state fully what that conversation was.

Answer. I have had conversation with Col. Armistead, whether more than once I do not recollect, with respect to my interest in the Mobile contract.

Question. What was your interest in that contract, and when and how did it accrue.

Answer. In the Spring of 1818, I made a contract, as Chief Engineer, with Benjamin Hopkins to construct fortifications at Mobile Point. In the year 1819, I believe in the month of September, Hopkins, while executing that contract, died of yellow fever. His father, Roswell Hopkins, of New York, was one of his sureties for the execution of the contract. R. Hopkins offered to sell to Samuel Hawkins, then of New York, his right and title in the contract of his deceased son. I was then residing in New York, as the Surveyor of the port. Hawkins called on me for advice whether or not he should purchase that contract. I told him that it was my opinion that the contract, in the hands of an able man, was a good one. He then proposed that himself and myself should purchase it together. I declined doing it; he stated that his desire for having me interested in it, was that he might have the advantage of my professional ability to commence and construct the work. After various propositions on his part, he made this proposition: that I should furnish advice and directions for the construction of the work; and, at the completion of it, I should receive one-fourth of the net profits, without, however, myself incurring responsibility for the expense. I acceded to his proposals; commenced furnishing directions to him, and he went to Washington, to make some modification in the contract with the War Department; what that modification was I don't now recollect. This is the sum total of my interest in, and connection with, the Mobile contract. This subject was at the time, and various times thereafter, mentioned by me to the gentlemen of the War Department. I mentioned the fact to Mr. Calhoun; he stated that he hoped that it would prove advantageous to me, and that it was satisfactory to the Government, as it would give an assurance that the work would be properly and satisfactorily executed.

Question. Had you in fact, at any time, an interest in the contract you made with Mix, for the supply of stone at the Rip Rap Shoal, near Old Point Comfort; or did you ever intimate to Mr. Calhoun, directly or indirectly, that you had?

Answer. I never had any interest in it, and I never made such an intimation to Mr. Calhoun, or to any body else.

Question. What was the practice of the War Department with regard to advertising for contracts, previous to 1818? State fully.

Answer. The War Department, previous to 1818, had no practice of that sort, that I know of, in relation to fortifications. Previous to the year 1819, it was the practise of the Engineers to make their separate contracts with individuals, wherever they were stationed, each in his own Department. In 1818, in consequence of the remoteness of the works that were to be constructed upon the Gulf of Mexico frontier, I caused advertisements to be made in New York, Phila-

delphia, Baltimore, New Orleans, and Washington, and possibly at other places not now recollected. The proposals received, in consequence of those advertisements, from Louisiana and Mississippi, were not equal to what was received from various parts of this country; and the contracts were made with citizens from this part of the country, who came to the Department and examined the plans and specifications, and predicated their bids upon the estimates of the Engineers. In relation to the Mix contract, I caused various examinations to be made on James river, Potomac, Susquehannah, and the Hudson; and, upon the reports made under these examinations, I was enabled to ascertain what was the lowest price at which stone could be furnished. The proceedings of the Committee of Investigation in 1822, will exhibit the particulars of that matter.

Question. When did you leave the office of Chief Engineer?

Answer. In the month of November, 1818.

Question. When was Hawkins recognised by the Engineer Department, as the successor of Hopkins?

Answer. I believe it was early in the year 1820, with some modifications of the original contract.

Question. Can you explain the reason why, in a letter from the Engineer Department to Lieut. Blaney, of the 11th August, 1818, it is stated that a contract had been made with Mix for 100,000 perch of stone; and, in a letter to James Maurice, of the 21st August, 1818, it is stated that the contract was for 200,000 perches?

Answer. I cannot; it is an error, very evidently.

Question. What was the condition of the Engineer Department previous to the new organization made by Mr. Calhoun?

Answer. I don't think the condition of the Corps of Engineers, as to its organization previous to 1818, was as good as it was after that period. I will state further, that the headquarters and the office was at New York; I was generally, indeed, almost all the time, travelling about the country; the business of the office had to be transacted when I was at home, which was for very short periods.

Question by Mr. Ingersoll. Will you examine the letter book, and say, whether the original letters to Lieutenant Blaney and Mr. Maurice, which are there copied, were written by you?

Answer. I think that, with the exception of the number of perches, which ought to be 150,000, the letters are according to the spirit of my instructions. I cannot say, positively, whether I did, or did not, write the letters originally; my usual practice was to furnish rough sketches, or instructions to my Aid, of whatever I wished written.

Question by Mr. Ingersoll. Did you have any negotiation with Mix during the month of August, 1818, or at any other time, about increasing the contract to 200,000 perches?

Answer. I had no other negotiation with Mr. Mix than stating to him, I was willing to increase the contract 100,000 perches, if he desired it; he did not accede to it; my reason for this was, that I considered the contract an excellent one on the part of the Government.

Questions by Mr. McDuffie.

Question. Will you examine the contract now presented to you and state, whether it was executed on the day on which it purports to have been executed?

Answer. Yes. It was executed on that day, to the best of my recollection; indeed, I am certain, it was.

Question. Do you know any thing of the execution of a second bond for the fulfilment of the Mix contract, if yea, what was the cause of it, and when was it executed?

Answer. Yes. The first bond, although considered ample for the purpose for which it was taken, had in it the name of George Cooper. Mr. Mix objected to this name, and, I think, he was informed, that, if he produced another bond, equally satisfactory, the first bond would be given up; a second bond was furnished, I think, some time in the course of the Fall of that year, the month I do not recollect, but it was before I left the office.

Question. Do you know any thing of a bond for the fulfilment of the Mix contract, executed in the Fall of 1820?

Answer. No. I do not; that was after I left the Army.

Examined by the Committee.

Question by Mr. Ingersoll. Why did the first bond describe the contract as for 100,000 perches, and as having been made by Mix and George Cooper, as Contractors?

Answer. I cannot tell. I have no way to account for the discrepance. The endorsement is for 150,000 perches, and is in my hand writing.

Question by Mr. Ingersoll. Was the bond ever approved or accepted by the Department as sufficient?

Answer. I think it was.

Question by Mr. Ingersoll. When was the first bond cancelled, and by whose order?

Answer. I do not recollect.

Question by Mr. Ingersoll. Were the forms of these bonds furnished by the Engineer Department?

Answer. I do not recollect, but think they were. We had no printed forms at that time.

Question by Mr. Ingersoll. Were advances made to Mix on the delivery of the first bond? and if yea, to what amount?

Answer. My impression is, that upon the delivery of the first bond, an advance was made to Mix of $10,000.

Question by Mr. Ingersoll. Who gave the requisition for that advance, and was the requisition in writing?

Answer. My impression is that the requisition was in writing, and was signed by me, but am not certain, whether it was or was not. In some instances, the requisitions were verbally given. At that time the Accounting Officers had charge of that business.

Question by Mr. Ingersoll. Who delivered either or both of these bonds at the Engineer Office?

Answer. I cannot recollect. I think, it was Mr. Mix: it may have been Major Vandeventer; but I have no distinct recollection upon this point.

Question by Mr. Ingersoll. Was any record or memorandum made in the office, while you were there, of the receipt of the second bond, and the cancelling of the first?

Answer. I presume there was. I cannot recollect upon this point.

Question by Mr. Ingersoll. Are you distinct in your recollection, that the second bond was received before you left the Department?

Answer. To say that *I am distinct* in my recollection, is to speak more precisely than I can; my *impression* is that it was.

Question by Mr. Ingersoll. At what time was the Engineer Department established at Washington?

Answer. I believe it was in April, 1818.

Question by Mr. Ingersoll. Will you state the day when you left the Department as Chief Engineer?

Answer. November, 1818; I think the 11th day.

Question by Mr. Ingersoll. Have you a brother-in-law, of the name of Walker? If yea, was he, at any time interested in the Mix contract.

Answer. I have a brother-in-law of that name; I dont believe he was interested at any time in the Mix contract, or any other contract with the Government; if he had been so interested, I think I should have known it.

Question by Mr. Sprague. Do you know the names of the persons who have been at any time interested in the Mix contract? if so, state them to the Committee.

Answer. I have heard that Mr. Jennings, Mr. Vandeventer, Mr. Cooper, and Mr. Goldsborough, say they were connected with that contract.

Question by Mr. Williams. Do you know whether any money drawn from the Treasury in the name of Elijah Mix, was afterwards paid to persons other than Mix? if yea, state the names of those persons, and the purposes for which the money was paid to them.

Answer. I have no knowledge of any such transaction.

Question by Mr. Williams. At what time did Major Vandeventer's interest in the Mix contract commence, and what part of it was he to hold?

Answer. Major Vandeventer, told me his interest commenced in the Spring of 1819; and that he held, I think, one-fourth, or one half, I don't recollect which. but am inclined to think one-fourth.

Question by Mr. Williams. At what time was the first bond filed in the Department?

Answer. I think it was early in August, 1818.

Question by Mr. Floyd. Have you knowledge of any contract made with the Department of War, whilst Mr. Calhoun was Secretary of that Department, in which he was concerned, or in the profits of which he participated?

Answer. I have no knowledge of any such contract.

Sworn to and subscribed, this 5th day of February, 1827.

J. G. SWIFT.

Letter from the Engineer Department, to Lieutenant Blaney, referred to in the testimony of General Swift.

ENGINEER DEPARTMENT,
11th August, 1818.

Lieutenant GEORGE BLANEY:
Corps of Engineers.

SIR: You will repair to Old Point Comfort, Hampton Roads. The Agent of Fortifications, Mr. Maurice, has been directed to have ready at Old Point, five heavy anchors, about 38 or 40 cwt.; these anchors, with the cables and buoys, I wish to have placed by you upon the Rip

Rap Shoal, in a position agreeable to the subjoined diagram. You will ascertain the nearest position of the point of shoal in 3 fathoms water, to Old Point Comfort, upon which you will recollect we had a buoy anchored last Winter. From that point of shoal, in a due South direction, at the distance of one hundred and fifty yards, I wish an anchor A and buoy to be put down; the other four anchors, &c. B, C, D, E, I wish to have put down at the distance of sixty yards each, from A 1st, in a due N. W. 2d in a due N. E. 3d in a S. E. and 4th in a S. W. direction from A. The buoys must of course be large enough to be easily seen. On A. there must be a large flag. You will require the agent to furnish you with such boats, and hands, &c. as may be necessary to execute this order. I wish the anchor A, to be in such position as will allow the vessels which come down with stone, to come to its buoy, to deposite with ease their loads. This anchor must have a stout iron chain cable attached to it, that the stone may not chafe the cable asunder. The vessels, on their arrival, should lay in an East and West direction, with the buoy on the side of the vessel next to Old Point Comfort, and by a warp, extended to B, C, D, or E, as the case may require, can with ease take the same position with each succeeding load of stone. By this arrangement, 3, or even 4 vessels may discharge at the same time; a desirable thing in forming a foundation upon sand. You will inform the agent that a contract has been made with Captain E. Mix, to deliver, as soon as practicable, at the Rip Raps, one hundred thousand perch of stone; that I wish him, the agent, to employ an honest, intelligent, and capable man, to look after the anchors and to see that they are not disturbed; and also, to superintend the delivery of every load of stone, of which he is to keep an exact account. After completing the duty assigned you, you will return to this place.

(Signed.)

Engineer Department, 9*th Feb.* 1827. The foregoing is a true copy of a letter recorded in one of the letter books of this Department.

ALEX. MACOMB, *Maj. Gen.*

Letter from the Engineer Department, to James Maurice, referred to in the testimony of General Swift

ENGINEER DEPARTMENT,
August 21*st*, 1818.

JAMES MAURICE, Esq. *Norfolk.*

SIR: Your letter of the 18th arrived this day. It pleases me much to find that you are able to execute rapidly the orders given. I enclose your letter of appointment; also, the regulations for your government. You will receive ten thousand dollars from the Treasurer of the United States, to be disbursed as you may be required by this Department. Mr. E. Mix will soon commence to deliver stone at the Rip Raps, under contract with this Department, for two hundred thousand perch. You will send a trusty person, or go yourself to the quarry with Mr. Mix, to determine how many perch, of 24 solid feet each, each vessel will contain. By this, no delay will arise in the delivery. All communications will be made to this Department. You will report to this

Department what is the cost of landing the stone at Old Point Comfort. The bonds which you enclosed to me have the approbation of the Secretary of War. Until an Engineer be sent to Old Point Comfort to superintend, you will receive your orders from this office.

(Signed.)

Engineer Department, 9th Feb. 1827. On the preceding page is a true copy of a letter recorded in one of the letter books of this Department.

ALEX. MACOMB,
Maj. Gen. Chief Engineer.

No. 42.

Second testimony of Captain J. L. Smith.

Captain John S. Smith again appeared before the Committee, and further testified as follows:

Examined by Mr. McDuffie

Question. Did you make the alterations which appears to have been made with a pencil in the letter of Elijah Mix, now presented to you, dated 13th April, 1821? (See exhibit No. 4, Mix's second deposition.)

Answer. I did not; they are in the hand writing of Major Vandeventer.

Question. Did you ever send from the Engineer Department the form of a letter which Mix would be required to write, transferring a part of his contract to Goldsborough?

Answer. I did not.

Question. Were the terms of the letter which you actually wrote, and which was signed by Mix, agreed upon by the parties in your presence?

Answer. They were.

Question. Was Major Cooper [present] when that letter was written by you, and signed by Mix?

Answer. I do not think he was.

Question. Was any compulsion used, by menace, or otherwise, to induce Mix to sign the letter in question?

Answer. There was not.

Question. Was the letter which has been presented to you, (see No. 4, Mix's second deposition,) interlined in pencil, ever sent to the Engineer Department, and by you sent back, with the alterations which appear in pencil?

Answer. No. I think this is the letter alluded to in my testimony when before the committee some time ago, as the draft prepared by Mr. Mix and Major Vandeventer.

Question. Was any compulsion used by Mix towards Vandeventer, in extorting from him an obligation for the payment of money, at the time of signing the letter of Mix, to the War Department, of the 13th of April, 1821.

Answer. There was. Mr. Mix refused to sign any letter authorizing the Secretary of War to recognise Goldsborough & Co. owners of one-fourth of the contract, independent of him, unless Major Vandeventer would sign a note to him for the sum of a thousand dollars; I think that was the amount which he claimed as a balance due him by Major Vandeventer. Major Vandeventer signed the note with the understanding that it was to be retained by Mix, until the accounts should be adjusted by arbitration; and if it should then appear that the amount of the note was not due to him, that he should be considered bound by the note for such amount only as should be awarded. This note Mr. Mix negotiated in the Branch Bank at Washington. Major Vandeventer consulted Colonel Randall, as his counsel, to know whether he would be justified in refusing to pay the note. Colonel Randall had a correspondence with the Bank on the subject, in which I understood he introduced the substance of a memorandum, setting forth the particulars of the transaction, which was obtained from me for the purpose; and I understood that the Bank, satisfied with the unfairness of the transaction, consented to commence a suit against Mr. Mix, upon his endorsement of the note.

Subscribed this 5th day of February, 1827.

J. L. SMITH.

No. 43.

Testimony of John B. Thorp.

John B. Thorp, of the City of New York, appeared before the Committee, in obedience to their summons, was sworn, and testified as follows:

Examined by Mr. McDuffie.

Question. Are you acquainted with the general character of Elijah Mix, formerly of New York? If yea, state fully what is his general character.

Answer. His general character is very bad. I became acquainted with him in 1813; he was then under indictment, in New York, for forging the name of Hone & Town, or rather, writing a note on a piece of paper containing their name, cut out of a receipt. He sent for me, and wished to make some accommodation of the suit I had against some of his creditors. On inquiring what he had to do with it, he answered he would get up the indictment on the forged note. He then stated, particularly, that that note had been by him forged for the purpose of raising money; and, if the person whose name was "Stillwell," to whom he passed it, had not exposed him by showing the note to Hone & Town, he would have taken it up, and nothing would have ever been heard of it. He then proposed to give me securities which he held against people in Nova Scotia, (Halifax.) I refused to take it, and the negotiation ended. Some years afterwards, there was a publication in the papers respecting that transaction; and among others, an affidavit in the Richmond Enquirer, purporting to be made by Walter S. Conkling, and purporting, also, to be an acknowledgment of Mr. Stillwell, that he had himself forged this note, for the purpose of injuring Mix.

Question. Do you or do you not regard the character of Elijah Mix as being perfectly infamous, and do you think him entitled to be believed on his oath?

Answer. His character is so infamous that I think no community where he is known would believe him on his oath.

Sworn to and subscribed, this 5th day of February, 1827.

JOHN B. THORP.

No. 44

Testimony of John Harned.

John Harned, of the city of New York, appeared before the Committee, in obedience to summons, was sworn, and testified as follows:

Examined by Mr. McDuffie.

Question. What is the general character of Elijah Mix, and what have been your means and opportunities of knowing it? state fully.

Answer. I have known him for several years; his general character is bad; he committed a forgery on Messrs. Hone & Town, of New York, and acknowledged the same to me, some time afterwards. This confession he made to me in the year 1812. He had previously absconded from New York. I would not believe him on oath.

Question by Mr. Williams. Do you know who were concerned in what is commonly called the Rip Rap or Mix contract, made with the Engineer Department, in 1818?

Answer. I do not, except from hearsay.

Question by Mr. Williams. Do you know that money, drawn from the Treasury in the name of Elijah Mix, was subsequently paid to persons other than Mix? if yea, state the names of those persons, and the purposes for which the money was paid to them.

Answer. I do not know any thing in relation to this interrogatory.

Sworn to and subscribed, this ninth day of February, 1827.

JOHN HARNED.

No. 45.

Copy of a letter from the Chairman of Committee to the Hon. Mr. Barbour, Secretary of War, requesting his attendance.

CAPITOL, *January* 2, 1827.

Sir: I am directed by the Select Committee of the House of Representatives, to which has been referred the communication of the Vice President of the United States, to transmit to you a copy of that communication, which is herewith enclosed, and to request that you will attend their next meeting, and bring with you all such papers and documents, in the Department of War, if any there be, relating to the subject-matter of said letter.

The Committee will assemble to-morrow, at 10 o'clock, at the Capitol, in the Committee room of Foreign Affairs.

I have the honor to be,
Sir, your obedient servant,
JOHN FLOYD,
Chairman of Select Com. House of Reps.

Hon. JAMES BARBOUR,
Secretary of the Department of War.

Mr. Barbour to Mr. Floyd, Chairman, &c. requesting certain persons to be summond before Committee.

4 o'clock, Tuesday, Jan. 2.

SIR: I have this moment received your communication, requiring my attendance on the Committee to-morrow at 10 o'clock. I see, most unexpectedly, that Mr. Calhoun has given, in his letter to the House, a prominency to the War Department, in connection with the object of your inquiry. It has become, therefore, desirable, on my part, that every act of mine, in relation thereto, should be fully explained; to that end, I consider the evidence of Mr. Rush, Mr. Southard, General Macomb, and Col. R. M. Johnson, necessary. I have, therefore, to request that they may be summoned as witnesses.

Very respectfully, yours, &c.
JAMES BARBOUR.

General FLOYD, *Chairman, &c.*

No. 46.

Letter from C. Vandeventer to General Floyd.

WASHINGTON, *January* 9, 1827.

SIR: If, in the testimony given by E. Mix before the Committee over which you preside, he has, in any way, implicated my statements, on the subject of his contract, I respectfully claim to be heard on the conflicting points; and as I have grounds on which to discredit the veracity of Mr. Mix, I respectfully request that Lieutenant M. P. Mix, of the United States' Navy now on board the Lexington, at New York, may be examined, touching the author of a certain affidavit, purporting to be made by Walter S. Conkling, at Richmond, Va. the 15th of May, 1822. Also, the admissions of E. Mix to him, that he had no paper to sustain his charge against Mr. Calhoun, but had made the charge as a threat to intimate me to pay him money. I also wish John Harned and John M. Thorp, of the city of New York, examined, touching a forgery committed by E. Mix, and confessed to them, in that city, in 1810, and respecting his general character,

I have the honor to be,
Your obedient servant,
C. VANDEVENTER.

Hon. J. FLOYD,
Chairman of the Select Committee, &c.

No. 47.

Address of Major Vandeventer to the Committee—received and read Jan. 10, 1827.

GENTLEMEN: A regard for my character, and for truth, are my motives for addressing you.

I have drawn up my statement on oath, at the direction of the committee, without having been informed on what points in particular my evidence was required, or whether the evidence of Mr. Mix in any degree affects my character, or whether it may be opposed on any point to that which I have given in my statement. If there be any thing in his evidence which, in the opinion of the committee, tends to impair my character, or, through me, to affect others, even ever so remotely, and which is not satisfactorily explained by my statement on oath, or if his has, in any particular, contradicted mine, I claim the right of every citizen standing in my situation, to be made acquainted with the same, in order to repel such imputation, and which I feel it to be in my power to do fully, whether the same shall have grown out of any letter or correspondence of mine with him, of which I kept no copies, or proceeds from any other source. If his oath contradicts mine in any particular, I claim the right of introducing testimony to show that he is utterly unworthy of credit under oath, by particularly showing that, in the year 1822, pending an investigation his contract before the House, he went to Richmond, in Virginia, and, under the fictitious name of Walter S. Conkling, made the oath of which the annexed is a copy, in order to acquit himself of the charges of forgery against him.

The witnesses against his credibility are principally in the city of New York, which fact I mention so that there may be no delay if it be thought that these oaths are necessary, and a list of whose names I am ready to furnish.

In making this communication to the committee, I am not actuated by the least disrespect towards them, but wholly by a due regard to character and truth, and with the view that neither myself nor any other through me, should be injured by my not having an opportunity fully to explain my conduct in this transaction, or by the oath of a man whom I believe to be without any title to credit, and who I believe is actuated by malignant feelings against me. Whatever may be the decision of the committee on the points submitted, I request that this communication may accompany the report of the committee to the House. I have the honor to be, your most obedient servant,

C. VANDEVENTER.

The Select Committee.

No. 48.

Chairman of the Committee to the Secretary of War.

CAPITOL, *Jan.* 13, 1827.

SIR: I am directed by the Select Committee, to whom was referred the communication of the Vice President, of the 27th of December

last, to request you to furnish them with a copy of the letter of W. K. Armistead, of the Engineer Department, under date of the 24th of March, 1821.

I have the honor to be,
Sir, your obedient servant,
JOHN FLOYD.
Chairman of Select Committee.

Hon. JAMES BARBOUR,
Secretary of the Department of War.

No. 49.

Secretary of War to Committee, in answer to letter of Chairman of the Committee of the 13th January.

WAR DEPARTMENT, *Jan.* 13, 1827.

SIR: I have the honor to acknowledge the receipt of your letter of this date, stating that you are requested by the select committee to whom was referred the communication of the Vice President of the 29th of December last, to request me to furnish them with a copy of the letter of W. K. Armistead, of the Engineer Department, under date of the 24th of March, 1821, and have the honor to state, in reply, that I have personally, with the Chief Engineer, examined the books of the Engineer Department, and find no letter of the date referred to entered on the books of said department.

I have the honor to be, very respectfully, your obedient servant,
JAMES BARBOUR.

To the Hon. JOHN FLOYD,
Chairman of Select Committee.

No. 50.

Chairman of Committee to Secretary of War.

CAPITOL, *January* 12, 1827.

SIR: I am directed by the Select Committee, to whom was referred the communication of the Vice President, of the 29th of December last, to request you to furnish them with the original bond or bonds, filed in the Department of War, in relation to the Mix contract; and that you also inform the committee whether it was the custom of the Department, at the time these bonds were received, to record such bonds; and, if so, to give the committee the name of the officer at that time charged with that duty; and, also, the copy of any entry on the books of the Department touching the receipt or approval of those bonds.

I have the honor to be,
Sir, your obedient servant,
JOHN FLOYD,
Chairman Select Committee H. of R. U. S.

The Honorable JAMES BARBOUR,
Secretary of the Department of War.

Letter from Secretary of War, enclosing original bond of Mix, with a copy of the cancelled bond.

DEPARTMENT OF WAR,
January 18th, 1827.

SIR: I have the honor to acknowledge the receipt of your note of yesterday's date, written under instructions of the committee to whom was referred the communication of the Vice President, of the 29th of December last, requesting me to furnish them with the original bond, or bonds, filed in the War Department in relation to the Mix contract; and that I will also inform the committee whether it was the custom of the Department, at the time those bonds were received, to record such bonds; and, if so, to give the committee the name of the officer, at the time, charged with that duty: and, also, a copy of any entry on the books of the Department touching the reception or approval of those bonds.

In compliance with the request, I enclose, herewith, the original bond, which has been procured from the office of the Second Comptroller of the Treasury, where all original bonds and contracts are deposited, dated on the 5th of August, 1818, signed by Elijah Mix, Samuel Cooper, and James Oakley. Of this bond there is no record in the office of the Secretary of War, nor any correspondence in relation to it on the files of the War Department, or in the office of the Chief Engineer.

The formation of the contract, and of the bond to which it refers, was, it appears, arranged by personal communications between the parties concerned; the then Chief Engineer having the immediate charge of the papers growing out of the business.

I have caused the bond-book and records of the Engineer Department to be carefully examined, with reference to the inquiries of the committee, and I find an exact record made of the original bond (before mention) and on the preceding page of the same book, the record of a bond signed Elijah Mix, George Cooper, Samuel Cooper, and James Oakley, dated on the 5th of August, 1818, with an approval of the sureties, signed by R. Riker, then Recorder of the city of New York, which bond was cancelled by order of the Secretary of War. A literal transcript of this bond is also enclosed.

I have to observe, farther, that previous to the establishment and organization of the subordinate departments of the War Office, in the early part of 1818, it was, as I understand, the custom of that office to record it in bonds taken in connexion with its special and proper business; and that, subsequently to that event, it was made the duty of those subordinate Departments to record all bonds relating to matters under their immediate control, the details of which devolved upon them. I will further observe, that the bonds mentioned, as entered in the bond book of the Engineer Department, are in the hand writing of a clerk, (now dead,) who was not appointed to it before December, 1820, and, of course, that they were not recorded there before that period.

At the time the bond was taken, General Swift was the Chief Engineer, Lieutenant George Blaney, of the Corps of Engineers, his Aid, and John R. Beall, the only clerk in the Engineer Department, whose duty it would probably have been to make the record of the bonds.

There appears to be on entry, other than that mentioned as attached to the cancelled bond, touching the receipt or approval of the bonds, upon the books of the War Office, or in those of the Engineer Department; nor is there any officer or clerk now in the Engineer Department who was attached to it at the time the contract with Mr. Mix was made.

I request that the original bond may be returned to this office when no longer wanted for the use of the committee;

And am, with great respect,
Sir, your most obedient servant,
JAMES BARBOUR.

Hon. JOHN FLOYD,
Chairman of Committee, &c. &c. Washington.

Elijah Mix's Bond, 5th August, 1818.

Know all men by these presents: That we, Elijah Mix, Samuel Cooper, and James Oakley, are held, and firmley bound, to the United States of America, in the sum of twenty thousand dollars, lawful money of the United States; for which payment, well and truly to be made, we bind ourselves, and each of us, ourselves and each of us, our and each of our heirs, executors, and administrators, for and in the whole, jointly and severally, firmly by these presents, sealed with our seals, and dated the fifth day of August, in the year of our Lord one thousand eight hundred and eighteen, and of the Independence of the United States the forty-third.

The condition of the above obligation is such, that whereas the above bounden Elijah Mix has contracted with Joseph G. Swift, U. S. Chief Engineer, to deliver one hundred and fifty-thousand perch of stone at Old Point Comfort, Virginia: Now, if the said Elijah Mix does faithfully perform his part of said contract, then the above obligation to be void; otherwise to remain in full force and virtue.

ELIJAH MIX. [L. S.]
SAM'L COOPER, [L. S.]
JAMES OAKLEY [L. S.]

Signed and delivered in presence of
EDW'D MACOMBER, for *Elijah Mix.*
R. RIKER.

Transcribed from the Bond Book of the Engineer Department.

[Cancelled, by order of the Secretary of War, by a new bond, of the same date. Recorded, page 15.]

Know all men by these presents: That we, Elijah Mix, George Cooper, Samuel Cooper, and James Oakley, are held, and firmly bound, to the United States of America, in the sum of twenty thousand dollars, lawful money of the United States, to be paid to the United States; for which payment, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators for and in the whole, jointly and severally, firmly by these presents, sealed with our seals, dated the fifth day of August, in the

year of our Lord one thousand eight hundred and eighteen, and of the Independence of said States the forty-third.

The condition of this obligation is such, That whereas the above bounden Elijah Mix and George Cooper has contracted with J. G. Swift, Chief Engineer, to deliver one hundred thousand perch of stone at Old Point Comfort, Virginia; Now, if the said Elijah Mix and George Cooper does faithfully perform their part of the contract, then the above obligation to be void; otherwise to remain in full force and virtue.

ELIJAH MIX, [L. S.]
GEORGE COOPER. [L. S.]
SAM'L COOPER, [L. S.]
JAMES OAKLEY. [L. S.]

Sealed and delivered in presence of
JOHN MORTON,
SIMON HILLYER.

The sureties having been, by me, duly sworn, I do hereby approve of them as sufficient.

New York, 5th Aug. 1818 R. RIKER.

A true transcript, from the Bond Book of the Engineer Department.

ALEX. MACOMB,
Major General Chief Engineer.

No. 52.

Chairman of the Select Committee to the Secretary of War.

CAPITOL, *January* 15, 1827.

SIR: I am directed by the Committee to whom was referred the communication of the Vice President, of the 29th of December last, to request you to furnish them with the original bond of Mix, which was cancelled; the original articles of agreement or contract; the Record Book in which these bonds were recorded; also, the time each bond, the cancelled bond and the substitute, were filed in the Comptroller's office.

I have the honor to be, Sir,
Your obedient servant,

J. FLOYD,
Chairman Select Committee.

The Hon. JAMES BARBOUR,
Secretary of the Department of War.

No. 53.

Secretary of War, to the Chairman of Committee.

WAR DEPARTMENT, *January 16th*, 1827.

SIR: I have received your communication of the 15th instant, stating that you are directed by the Committee to whom was referred

the communication of the Vice President, of the 29th of December last, to request me to furnish them with the original bond of Mix, which was cancelled; the original articles of agreement, or contract: also, the record book in which these bonds were recorded; the time each bond, the cancelled bond, and the substitute, were filed in the Comptroller's Office.

The original bond of Mix, which was cancelled, is not to be found in the files of the War Office, or on those of the Engineer Department; nor is there any trace of it, other than the transcript of it in the Bond Book of the Engineer Department, of which an exact copy was sent in my letter to you of the 13th instant.

I enclose the original articles of agreement of contract, dated on the 25th of July, 1818, signed J. G. Swift, Elijah Mix; and I send the record book (of the Engineer Department) in which these bonds, the cancelled bond, and the substitute, are recorded.

The time at which these bonds were filed in the Comptroller's Office, cannot be ascertained, as there does not appear to be any entry on the subject in the War Office, the Engineer Department, or in the Comptroller's Office.

It is requested that the contract may be returned to this office.

I have the honor to be,
Very respectfully,
Your obedient servant,
JAMES BARBOUR.

Hon. JOHN FLOYD, *Chairman*, &c. &c.
Washington.

Contract between Elijah Mix and J. G. Swift, for delivering Stone at Rip Raps.

This agreement, made between Joseph G. Swift on the part of the War Department of the United States, on the one part, and Elijah Mix of New York, of the other part, witnesseth: that the said Elijah Mix agrees to deliver one hundred and fifty thousand perch of stone from the banks of York river in Virginia, agreeably to samples this day lodged in the Engineer Department, at Old Point Comfort and the Rip Rap Shoals, in Hampton Roads, Virginia, at the rate of not less than three thousand perch a month, commencing by the fifteenth day of September, 1818: and the aforesaid Joseph G. Swift agrees to pay, or cause to be paid, him, the said Elijah Mix, three dollars a perch, for every perch of stone delivered at the abovementioned places agreeably to this contract.

In witness whereof, we have hereunto set our hands and seals, this twenty-fifth day of July, one thousand eight hundred and eighteen, at the city of Washington.

J. G. SWIFT, [SEAL.]
ELIJAH MIX, [SEAL.]

Witness, C. VANDEVENTER.

No. 54.

Elijah Mix's Bond, 5th August, 1818.

[Cancelled by another bond of same date, this being incorrect in reciting a contract for 100,000, instead of 150,000 perches.]

Know all men, by these presents, that we, Elijah Mix, George Cooper, Samuel Cooper, and James Oakley, are held, and firmly bound, to the United States of America, in the sum of twenty thousand dollars, lawful money of the United States, to be paid to the United States; for which payment, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, for and in the whole, jointly and severally, firmly by these presents.

Sealed with our seals, dated the fifth day of August, in the year of our Lord, one thousand eight hundred and eighteen, and of the independence of said States the forty-third.

The condition of this obligation is such, that, whereas, the above bounden Elijah Mix and George Cooper, has contracted with J. G. Swift, Chief Engineer, to deliver one hundred thousand perch of stone at Old Point Comfort, Virginia. Now, if the said Elijah Mix, and George Cooper does faithfully perform their part of the contract, then the above obligation to be void, otherwise to remain in full force and virtue.

ELIJAH MIX, [L. S.]
GEORGE COOPER, [L. S.]
SAMUEL COOPER, [L. S.]
JAMES OAKLEY, [L. S.]

Sealed and delivered in the presence of
JOHN MARTIN,
SIMON HILLYER.

The sureties, having been by me duly sworn, I do hereby approve of them as good and sufficient.

R. RIKER.

New York, 5th Aug. 1818.

No. 55.

Letter from the Chairman to the Secretary of War.

CAPITOL, *Jan.* 17, 1827.

SIR: I am directed by the Committee, to whom was referred the communication of the Vice President of the 29th of December last, to request you to furnish them with the letter of Mix to the Secretary of the Department of War, consenting to Goldsborough's interest being recognised, dated the 13th of April, 1821.

Also, that you would inform them whether the original contract with Mix was recorded, when recorded, and by whom.

I have the honor to be, Sir,
Your obedient servant,
JOHN FLOYD,
Chairman Select Committee.

The HON. JAMES BARBOUR,
Secretary of the Department of War.

No. 56.

Letter from Gen. Macomb to the Committee, with Mix's letter recognizing Goldsborough.

ENGINEER DEPARTMENT,
Washington, January 18th, 1827.

SIR: Your letter of this morning to the Secretary of War, stating that you are directed by the Committee, to whom was referred the communication of the Vice President of the 29th of December last, to request the Secretary of War to furnish them with the letter of Mix to the Secretary of the Department of War, consenting to Goldsborough's interest being recognised, dated the 13th of April 1821; also, that the Secretary would inform them, whether the original contract with Mix was recorded, when recorded, and by whom, was received by the Secretary of War this morning, when about starting for Alexandria, and was immediately put into my hands, with direction to answer it.

The letter of Mix, referred to, is not on the files of this office, but is probably with other papers, in the hands of Captain Smith, now before the Committee. I find, however, the following entry in the brief book of letters received at the Engineer Department, which in no doubt, an abstract of the contents of the letter in question, though there is no date affixed to the entry, by which it could otherwise be certainly identified. "Letter referred, No. 142: Capt. E. Mix to Secretary of War, is willing that Mr. H. Goldsborough, who had purchased of Mr. S. Cooper one-fourth of the Mix contract, be recognised by the Government as the proprietor of said one-fourth, and receive payment on delivery made thereon, provided Government will absolve him (Mix) from a proportionate degree of responsibility for the execution of his contract and the redemption of $10,000 advanced: the arrangement will be considered conclusive upon the notification to that effect by the Department of War."

The original contract with Mix was recorded in the Engineer Office contract-book, by G. T. Rhodes, a clerk now in said office, but the time at which it was recorded does not appear from any entry in the book or otherwise, though as Mr. Rhodes was not attached to the

office till March 29th, 1819, it could not have been recorded by him before that time; probably some considerable time afterwards.

I have the honor to be,
Very respectfully, sir,
Your obedient servant,
ALEX MACOMB,
Maj. Gen. Chief Engineer.

Hon. JOHN FLOYD,
Chairman of Committee, &c. &c.

GEORGETOWN, 13*th April*, 1821.

SIRS: Mr. H. Goldsborough having purchased from Mr. S. Cooper, the undelivered part of one fourth of my contract, I have no objection to his being recognised by the Government as the owner thereof, and, to their giving orders for payment to be made to him or to such persons as he may authorize to receive it for him, without further authority from me, for the deliveries that have already been or that may hereafter be made thereon, provided the responsibility now attaching to me for the due fulfilment of the whole contract be so modified as to transfer from me to him, so much thereof as will apply to the portion withdrawn as above stated, from my jurisdiction, and provided, also, the Government will exonerate me from obligation to liquidate one fourth of the $10,000 advanced by them on the contract, holding him liable therefor.

The foregoing I will consider to be binding on me, whenever I shall receive a notification of its acceptance by the War Department.

I have the honor to be, sir,
With much respect,
Your obedient Servant,
ELIJAH MIX.

Hon. J. C. CALHOUN,
Secretary of War.

No. 57.

Chairman of the Committee to the Secretary of War.

CAPITOL, COMMITTEE ROOM,
January 18, 1827.

SIR: I am directed by the Committee to whom was referred the communication of the Vice President, of the 29th of December last, to require you to send them "Mix's original proposition (for delivering stone at Old Point Comfort:) the original acceptance of the Engineer Department of that proposition, or any entry that shows the time of accepting it: the private statement furnished by the Engineer Department to the President; the instrument showing Vandeventer's interest; the instructions given to Lt. Col. Gratiot, dated Engineer Department, August 19th, 1819; the letter, information, or statement on which the last named instructions were predicated; the in-

structions given to Capt. F. Lewis, dated Engineer Department, 1st of June, 1820; also copies of any entry in the War Department, touching the exoneration of Mix from accountability for one-fourth of the advance of $10,000 made to Mix on his contract, on Goldsborough's being recognised as party in interest in the contract, and of his notification of such exoneration."

I have the honor to be, Sir, your obedient servant,

JOHN FLOYD,
Chairman, Select Committee, Ho. of Reps.

The Hon. JAMES BARBOUR,
Secretary of the Department of War.

No. 58.

Letter from the Secretary of War to the Chairman of the Committee.

WAR DEPARTMENT, *Jan.* 22, 1827.

SIR: Much time has been consumed in searching the papers of the Department to procure, if possible, the documents required by the Committee, as described in your letter of the 18th. As many of them cannot be found, and as the contemporary letter book contains all the information in this Department connected with the inquiries of the Committee, I have instructed Gen. Macomb to present himself to the Committee, with the letter book, and refer to such letters as the Committee may wish to see.

I offer you my respects.

JAMES BARBOUR.

To the Hon. J. FLOYD,
Chairman, &c. &c.

Original proposals of Elijah Mix, to deliver stone at Old Point Comfort, 23d July, 1818.

WASHINGTON, 23*d July*, 1818.

SIR: I offer to deliver, at Old Point Comfort, from one to one hundred and fifty thousand perch of stone, at three dollars per perch, of sample No. 1, exhibited. I will deliver, at the same place, from one to two thousand perch of the sample No. 2, for $2.75 a perch.

I offer Samuel Cooper, James Oakley, and Mudler Robbins, as securities in such sums as may be agreed upon for the performance of any contract I may make with the United States.

I have the honor to be, Sir, with true respect, your obed't serv't,

ELIJAH MIX.

Brig. Gen. SWIFT,
Chief Engineer, U.S.

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No. 59.

Chairman of the Select Committee to the Secretary of War.

CAPITOL, COMMITTEE ROOM,
January 22, 1827.

SIR: I am directed by the Committee, to whom was referred the Vice President's communication of December 29th last, to request you to furnish them the correspondence of Commodore Lewis with the Department of War, touching charges against General Swift, Colonel W. K. Armistead, and Major Vandeventer.

I have the honor to be, Sir,
Your obedient servant,

JOHN FLOYD,
Chairman of Select Committee.

The Hon. JAMES BARBOUR,
Secretary of the Department of War.

No. 60.

Secretary of War to Chairman of Select Committee.

WAR DEPARTMENT,
January 23*d*, 1827.

SIR: I have the honor to acknowledge the receipt of your communication, addressed to me, under date of the 22d instant, in which you request, at the instance of the Select Committee appointed for the investigation of the subject-matter presented in the Vice President's letter of the 29th ultimo, that they be furnished with "the correspondence of Commodore Lewis with the Department of War, touching charges against General Swift, Col. W. K. Armistead, and Major Vandeventer;" and, in compliance with the request, I transmit herewith, copies of the documents containing the correspondence called for, of which the following is an abstract:

No. 1. Colonel Armistead to Colonel Gratiot, dated August 19, 1819, stating, that an arrangement had taken place, as stated.
2. J. Lewis to the Secretary of War; March 28, 1821.
3. W. K. Armistead to J. Lewis & Co., stating the conditions on which 7,000 dollars would be advanced; March 29, 1821.
4. J. Lewis & Co. to the Secretary of War; June 7, 1821.
5. Secretary of War to J. Lewis & Co.; June 14, 1821.
6. J. Lewis & Co. to the Secretary of War; June 21, 1821.
7. Secretary of War to J. Lewis & Co.; June 25, 1821.
8. Do. do. do. do. June 28, 1821.
9. J. Lewis & Co. to the Secretary of War; June 29, 1821.
10. J. Lewis & Co. to the Secretary of War, enclosing a copy of a letter from them to Col. Gratiot—remarks by the Engineer Department enclosed; June 30, 1821.

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11. F. Le Baron to Secretary of War, disclaiming the sentiments of a letter written on the 25th ult. by J. Lewis & Co.; July 1, 1821.
12. J. Lewis & Co. to the Secretary of War; July 25, 1821.
13. Secretary of War to J. Lewis & Co.; August 2, 1821.
14. Secretary of War to Col. Armistead, relative to certain charges against him; August 3, 1821.
15. Secretary of War to J. Lewis & Co.; August 3, 1821.
16. F. Le Baron to Secretary of War, relative to a letter suspecting the motives of General Swift, &c.; Aug. 6, 1821.
17. J. Lewis to Secretary of War; August 17, 1821.
18. General Macomb to Colonel Gratiot, authorizing indulgence to J. Lewis & Co.; September 27, 1821.

I am, very respectfully, Sir,
Your obedient servant,
JAMES BARBOUR.

Honorable JOHN FLOYD,
Chairman of Select Com. &c. Washington.

Enclosure No. 1.

ENGINEER DEPARTMENT,
Washington August 19th, 1819.

Lt. Col. C. GRATIOT,
Corps of Engineer, Old Point Comfort, Va.

SIR: An explanation has taken place between the Secretary of War and Messrs. Jacob Lewis & Co. on the subject of their contract for supplying stone at Old Point Comfort; the following is the result: viz:

1st. The draughts of their vessels to be marked, and several cargoes of each vessel to be measured, and, if the results shall be satisfactorily conclusive of the correctness of that mode of ascertaining the measurement, then to adopt it.

2d. The Captains of their vessels, in all cases, except receiving payments, to be considered the Agents of Messrs. J. Lewis & Co. unless either of the parties being present shall choose to assume the agency, or unless they shall appoint a special Agent.

3d. The Government are to afford to Messrs. J. Lewis & Co. every reasonable facility in the execution of their contract, particularly in promptly taking the necessary steps to receive the stone as soon as the Captains or Agent report the arrival of a vessel or vessels, so that there will be no delay or detention in the delivery.

4th. The Government is to provide a number of wharves sufficient to admit their vessels to discharge as fast as they shall arrive.

5th. When unloading at those wharves, if the vessel can approach them near enough to admit of the stone being hoisted from the vessel upon the wharf, without the aid of staging or skids, then Messrs. J. Lewis & Co. are to deliver the stone upon the wharf; but, if staging or skids be necessary, (and in that case they are to be provided, placed upon the vessel, and removed when done with, at the expense of Gov-

ernment) then they are to deliver the stone upon the gunwale of the vessel or, if they prefer, upon the staging or skids.

6th. While the wharves are preparing, a part of the vessels may discharge their cargoes along the beach, if the calmness of the sea will admit of it, without danger to the vessels, and, if their draught will permit their being brought near enough thereto. In such cases, staging or skids will be used as was stated with regard to wharves, and the deliveries will be made accordingly.

7th. Whether the delivery be made directly from the vessel upon the wharf, upon staging or skids, the Government is to remove the stone as fast as it shall be delivered, so that no interruption will be experienced by Messrs. J. Lewis & Co. in the delivery.

8th. Messrs. J. Lewis & Co. under the conditions governing in the contract of Mr. Elijah Mix, except the price, are authorized to deliver upon the Rip Raps, one-fourth of the whole quantity of stone, contemplated in their contract; and, until the preparations for receiving stone at Old Point Comfort, shall be farther advanced, they may be permitted to make the bulk of their deliveries at the Rip Raps.

9th. Messrs. J. Lewis & Co. shall be entitled to receive payment for stone already delivered, or that may be delivered, by them, either at Old Point Comfort or the Rip Raps, until the 6th day of October next. The sums that shall become due to them for deliveries made by them after that period, to be applied to the liquidation of advances, to the amount of thirty thousand dollars, that will have been made to them upon their contract up to that period. After the liquidation of said advances, the payments upon deliveries to be resumed.

10th. The following to be considered a definition of building stone, and to govern in receiving stone upon the contract with J. Lewis & Co. The stone to be in the rough state in which it is quarried; the length and breadth to be greater than, and to bear such proportions to, the thickness, as to admit of breaking joints, and making a good bond; the stones to be of such size that two men may conveniently lift them; but if a portion shall be furnished larger than that size, a corresponding portion of a smaller size may be received; in either case, the proportions of the length and breadth to the thickness, as above stated, to be required; each stone to have a good bed and face.

As it is not contemplated to face the walls connected with the fortifications at Old Point Comfort in regular parallel courses, such stone only will be required as is necessary to make strong masonry. Stones of the description above defined, are considered suitable and sufficient for that purpose. If, however, you should be of a different opinion, the Department would be pleased to learn the nature and extent of your objections, and to receive from you a description of such stone, as you may conceive to be suitable for the construction of the walls, forming a part of the fortifications to be erected at Old Point Comfort.

You will appropriate, and place at the disposal of Messrs. J. Lewis & Co. a comfortable room for their accommodation as quarters, while at the Point.

I have the honor to be, &c.

W. K. ARMISTEAD,
Colonel Engineers.

Enclosure No. 2.

J. Lewis to the Secretary of War.

The liberal manner, in which you decided my business, yesterday, induces me to make one more effort by the following explanation, viz: The securities of the contract, are, in all respects, bound for the fulfilment of it. The advances of the Government do not exceed the sum stipulated in the contract. The sum stipulated, is $30,000. It has been diminished to about $22,000; the sum now granted will bring the amount within the sum specified, consequently, the responsibility of the securities continue the same, although no question can exist as to their consent to the measure, yet the time it would take to obtain it, would be a very serious loss to me. My business in Havre de Grace is suffering beyond calculation, for want of immediate money and my presence.

My claim on the Hayhen Government requires my presence at home, in order that I may provide Mr. Robinson with the necessary documents, and the more so, as the Senate of that Government rise in May. His departure without delay, is highly important to me; under all these considerations, I hope and trust you will forthwith order the sum, which you have accorded me, to be placed in my hands, and thereby essentially oblige one, who holds you in the highest respect and esteem.

LEWIS.

March 28th, 1821.

P.S. I would have made this representation personally, but I am in bed.

To the SECRETARY OF WAR.

ENGINEER DEPARTMENT,
Washington, March 29, 1821.

GENTLEMEN: Commodore Lewis, in your behalf, yesterday consented to relinquish and cancel all claims of indemnity for demurrage, or for any other injury, for which you may have thought yourselves to be entitled to indemnity, depending upon, or having connexion with, however remotely, your transactions with the Government, or any of its officers, growing out of your contract with the Government for the delivery of 80,000 perches of building stone at Old Point Comfort, provided the Government would advance you, on account of the aforesaid contract, the sum of $7,000, to be liquidated by stoppages from the avails of deliveries on account of the contract, in such proportions as may be determined on by the War Department.

In pursuance thereof, the Secretary of War has authorized me to state to you, that the $7,000 will be advanced to you on the condition before stated, upon your furnishing to this Department a declaration from the sureties to the bond for the fulfilment of the stipulations of the contract aforesaid, of their assent thereto, and a certificate or certificate from the Attorney or Attorneys of the United States, for the district or districts in which they may reside, declaring their present competency for $50,000, the amount of that bond.

Your answer to this letter will be expected with your assent to the arrangement.

I have the honor to be, &c. &c.

W. K. ARMISTEAD,
Colonel Engineers.

P. S. If the District of Attorney is not within convenient distance, a certificate from the Member of Congress for the district will answer.

W. K. A.

Messrs. J. LEWIS & Co. *Washington.*

Enclosure No. 4

Hon. JOHN C. CALHOUN, *Secretary of War:*

SIR: We regret exceedingly to have occasion, and indeed be under the necessity of again addressing you on the subject of our contract, but such are the difficulties and obstacles thrown in our way, that it becomes a duty we owe to you, as well as to ourselves, to hand you the following exposition of facts, (brief:)

Scarcely had our J. Lewis signed the document which was so carefully handed to him by C. Smith, the object of which was to obtain a pledge from the Company that they would not prefer charges against the Engineer Department for an absolute breach of contract, and other injuries done to J. Lewis Co. contrary to the intent and meaning of said contract, than a recurrence happened of a similar nature to those which happened before, and others of a new kind, equally unjust and unwarrantable, namely, sending our vessels back with Rip Rap stone; making our captain and crews transport the stone twenty or thirty feet from the vessel, and place it on a high pile; and, above all, they refuse all Rip Rap stone under one hundred fifty pounds. We expect hourly to receive information that they are weighing the Rip Rap stone in scales.

It will be remembered, when our J. Lewis had the honor of an interview with you, at which time he presented our demand for damage, and which had previously been agreed to, it was observed that the accommodation afforded J. Lewis & Co. by permitting them to cast stone on the Rip Raps, was, and ought to be, considered as a quid pro quo, and although our J. Lewis, under all circumstances, consider it a severe exaction, consented in preference to demur.

Now let us examine, Sir, the nature of the supposed advantages given to J. Lewis & Co. by permitting them to cast stone on the Rip Raps which by C. Armistead has been considered a fair offset to our just demand for demurrage. After having obtained the supposed indulgence, we employed a great number of men to quarry. We have on our shores 6,000 perch of stone, *paid* for, called Rip Raps, such as we had furnished. We are now called on to furnish Rip Rap stone of one hundred and fifty pounds weight; consequently these stone are all lost to us, provided Mr. Delafield's caprice is adopted in violation of common sense and justice: for we contend that large and small stone, mixed promiscuously together, lay infinitely more solid than stone all of one size. He is a boy in practice and experience; he is supercilious

in manners and conduct; he is the one appointed to determine as to the quality of stone for mason work, or otherwise, what is called building stone; he is known to have a determined hatred to J. Lewis & Co.; he has evinced it in every instance in his power; he is in fact incompetent, if he was without prejudice; and it is him, we are told, who, in his wisdom, has made the latter determination, that no stone shall be received at the Rip Raps of less weight than 150 lbs. The consequence is, that our quarrymen quit laboring; our quarries are choaked by Rip Rap stone, and we cannot work the building; vessels quit freighting, &c.

We have another grievous circumstance to contend with. The Engineer Department have contracted to have the wall laid by the perch. This arrangement operates most prejudicial to J. Lewis & Co. The mason objects to every stone that requires hammering, or that will not fall exactly into its bed, and this becomes a criterion with the officer inspecting.

Another serious grievance is the mode in which the stone has been and is now measured. We contend, notwithstanding the repeated difficulties made by Col. Gratiot, that such superior building stone never was delivered at any post in the country; yet it is measured twenty-five feet to the perch, instead of sixteen. Such are the two sides of it, that it perches like a solid mass.

Such stone as we often deliver, would sell, in Baltimore for $8 per perch, 16 feet measurement, which is a perch. It is called coping and corner stone. Notwithstanding, if two stones appear, in a whole cargo, not to please Mr. Delafield, he will order the vessel to take those two stones to Fort Calhoun, or back to Havre de Grace, all which is intended to ruin J. Lewis & Co.

Freighted vessels we cannot keep; the captains all exclaim, they are determined to ruin J. L. & Co. at Old Point Comfort, and all of which we knew before, and they will succeed, unless we are saved by your interposition. We had better, and indeed necessity will conduct us to the measure, stop now, than linger twelve months longer, and then be hung, and pay forty shillings for the halter; which must inevitably be the result, if we continue to work the quarries under such disadvantages as we are placed by the Engineer Department.

Captain Smith, who is the amanuensis and mouth piece of Colonel Armistead, had (an esprit de corps) with him, and is offended at our letter written to Colonel Armistead, more particularly, as he was the author, therefore will say every thing in favor of his chieftain and patron. Colonel Gratiot is offended also, because in the charges we made to the Engineer Department he was included, so that J. Lewis & Co. have to contend with a most *determined resolution on the part of those gentlemen to ruin them;* and they certainly have it in their power to effect it, provided they are allowed to proceed as they have done, and appear determined to do.

And J. Lewis & Co. contend, that the Engineer Department have again twice broken the contract; we wish an examination into the fact, when many more important facts shall be related and substantiated. If General Bernard could be made the judge on the subject, we should be satisfied, or Colonel Totten, or any other unprejudiced judge or judges; a survey of masons from Norfolk; in short, any mode

we would willingly consent to, when pointed out by justice, otherwise ruin is inevitable, and we must immediately stop; our quarries are all choaked by our exertions to hurry, but all is abortive. Expecting to be honored with your reply, we have the honor, &c.

J. LEWIS & Co.

Havre de Grace, June 7, 1821.

Enclosure No. 5.

DEPARTMENT OF WAR,
14*th June*, 1821.

SIR: I regret to learn, by yours of the 7th instant, that you should experience, what you consider as unreasonable difficulties, in the execution of your contract, from the Engineer superintending the works. I did hope, after the arrangements made with Com. Lewis, when he was last in this city, that no further difficulty would be experienced. I cannot assent to the idea suggested in your letter, that the arrangement then made, was to obtain a pledge from the company, that they would not prefer charges against the Engineer Department. The arrangement originated wholly with the Department, and was intended to adjust, in a manner satisfactory to both parties, claims, which grew out of points of dispute in the construction of the contract, admitting of doubt. If an officer is guilty of neglect of duty, or offensive conduct, it is not the practice of this Department, to shelter him from merited censure or punishment, much less to sacrifice the public interest for that purpose. Your complaints may, I think, be principally embraced under three heads: that you are compelled to transport the stone to too great a distance, and place them on a high pile; that you are compelled to deliver at the Rip Raps, stone weighing at least 150 lbs.: and that the perch is estimated at or near 25 feet, instead of 16. On the first point I have no information; but Col. Gratiot has been directed to report the facts, and the reason for the order, if there is one, for transporting to so great a distance. When his answer is received, it will become the subject of a communication. The order to deliver stone not less than 150 lbs. has been extended alike to Mr. Mix's contract and yours; and has been founded on the belief, that the stones for casing the exterior ought to be at least of that size. But the difficulty arising to the contractors, of choking the quarries, of which you complain, appearing to be well founded, the Col. has been ordered to receive, in separate cargoes, stone of an inferior size, in due proportion, to be deposited within, in order to clear the quarries, if he should be of the opinion it can be done consistently with the public interest; but, if he should be of an opposite opinion, to report the grounds of such opinion to the Department, in order that a final decision may be made here. You must, however, remember, that the delivery at the Rip Raps, under your contract, is not a matter of obligation on your part, but an indulgence on the part of this Department; and, if the decision as to the size should be unfavorable to your wishes, it is at your option to deliver the whole at the Point, according to the terms of your contract.

On the last point, I understand, that the custom is well established, of estimating the perch at 25 feet, or rather, 24¾, and that the experi-

ments made by the Engineer Department, previous to making any contract for stone at those works, in order that the price which ought to be paid might be ascertained, were on perches of that measurement, and that the delivery, on Mr. Mix's contract, has been invariably so measured, both before and since the date of your contract.

I have the honor, &c.

J. C. CALHOUN.

Messrs. JACOB LEWIS & Co.
Havre de Grace.

[Enclosure No. 6, of this Document, is referred to as Exhibit R, in Major Vandeventer's second deposition, and is filed with it.]

Enclosure No. 7.

DEPARTMENT OF WAR,
25th June, 1821.

SIR: I have received your letter of the 21st instant, marked private, which I have perused with attention. I perceive from the perusal, that you have not received mine of the 14th instant, in answer to yours of the 7th, which ought to have been received by you, previous to the date of your last, and which you have probably received before this time. By it you will learn in what light the subjects to which it refers, are regarded by this Department, and what means have been adopted in consequence of your representation.

I have no information in relation to the additional point of complaint, as to measurement of the stone, but have directed Col. Gratiot, to report the facts, and the explanation why the same vessels deliver perches less now than formerly. When this answer is received, it will become the subject of an additional communication.

I have examined your contract, and the correspondence with you and Col. Gratiot, in relation to it, by the Engineer Department, and I must say, that I cannot discover any thing inimical to you on the part of that Department. The advantages granted to you, are to the full, (in fact, I might say, much more so.) as liberal as those to other contractors. To Mix, I believe not a single has been granted, and the order as to the size of the Rip Rap stones, equally embraces him, and those who hold under him. He has acquiesced thus far without a complaint. The contractors under him, have done the same, simply requesting that they might be permitted to deliver a portion of small stones, at the same time, if it could be done consistently with the public interest. When it is considered that your delivery at the Rip Raps, is mere indulgence, your contract being for the delivery of massive stone, of a kind calculated for building the most substantial wall, and that you have still the right to use the indulgence or not, at your option, it does appear singular, that you, to whom the indulgence is granted, should complain of a measure as highly injurious to you, while those who deliver under an express contract, and whose right must, under the view which you take, be so deeply affected, should acquiesce. The complaint ought to have come from them, and not from you; but still being desirous that no inconvenience should result to you in the fulfilment of your contract, which can be avoided, I have

directed Col. Gratiot, as was stated to you, to permit the delivery of smaller stones in proper proportion, if it can be done in his opinion consistently with the public interest, and, if not, to report the facts with his opinion to this Department, for its special decision.

Your charges against Gen. Swift, Col. Armistead, and Major Vandeventer, are of a very serious character, as deeply affecting their integrity, and ought to be investigated. If they have prostituted in a single instance, their official station for peculation, favoritism, or oppression, they ought not to be permitted to hold a commission from the Government for a moment. These officers have partaken, and do still partake of my good opinion, but only on the supposition of their integrity; but I will not permit any favorable impression in any degree to screen them from the severest scrutiny, and merited punishment, if they are guilty. If you will give me the means of investigation, it shall be pursued with zeal. You say that you will undertake to prove that Col. Armistead, was concerned with the mason at Old Point Comfort, in the contract for brick. I must call on you as a duty, which you owe the country, to present the charges against him for investigation; or if you do not choose to appear as prosecutors, to give me the name of the person or persons, by whom the charge can be substantiated, in order that an immediate investigation may take place, so that, if guilty, he may be punished, or, if innocent, that he may be freed from the suspicion.

Unless you take some measure to substantiate these charges, I must in justice to these officers, refuse to receive, as private, any additional communication implicating them.

I return you the letters, and the copies of the letters accompanying your last.

I have the honor &c.

J. C. CALHOUN.

Messrs. Jacob Lewis & Co.
Havre de Grace, Md.

Enclosure No. 8

Department of War,
28*th June*, 1821.

Gentlemen: Since my letter to you, of the 25th instant, a report from Colonel Gratiot, on the subject, has satisfied me as to the necessity of having large stones at the Rip Raps, as required by him, as well as the reasonableness of his requisition. The following extract, from the same report, will, no doubt, convince you, that your complaint, to which it refer, was not well founded. Extract, "With respect to the complaints of Messrs. Jacob Lewis and Co. that they are required to transport their stones, 20 or 30 feet, after landing them, is founded on misrepresentations obtained from captains of their vessels, and not, as might have been expected, from their agent, located to watch over and transact their business, at this place. It is required of them, as of all other contractors, that the stones should be deposited on the crest of the pile; this is accomplished, most generally, by means of planks, 12 or 15 feet long, reaching from the gunwale of the vessel to the pile, on which the stone is either carried, slided, or rolled, to the place of deposite. The object of placing the stone on the crest, is to allow the

pile to assume, externally, a regular slope to the bottom. Without this precaution, and were masters of vessels permitted to discharge from the gunwale, the consequence is evident, that after a few deliveries, the free access to the pile would be cut off by irregular projections on the slopes and sunken piles, over which it would be dangerous for other vessels to pass."

I have the honor, &c.
J. C. CALHOUN.

Messrs. JACOB LEWIS & Co.
Havre de Grace, Md.

Enclosure No. 9.

HAVRE DE GRACE, *June* 29, 1821.

SIR: We have the honor to acknowledge receipt of your favor of the 14th instant, on the 25th, and that of the 25th in due course. Com. J. Lewis had departed for Old Point Comfort, previous to the receipt of the first letter. On his return, which we look for in a few days, they will be immediately presented to him.

With respect,
JACOB LEWIS & Co.
per ARCH. AUSTIN.

Hon. J. C. CALHOUN,
Secretary of War.

Enclosure No. 10.

FORT MONTRE, 30*th June*, 1821.

The Hon. JOHN C. CALHOUN:

SIR: I have the honor to acknowledge the receipt of a copy of the communication made by you to Jacob Lewis & Co. under date of the 14th instant, touching the subject of their contract with the Government; previous to which I had had an interview with Colonel Gratiot, and a general conversation, relative to the several difficulties which, either generally or partially, existed between the Engineer Department and Jacob Lewis & Co. *from the commencement*. I stated very frankly the nature of our complaints, as well as our determination, and the consequences that must inevitably follow, provided he persisted in persevering in the same conduct towards us as he had hitherto done.

Firstly, I stated that the loss by measurement must be our utter *ruin*.

(*a*) He answered, that he was sensible of the difference between measuring such superior laminated stone as we were delivering, and that delivered at Fort Calhoun, the loss must be from 25 to 30 per cent.; but at the same time observed, that the remedy was not with him, that I had my appeal, &c. *This loss alone is evident ruin.*

Secondly, I stated, that when the indulgence, *so called*, was given to J. Lewis & Co. to cart stone on the Rip Raps, it was not mentioned, consequently not contemplated, that stone of 150 lbs. would be required; therefore, we quarried such stone as we were told were considered Rip Rap stone, and there they are (*b*).

Answer. The remedy is not in me. I am sensible that it is a grievance, and that the Government ought to indemnify J. Lewis & Co.

Thirdly, That, as to the transportation of the stone on the works, *it was totally out of the question;* that the request was not warranted either by custom, or usual understanding, or contract.

(*c*) Answer. Mix has consented to it, why not J. Lewis & Co.?

Fourthly, I stated, because Mix had not made any stipulation as to the mode of delivery, and that he could well afford to sport away a few thousands while he was, and had been, delivering Rip Raps for $8, a gain of 25 per cent in the measurement, and got his stone carried for half a dollar less per perch than J. Lewis & Co. pay for building stone. These are incontrovertible facts, whatever may be said to the contrary notwithstanding.

(*d*) Finally. The Colonel proposed that the stone should be measured by tonnage measurements, being, in his opinion, more equitable. He also proposed referring our differences to the Board of Engineers. To this I cheerfully consented, or, if it would be more convenient to the Department, to Mr. Hoban, (who is reported to be a man of strict honor, and to be the first judge of massive work in the country.) He has been in the service of Government since the year 1792. I have the honor to enclose you, herewith, a copy of my answer to Colonel Gratiot's proposition.

Be assured, Sir, of my highest consideration, and profound respect.

J. LEWIS.

Remarks on a letter from Jacob Lewis to the Secretary of War, dated 30th June, 1821.

(*a*) A letter from Colonel Gratiot, to the Engineer Department, dated 25th June, 1821, expresses a suspicion that the fact of the great increase of measurement of small stones in comparison with large, had chiefly influenced J. L. & Co. in making objections to the delivery of the latter kind, and, in proof, asserts the fact to be known to him, that they had purchased small stones to be delivered at the Rip Raps, that were not produced in their own quarries.

(*b*) It may be doubted if Colonel Gratiot had, as here stated, admitted to be a grievance, what he had, in a previous letter to J. L. & Co. claimed as a right, supporting his claim by the argument, that the Government could not be suspected of having intended in their contract that rabbish stone should be received, when it was known to them that stone of that kind would not answer the purpose for which stone was to be furnished. Besides, had he examined the letter to him of 19th August, 1819, authorizing certain ameliorations to J. L. & Co's contract, he must have seen, that the size of the stone is there distinctly regulated to be such, that each may be lifted by two men.

(*c*) This answer is conclusive: because in the ameliorations above stated, it is distinctly provided, that they shall be governed in their deliveries at the Rip Raps by Mix's contract.

(*d*) All the difficulties complained of are founded on objections to the manner of Government, in administering favors to J. L. & Co. A withdrawal of those favors would, therefore, remove the cause of complaint, and render a reference unnecessary.

Enclosure No. 11

HAVRE DE GRACE, *Md. July 1st*, 1821.

SIR: In your letter of the 25th ultimo, addressed to Jacob Lewis & Co. I read, with surprise, that portion of it answering a clause inserted in a letter from said Company, respecting certain charges made against three gentlemen mentioned therein. For my part, Sir, as I compose the only partner of J. Lewis, I disavow any knowledge or participation of any communication made to you implicating either of those gentlemen therein alluded to. They are gentlemen for whom I have the warmest friendship and esteem, and nothing but direct and strong proof can alter any opinion I have of them, that derogates from honest and honorable actions.

I have the honor to be,
Most respectfully,
Your obedient servant,
FRANCIS LE BARON.

Hon. J. C. CALHOUN, *Secretary of War.*

Enclosure No. 12

Honorable J. C. CALHOUN,
Secretary of War, Washington.

SIR: Seeing by your late communications to J. Lewis & Co. that you have manifested high displeasure at their writing the word "private" on their communication to you, as well as their effort, as you suppose, to prejudice you against persons whom you appear to esteem highly, in consequence of which I feel it a duty to inform you, that all parts of the communication which J. Lewis & Co. had the honor to make to you, of a personal nature, I am individually the author of, consequently personally responsible.

My apology for having so mal apropos incurred your displeasure, allow me to proffer. When I had the honor of an interview with you, I proposed a private and confidential communication to you; you appeared to receive it cheerfully, and at the same time informed me, that you was always ready to receive any information from any quarter, &c. I therefore took it for granted, and thought that I could write with the same confidence that I had spoken. I was induced to believe so the more, because I had been in the habit of writing confidentially to the Department of State since twenty years, and often received the thanks of the Department as well as the President of the United States. I was also invited by an opinion of my own consequence. I did think that I deserved as well of my country and your confidence as either of the gentlemen in question, having served it in three ways with, I trust, honor, and equal rank with either. And, finally, I did believe, that the information I gave you in my private communication respecting Mix, connected with the style and nature of their contract, would at least have shaken your prepossession in favor of General Swift and Mr. Vandeventer; and I did think the information of the highest importance to you, consequently my duty to tell you, and I was promptly by no other feelings. For proof, I beg leave to refer you to Mr. George Bibby, of the Engineer Depart-

ment, or John and Philip Hone, New York. You require particularly that I will give you the name of the person by whom the charge can be substantiated against Col. Armistead; in some instances it would be improper for me to do so, but that which is mine I can give. The person is Captain Lewis, of the Engineer Corps, my son, who was the person that made the contract for bricks with Mr. Laws, and received the information from his, Mr. Laws, mouth; and I received it from Captain Lewis, and I believe Captain Lewis had no particular motive for mentioning the circumstance to me, believing that it was not more incompatible for Col. Armistead to be connected in a contract than for Major Vandeventer, inasmuch as he was not the person who made the contract. If, for any reasons that you may entertain, you are desirous to make public my *private* communications, I hereby withdraw the injunction.

I have the honor to assure you of my consideration and respect.

J. LEWIS.

HAVRE DE GRACE, *July 25th*, 1821.

Enclosure No. 82

DEPARTMENT OF WAR,
August 2, 1821.

SIR: I have received your letter of the 25th of July, and can assure you, that I neither felt, nor intended to express, that "high displeasure" which you have been pleased to infer from my letter of the 25th June. I am at all times desirous to obtain such information as may enable me correctly to discharge my duty, whether it be communicated privately or publicly, and to that effect I informed you in the conversation to which you refer. In the particular case under consideration, though I had no right to be displeased with the form in which you might think proper to communicate the statement which you made, yet it was of such a character as to compel me to adopt the course which I did. With the exception of its being marked private, it seems to me in no other respect to be so. It was signed Jacob Lewis & Co.; the great body of the communication consisted of representations in relation to your contract, and complaints against the decision of the superintending Engineer in relation to it. In fact, it had so much the business character about it, that to effect what appeared to be your object, I had to make it the basis of a communication and order to the Engineer, which necessarily compelled me to place the communication among the papers of the office, with, however, its private character affixed to it. It thus became liable to future inspection by those who might succeed me in office, or to become the subject of a call on an investigation. Thus circumstanced, I could not, particularly with your pledge "to prove the correctness of the statement," in duty to myself, to the officers implicated, or to the country, adopt, as it appears to me, any other course than the one which I did; and such, I trust, will be your own impression; on a review of the facts.

The charge against Colonel Armistead has assumed such a shape, both as to its character and proof, that I deem it my duty to cause an inquiry to be made into it, and shall accordingly avail myself of the

extent which the inquiry may make necessary, of your permission to consider your former communication as public.

I have the honor, &c.

J. C. CALHOUN.

Messrs. JACOB LEWIS & Co.

Enclosure No. 14.

DEPARTMENT OF WAR,
3d August, 1821.

SIR: I have been informed, from a source which does not permit me to overlook it, that you are concerned with Mr. Laws in the contract for brick at Old Point Comfort, made with Captain Lewis, of the Corps of Engineers. My informant states, that he understands that the information was given to Captain Lewis by Mr. Laws the contractor. The charge, you will perceive, is specific, and the proof referred to of such a nature as to enable you to meet it fairly, if not founded in truth. Having always entertained a high opinion of your honor and integrity, I deem it my duty in the present stage of the inquiry to apprize you of the charge which has been made, so that you might take such measures to meet it and satisfy this Department of your not being guilty of the charge as you might judge advisable. You will see the necessity of prompt attention to the subject.

I am, &c.

J. C. CALHOUN.

Col. W. K. ARMISTEAD,
Fort Washington, Potomac.

Enclosure No. 15.

DEPARTMENT OF WAR,
August 3, 1821.

SIR: I wrote you yesterday, in answer to your letter of the 25th of July, and I now enclose a copy of my letter to Colonel Armistead, that you may be apprized of the shape which has been given to the inquiry. The charges against the other person implicated in your letter will claim the early attention of the Department.

I will not, unless it should become absolutely necessary, use your name in the inquiry.

I have the honor, &c.

J. C. CALHOUN.

Com. JACOB LEWIS,
Havre de Grace, Maryland.

Enclosure No. 16.

WASHINGTON CITY, *6th August*, 1821.

SIR: I have read with some surprise, that part of Commodore Lewis's letter to you relative to his suspicions of the motives that influenced

General Swift and Major Vandeventer, in their conversation with, and advice to me, on the subject of my stone contract, which he believed to be interested and base. My opinion, Sir, is diametrically opposite to that of Commodore Lewis's, and I here beg leave explicitly to declare to you, and to all those who may see said letter, that I had no conversation whatever with Major Vandeventer on the subject of my contract; and none with General Swift, except a friendly wish, frequently expressed to me, that I ought, in some way or the other, to extricate myself from the contract, as he considered it a ruinous one. Such advice was, in my opinion, given with sincerity and truth, and emanated from the best feelings of a friendly heart, and I am more led to this belief from a knowledge of General Swift's character; and I am sure that no motive could possibly ever exist to induce the General to depart from those high principles of honor in which he was educated.

I have the honor to be,
Most respectfully,
Your obedient servant,
F. LE BARON.

Hon. J. C. CALHOUN, &c.

Enclosure No. 17.

Hon. J. C. Calhoun:

SIR: Capt. Lewis has called on me, on the subject of a letter received from Col. Armistead. It appears, from his explanation, that I was mistaken in stating that he heard Mr. Laws say, that Col. Armistead was concerned with him in a contract for bricks; but it was from others, whose names he will give when called on to do so, and who state that they heard Mr. Laws say so, and that indeed it was in the mouths of many.

I have the honor to assure you of my consideration and respect,
J. LEWIS.

New York, Aug. 17, 1821.

WASHINGTON CITY, *August* 1*st*, 1821.

SIR: I have come on here to represent to the War Department, through you, the difficulties we have to encounter in the performance of our contract, and to that extent that forbids its completion, unless the Engineer Department will extend to us more liberal arrangement than now exists at Old Point, and at the Rip Raps. The following statement will exhibit to you wherein we can be benefitted. Our contract was made to supply your Department with building stone. Whatever the ideas of the Superintendent of Works may be, he cannot have it in his power so to construe the words of that contract, as to materially alter the quality of that article, especially if the article is more valuable and difficult to procure, unless proportionable allowances are made. In consequence of the Department allowing us to deposite our small building stone, and the large and small refuse stone, on the Rip Raps, to the extent of one-fourth of the whole amount of our contract, we agreed to furnish at Old Point, building stone not less than two men could easily handle. This arrangement was useful to

us both, as the Government had already a large portion of small stone then on the Point furnished by the Engineer Department, and we necessarily quarried out some refuse stone, and had broken off from the building stone a quantity of spawls. This enabled us to agree to furnish this uncommon size building stone, and to throw on the Rip Raps common quality of stone. Such arrangements being made with the Engineer Department, we had to make the same with all our subcontractors, taking care not to allow them to break up any, unless over a ton; and we have for ourselves always observed that rule, and contrary to the practice of other Rip Rap contractors, have delivered large and small mixed, as the Inspectors at the Rip Raps will testify. The stone, on an average, has been as follows: one-third, over 110 lbs., one third, over 50 lbs.; and one third, less.

Now, I submit to you, Sir, if stone of that size is not more suitable to make a loose wall, with an angle of 45 degrees, than if all was 150 lbs., and upwards, as we are directed to furnish; and is it justice to us to reject such stone as we have purchased and quarried out on the faith that they would be received? Two to four thousand perches are now on hand, paid for. No notice was forwarded to us until April, that these stones would not be received: and then they were all quarried, and to handle over and pick out such size stone as would cost more than we received for them. We complain as a hardship, that our crews are obliged, contrary to all mercantile rules, to carry up the cargo fifty yards, (in some instances) and fill up the inequalities of the crown, when the only duty that can be required of the crew is to deliver the cargo over the gunwale and deposite on a wharf, shore, cart, or vessel. This regulation bears peculiarly hard on us, as we lose all our chartered vessels by it, as the crews will not submit to the exaction, and the owners of the vessels will not subject their vessels to lay so long chafing their bottoms and wakes against the sides of the cone, and we cannot charter them to carry building stone, alone. One quarter must be refuse stone, or our quarries will be so choked as to stop working them. If the pile is to be graduated, is it proper that the crews of our vessels are to do it? Why not employ a gang of men to attend exclusively to this business? But a still greater hardship than those before enumerated, we complain of, as it draws daily from us our hard earned profits, which we so much want at this time, to answer the demands of Government and individuals. At the bare mention of it, you will see at one view the necessity of making some immediate arrangement for our relief. Even Colonel Gratiot himself gives it as his unequivocal opinion that it bears too heavily on us; and computes the loss of measurement, since the opening of our new quarries, at 25 to 30 per cent. This loss is occasioned by the superior quality of stone, which affords no interstice when piled and packed for measurement, or not one-eighth of what common building stone forms. When the contract was made, we supposed the stone would be weighed and measured, so as to come as near $16\frac{8}{12}$ feet cubic, as possible. We found that, in this district, and in neighboring States, 8 feet was allowed to make up for interstices.

In New York and New England, where the stone is better, five feet only is allowed, but we are perfectly satisfied that $24\frac{8}{12}$ cubic feet should be the measurement, providing our vessels are marked with the common building stone of the country, such as our contract specifies.

But to furnish the quality of stone we have been sending to Old Point since March last, at that measurement, cannot be done, without certain ruin to the contractors. Mr. Hoban, Mr. Colter, and several other architects and masons, who have seen the stone from our quarries, say they are worth to the Engineer Department $6 per perch, for their peculiar work. If the Department will allow our vessels to be marked with common stone, such as the contract mentions, or with large Rip Raps, we will be perfectly satisfied on that point. In making them, however, if the Department prefers common building stone, to have them marked with, we will send down one or two loads, as they may think best, and it shall be inspected by master masons from Norfolk, or elsewhere, who are *disinterested*, and who act under oath, to say that the stone is equal to the article meant by the contract. This precaution is necessary, as heretofore our stone has been rejected and complained of—by whom? Why, the stone contractor, who has agreed to lay the stone at a certain price per perch! and nothing less than square stone would suit him, if he was allowed to be the judge, as then he could easily and rapidly make up the wall, and his fortune besides. The Inspectors of Stone are necessarily biassed by his opinion, as their former lives and occupations little fitted them to be judges of the quality of building stone. If the Department say that our vessels shall be perched by the assorted Rip Raps, or the large kind, then we are willing to submit the measurement to the Government agents, and measurers under the Superintendent. We are sure the object of Government is not to ruin but to protect the contractors: especially, when it sees those who have taken contracts low, and are threatened with ruin unless such protection is extended to them. Convinced of this, we will point out in a few words what we want to save us, and what we think can be granted without injury to the Government, but rather an advantage.

Let us deliver all our Rip Rap stone, now quarried out and paid for, providing it does not exceed the proportion allowed, and then allow us to deliver such quality of Rip Raps, as before mentioned.

Oblige us not to carry the cargoes at the Rip Rips farther than it is necessary to deposite them in safety: say at the top of the pile, or on the sides of the cone.

Let our vessels, carrying building-stone, be marked with common building-stone, such as will pass a board of master-masons on oath; or marked with large Rip Raps, as inspected by the Government surveyor and measurer, all at the rate of $24\frac{9}{12}$ cubic feet.

Allow all deficiencies according to the new measurement since the opening of the Spring navigation.

If these indulgences are granted us, nothing else, I hope, will prevent the completion of the contract without ruin to ourselves, and in good faith to the Government.

Respectfully, your obedient, servants,

FRANCIS LE BARON,
for
JACOB LEWIS & Co.

To Maj. Gen. ALEX. MACOMB,
Chief U. S. Engineer Department,
Washington City.

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Enclosure No. 18

ENGINEER DEPARTMENT,
Washington, 27th Sept. 1821.

SIR: Upon examining the grievances complained of, by Messrs. J. Lewis & Co. in executing their contract for delivering stone at Old Point Comfort, it is deemed proper to grant them the following facilities and indulgences.

The delivery of stone of any description whatever at the Rip Raps, is an indulgence. The small stone therefore, which they may be permitted to deliver in the centre of the mole, and stone of such size as shall be required by the Engineer, to form that part of the mole, on which the foundation of the Fort is to rest, must be deposited according to the directions of the Engineer, and agreeably to the plan; and larger stones to form the breakwater in their proper places.

But the contractors will only be required, in the first instance, to deposite their cargoes on the top of the pile, and not obliged to fill up any inequalities or cavities, which were not occasioned by their own neglect or carelessness in making the deposite in the first instance, or which were occasioned by the gradual settling of the mole, or by any other accident. They are, however, to deposite their cargoes on the top of the mole and around it, in such places as the Engineer shall point out, and not where they may select.

The stone shall be measured as agreed upon, and specified in the 10th article of the arrangement, of the 19th of August, 1819.

Messrs. Lewis & Co. also complain that the perch is measured at 24 cubic feet, instead of 24$^{9}/_{10}$. This measurement of the perch was fixed upon before they made the contract with the Engineer Department, and has been the customary measurement at all the public works on the Potomac and Hampton roads. The other contractors have made no complaints on this subject, and it is not deemed advisable to deviate from the established mode of measurement.

In order to enable the contractors to deliver their cargoes with facility, at the Rip Raps, you will allow them the use of the public buoys, anchors, and cables, purchased for the use of that service, provided they moor them, &c. at their own expense.

You will furnish to J. Lewis & Co. a copy of these instructions, as soon as convenient.

I have, &c.
ALEX. MACOMB, *Maj. Gen.*

Lt. Col. C. GRATIOT,
Corps of Engineers, Old Point Comfort.

Tons	Name	1819	1820	1821	Perch	Minus	
	Sloop:						
70 46/100	Sister	69	67.5	55.4	14		
53 85/95	Halcyon	69	69.3	44	25		
88 16/95	Lincoln	78.16	74.18	40.12	38		One of the most burthensome vessels in the Chesapeake.
54	Manilla	44.4	45	45			
79 7/95	Borealis	52	55	50.10	2½	Do.	
	Schooner:						
174	Marino	111	116		(1)	Do.	
99 65/95	Union	66.22	64	50.10	16	Do.	
	Sloop Susanna:						
81 65/100	1	61.15	124.16	67.5	35	Do.	
	2	150.10	285				

[1] Not yet arrived.

J. Lewis & Co. to Col. Gratiot, Fort Monroe, July 27th, 1921.

FORT MONROE, *July 29th*, 1821.

SIR: I have perused your communication of the 18th instant, made to Thomas B. Smith, Agent for J. Lewis & Co. at Fort Monroe. The nature of the proposition, together with the conditions therein contained, inhibits the possibility of J. Lewis & Co.'s accepting it; that is to say, if J. Lewis & Co. are to understand that they are to deliver 979 perches *only*, and that to be at their expense placed on the pile as the Superintendent may direct, and non less than 50 pounds weight.

J. Lewis & Co. are very desirous of being informed, if Colonel Gratiot is determined to persist, *now* and henceforth, to require the compliance, on the part of J. Lewis & Co. to the condition and proposals alluded to.

We have the honor to assure you of our respects.

J. LEWIS & CO.

Colonel GRATIOT,
Commanding Fort Monroe.

No. 61.

Mr. McDuffie's Communication to the Committee.

The Hon. JOHN FLOYD:

SIR: The Committee of Investigation over which you preside, having announced to me as the friend and representative of Mr. Calhoun, that they have closed the examination of all the witnesses they deem it necessary or proper to summon before them, I should be equally insensible to the claims of private friendship and the obligations of public duty, were I not to enter my solemn protest against the extraordinary course, and not less extraordinary conclusion, of a proceeding singularly destitute of almost every attribute of a legal investigation. Even if it should be considered that this Committee was instituted, not for the exclusive purpose of sitting in judgment on the specific charges submitted to their examination, but for the additional purpose of exercising, to a certain extent, the functions of an inquisitorial commission, I cannot conceive that there would be any thing in the character of such a commission that would authorize it to depart from the fundamental principles of judicial investigation, and the established rules of judicial evidence, and, after wandering at large through the perplexing mazes of suspicion and conjecture, guided only by the bewildering lights of incompetent and inadmissible testimony, to select the precise point where suspicion ends and legal evidence begins, as the conclusion of their inquiries. But, confidently believing that it was the intention of the House that this Committee should assume the solemn character of a judicial tribunal, and that the facts and opinions which they may report to the House, will be consequently regarded by the public as having the stamp of judicial authenticity, I feel impelled, by a profound sense of the duty which I owe to Mr. Calhoun, to the country, and even to the Committee themselves, to state briefly and distinctly my objections to the course pursued, before it shall be

too late to correct or to palliate its injustice: and, in the very outset of my remarks, I cannot but advert to the fact, as strikingly illustrative of the anamolous character of this proceeding, that with the exception of the solitary question as to the fact of Mr. Calhoun's participation, which every witness has promptly and unequivocally answered in the negative, there is not one tittle of all the incumbring mass of documentary and oral testimony which has occupied the incessant labors of the Committee for more than twenty days, that has the slightest pretension to the character of legal evidence, whether we regard it as applicable to the present accusation, or to any other accusation against the private integrity or official purity of Mr. Calhoun. In order to demonstrate this proposition, I beg leave to present, for the re-consideration of the Committee, a descriptive and analytical review of the recorded testimony.

It will be recollected that the first three or four days of this inquiry, were devoted to the examination of witnesses, professedly produced for the purpose of exculpating the present Secretary of War from the imputation of having any agency, either in bringing forward the charge of peculation against Mr. Calhoun, or in the infamous publication of the equally infamous letter of the yet more infamous instrument of this dark and nefarious conspiracy. It is not my purpose to complain of the course pursued by the Committee, in this respect, although it might seem to indicate a more anxious desire to exonerate one, against whom no imputation had been made, than to administer speedy justice to the second officer of the Government, when actually on his trial, upon a charge of official delinquency, calculated, if true, to stamp his reputation with indelible infamy. But as the Committee have thought proper to make the conduct of Mr. Barbour, in this transaction, a distinct subject of inquiry, I feel constrained to remark, that, although I readily exonerate him from any intentional participation in this most insidious attempt at moral and political assassination, yet it is a circumstance much to be regretted, that, in the editorial commentaries by which the publication of the letter of Elijah Mix, in the Phoenix Gazette, was accompanied, the name, and office, and official decision of the Secretary of War, were so artfully associated with the charge against Mr. Calhoun, as to give it additional solemnity and importance; and that no measures were taken to have this injurious association disclaimed, through the same channel. It is a fact, equally to be regretted, that the Secretary should have retained in his possession, officially, for three days, the letter containing the charge against Mr. Calhoun, without giving him the slightest intimation of it. And even the verbal declaration made by the Secretary to Colonel Johnson, that he believed the charge against Mr. Calhoun to be an atrocious calumny, was not made until a day had elapsed after the publication in the Phoenix Gazette, and was only communicated to Mr. Calhoun after he had prepared and sealed his letters to the House of Representatives, and placed it in the hands of a friend. And I must also state as a fact worthy of notice, that neither in the Phoenix Gazette, which assumed a semi-official attitude, in stating the proceedings of the Secretary of War, in relation to the letter of Mix, nor in the notice taken of the publications in that Gazette by the National Intelligencer, the next day, was the fact stated, that the Secretary regarded the charge against Mr. Calhoun as an atrocious calumny.

But to resume the analysis of the testimony, with a view to its immediate bearing upon my opening proposition. After submitting the obvious remark, that all the evidence produced to exculpate Mr. Barbour, was not only irrelative, but immaterial to the pending issue, I will proceed to the examination of that part of the testimony which is intended, as I presume, to bear directly or indirectly upon the official character and integrity of Mr. Calhoun. The great mass of the evidence that has so long engaged the attention of the Committee, consist of the private letters of Major Vandeventer to Elijah Mix, with the explanations to which they have given rise. It is hardly necessary that I should enter in a course of argument, before a Committee, of which six out of seven are lawyers by profession, to show that these letters ought to have been promptly rejected, as incompetent and improper testimony. Even if it be granted that Mr. Calhoun is now on his trial for every act of his life, official or private, and not merely upon the specific charge referred to the Committee, it is perfectly clear that, according to those great principles of evidence which have been devised by the wisdom, and consecrated by the experience of ages, the letters or declarations of another person cannot be given in evidence against him. Nor is this one of those technical principles which sometimes mar the symmetry of the law, and have no foundation in reason. There are no principles of our law more deeply founded in wisdom, than those which regulate the admission of evidences; and I will take this occasion to remark that, next to such an organization of the Government as will secure the effective responsibility of political agents, civil liberty derives its principal security from the establishment and sacred observance of fixed rules of judicial proceedings, and of judicial evidence. The opinion entertained by the enlightened sense of modern times, of the inseparable connection between the rulers of criminal evidence and civil liberty, may be clearly inferred from the opposite judgments which posterity has pronounced upon the characters of Sidney and of Jeffries: for, while the name of Sidney is inscribed on the imperishable rolls of fame as a patriot and martyr, that of Jeffries has, by universal consent, been consigned to everlasting infamy, as a judicial monster. And yet the catastrophe of the victim has excited the sympathy, and the tyranny of the judge, the abhorrence, of mankind, principally because the sacrifice was effected by violating those rules of evidence in which every member of the community had a common interest, as the only means of securing his life and character against the combined machinations of prostitute informers and profligate rulers. To unsettle and subvert these rules, therefore, under whatever plausible pretext it may be attempted, is to destroy the only substantial security for every thing sacred in life, and consequently to inflict a vital stab upon the public liberty. Nor is there any thing in the character or circumstances of the present investigation that should absolve the Committee from the observance of these rules.

On the contrary, all history will justify the remark that there are no occasions in which their rigid observance is so highly important as when legislative bodies or political commissions exercise judicial powers for the trial of political offences. On such occasions, the strongest of human passions almost unavoidably usurp the seat of judgment, and unless restrained by pre-established forms of proceed-

ing and pre-established rules of evidence, the most capricious freaks of despotism and vengeance are perpetrated in the sacred names of law and justice. Without referring for illustration, to the lawless proceedings of those inquisitorial tribunals which are at once the reproach and the terror of despotic Governments, or to the shocking outrages committed by the revoluntary tribunals of France, it would be sufficient to advert to the disgraceful proceedings of the Parliament of England in cases of attainder, not only to sustain the general principles here presented, but to communicate the most vivid impression of their truth and importance. If these general views evince to the Committee the necessity of adhering to the established rules of evidence, and if I have shown that one of the most important of those rules excludes the letters or declarations of a third person under any circumstances, how incomparably stronger does the objection to their admission become, when we advert to the singular and extraordinary circumstances under which the letters of Major Vandeventer have been produced to the Committee. In the first place, they are obviously the detached parts of a garbled correspondence. In the second place, they are mutilated and defaced, so as to render their meaning unintelligible as to every purpose connected with the investigation. But, what is of infinitely more importance, this correspondence was obviously garbled, and the letters mutilated and defaced, by one of the most artful and consummate villains that ever figured in the annals of human depravity, for the unquestionable purpose of exciting doubts and suspicions, by means of the mutilations and erasures, which could not have been produced by the letters in their original and entire state. It is impossible, therefore, to conceive a combination of circumstances more strikingly demonstrative of the wisdom of those rules of evidence from which the Committee have thought proper to depart, than that which exists in the present instance. For it is obvious to remark, that this is a political commission, composed of political men; and, disguise it as we may, I must be permitted to add, without intending to insinuate any thing in the slightest degree disrespectful to a majority of the Committee, that they are sitting in judgment on a political opponent charged with a political offence. And when it is moreover considered, that these garbled and mutilated letters have been produced by the vilest of all that tribe of informers who have been the disgrace and the terror of those countries in which they have been countenanced by the wickedness and profligacy of rulers—a self-condemned and self-immolated wretch, who, in the very presence of the Committee, has literally covered himself with "all the multiplying villanies of nature"—I cannot but believe that the Committee will themselves shrink back with abhorrence from those machinations and devices, which they have unwittingly received in the place of evidence, and upon which the characters of incompetency and infamy are so clearly and indelibly impressed. There is one other species of testimony sought by the questions, and placed upon the records of the Committee, equally excluded by the principles upon which I have insisted. Hearsay evidence is inadmissible, not only by the code to which we have been accustomed, but by every system of civilized jurisprudence with which we have any acquaintance: and yet the Committee, apparently assuming, by a strange complication of issues, that every officer of the War

Department who had any agency in forming a certain contract with Elijah Mix, or any interest in it, is now actually under trial, have received and recorded, as testimony, the declarations of those officers, indistinctly recollected, and vaguely and doubtingly stated.

Admitting that it is proper for the committee to assume inquisitorial powers in this investigation, and in that character to ask of the witnesses not only what they know, but what they have heard from others, it must be exceeding apparent, that the only excusable purpose, even of an inquisitorial kind, for which such questions could be propounded, is the discovery of other witnesses, by whose evidence the charge might be established. Let us see how far the proceedings of the committee have been conformable to this view of their functions. In the evidence recorded by the committee, Col. Armistead states, in substance, that either Major Vandeventer, on Gen. Swift, informed him that the latter was concerned in the Mix contract. Upon further recollection, the witness states that he must have received this information from General Swift himself, for that he remembers to have had a conversation with him, in which the General stated that he had an idea of leaving the army and becoming interested in some contract with the Government, which the witness supposed to have been the contract in question. He further states, in the same conversation, Gen. Swift informed him that he had asked the permission of Mr. Calhoun to become thus interested. This evidence, if evidence it may be called, is to be regarded in the two-fold aspect of implicating Gen. Swift in a criminal participation in a contract made by himself as the agent of the Government, and Mr. Calhoun in a scarcely less criminal connivance at such a participation. So far as it relates to Gen. Swift, common justice requires me to remark that, it is contrary to those great principles of criminal jurisprudence which our forefathers have consecrated by a constitutional declaration, to sit in judgment upon a citizen against whom no charge has been presented, who has no notice that his character is even thus informally implicated, and who, instead of being present to confront his accusers, is wholly unrepresented before the committee.

But, so far as this testimony tends to implicate Mr. Calhoun, the course adopted by the committee is liable to a much stronger objection than that merely of receiving and recording for publication, incompetent and improper testimony. They have evidently closed the investigation precisely where it ought to have commenced; leaving upon the reputation of Mr. Calhoun all the suspicion which illegal evidence could produce, and omitting to summon before them the only witness who could give legal testimony on the matter in question.

Col. Armistead states, obviously from the recollections of a most treacherous and feeble memory, that Gen. Swift informed him, eight or nine years ago, that he had asked Mr. Calhoun's permission to become concerned in some contract with the Government. This is the only material fact bearing upon the character of Mr. Calhoun, and it must have been obvious to the committee, that Gen. Swift was the only witness who could give legal testimony in relation to it. Yet they have declined to summon him on their own motion, no doubt from a view of the subject satisfactory to themselves. The ground upon which I must presume they have acted, is the incompetency of the evidence before them, and its utter insufficiency to fix upon Mr. Calhoun any imputa-

tion which requires to be refuted. But I must be permitted to say, that the incompetency and insufficiency of the evidence, though a very sufficient reason for rejecting it altogether, is no reason at all for refusing, when it is improperly received and recorded, to produce the only legal testimony by which judicial certainty could be obtained on the subject. Although, therefore, the committee must have acted with a view to impartial justice, the course they have pursued has been precisely that which is best calculated to give the most injurious efficacy to illegal testimony against Mr. Calhoun, and to avoid the conclusive refutation which the production of legal evidence would undoubtedly establish. To do away the effect of this proceeding, the only alternative left to Mr. Calhoun is, to place the most emphatic and unequivocal negative, which I am expressly authorized to do, upon the imputation of his ever having any knowledge or belief of Gen. Swift's participation in the contract, and to call upon the committee to examine Gen. Swift himself, as to the imputed fact of Mr. Calhoun's knowledge and connivance.

Having shewn that the entire mass of the testimony produced, is legally inadmissible, on the trial of any issue which can be made upon Mr. Calhoun's official conduct or moral integrity, it is due to the committee that I should explain my reasons for not objecting to it as it occurred, in the progress of the investigation.

Convinced of the absolute falsity of the charges presented, and of the entire purity of Mr. Calhoun's character, in all the relations, public or private, in which it can be contemplated, I determined, from the beginning, that I would interpose no objection to any inquiry which the committee might think proper to institute, nor to any description of evidence by which they might think proper to pursue it. Any attempt, on my part, to restrain the latitude of the investigation, or to prevent the adduction even of improper evidence, would have been construed by the malicious into a desire to screen Mr. Calhoun behind technical forms, from a full and free investigation. And as I was satisfied that the more severe the ordeal, the more conclusive would be the evidence of the fidelity and zeal of his official conduct, I was the more willing that the investigation should assume any form which the committee might choose to give it, and be prosecuted by any sort of evidence which they might think proper to admit, upon their own responsibility.

But, although I had a right, as the personal friend of Mr. Calhoun, to abstain from any interference with the course of the committee, I have no right, considering the relation in which he stands, and in which I stand, to the public, to sanction, by my acquiescence, a species of unlicensed inquisition, unknown to the jurisprudence of any free country, and which would furnish a precedent utterly subversive of the only effectual safeguards of the reputation of public men in periods of great political excitement.

Having disposed of that branch of the investigation which relates to the imputations upon Mr. Calhoun's official integrity, it remains for me to offer a few remarks upon a view of this subject, which, though not involved in the issue referred to the committee, is evidently embraced in the scope of their inquiries. It has been too apparent to escape the observation, even of one less interested than I am, to mark the bearings of this investigation, that a very large portion of the

testimony can have no other application, or object, than to call in question the general administration of the War Department, while Mr. Calhoun presided over it, by holding him responsible for the minute irregularities of its subordinate branches, and particularly those of the Engineer Department. While, therefore, the charge is specific and limited, the investigation is general and undefined; and the most obvious principles of justice require that the defence should be, at least, co-extensive with the attack, whether this be open and direct, or disguised and incidental.

Assuming, then, that the general irregularities of a subordinate branch of the War Department are fair subjects of inquiry, let us see whether the specifications are such as, admitting their truth, will fairly fix any portion of the responsibility on Mr. Calhoun. The contract, in relation to which the imputed irregularities occured, was made the 25th of July 1818. Mr. Calhoun took charge of the War Department the 8th December, 1817; and it is a fact of undisputed notoriety, that he found it utterly destitute of organization in almost all its branches, and pre-eminently so in the Engineer Department. The extensive operations and large disbursements of the then recent war, effected under a system of administration having neither organization nor responsibility, had introduced such irregularities and abuses, and caused the accumulation of such a mass of unsettled accounts and unfinished business, that the War Department was actually shunned by several distinguished citizens who were solicited to preside over it, as an Augean stable, holding out in prospect the labors of Hercules, without any portion of his fame. Such being the condition of the Department when Mr. Calhoun became its chief officer, and every irregularity which is imputable to the Mix contract, including the omission to advertise, having been common and frequent in every preceding Administration, without any effectual effort to correct them, the injustice of holding Mr. Calhoun responsible for not correcting, in a few months, irregularities which his predecessors had not even attempted to correct in as many years, is too gross to be tolerated for a moment.

It is obvious that the head of such a Department cannot, upon any rational principle, be made responsible for a particular instance of irregularity in the details of a subordinate department. The true point of his responsibility is, the general laxity and want of system from which the particular instance arises. If, therefore, Mr. Calhoun is obnoxious to any censure in the present case, it is for the imperfect organization of the Engineer Department on the 25th of July, 1818. In this view of the subject, it is to be remarked, that he took charge of the Department in December, 1817, at the opening of the session of Congress, left Washington for South Carolina, on indispensable business, immediately after the close of the session in the May following, and did not return until the month of July, only two weeks before the contract in question was closed, and was almost incessantly occupied, during those two weeks, in the deliberations of the Cabinet on the military occurrences of the Seminole campaign.

Under these circumstances, the irregularities in question, cannot be imputed to him, either in fact or in theory. Coming into a complicated Department, which was almost literally in a state of chaos, nothing but a spirit of official quackery could have prompted him to commence

the great work of a general and systematic reformation before he had deliberately surveyed the working of its disordered machinery, and ascertained both the causes of the existing irregularities, and the most effective means of correcting them permanently.

In fact, when it is considered that Mr. Calhoun first necessarily devoted himself to the creation and organization of the Departments of the Quartermaster General, Surgeon General, and Commissary General, under an act of Congress passed, upon his recommendation, in April, 1818, the wonder is, that the reformation of the Engineer Department was commenced and completed at such early periods as, in fact, it was. I cannot believe it possible, therefore, the Committee will select the minute irregularities of detail, in a transaction which was conducted exclusively by subordinate officers, and of which the irregularities really belonged to the antecedent period of disorder, as criterion of Mr. Calhoun's general administration of the War Department.

Indeed, the very irregularities which we are now considering are the more striking, because of the perfect organization, responsibility, and system, which Mr. Calhoun has the high merit of having subsequently imparted to all the arrangements and operations of the Department.

Standing in contrast with his own improvements, these petty and subordinate irregularities are exhibited in bold relief to the prying and invidious research of the censorious; and, in this way, not only the imperfections which he found in the system of administration, but the signal regularity which he introduced in the proceedings of the Department, are made to furnish matter of accusation against him.

As the general industry, zeal, and ability, with which Mr. Calhoun discharged his official duties, are thus distinctly put in issue by the direction which the committee have given to the examination, I claim the right of calling before them all the heads of the subordinate departments, who were his able coadjutors in the great work of reform, and of showing, by their united testimony, the condition in which he found the departments, the fidelity and unremitting labor with which he devoted himself to its improvement, and the high perfection of its arrangements, which crowned his labors with a success equally conducive to his own fame, and to the welfare of his country. I must, therefore, request that the committee will examine the following gentlemen touching this branch of the inquiry: Major General Brown, General Thomas S. Jessup, General A. Macomb, Doctor J. Lovell, Colonel N. Towson, Colonel G. Gibson, Colonel G. Bomford, Colonel I. Roberdeau, and Colonel John E. Wool. If I am not greatly mistaken, it will conclusively appear, from their evidence, that the system of rigorous responsibility and strict economy which Mr. Calhoun introduced in the operations and disbursements of the military establishment, have effected an annual saving in the national expenditure of more than a million of dollars, to say nothing of the striking improvement made in the moral of the Army, as well as in its military discipline and efficiency.

Although the views already presented, shew the injustice of holding Mr. Calhoun in any degree responsible for the formal irregularities which may have existed in the formation of the contract with Elijah Mix, it is due to the historical truth of the case that I should state,

that, in point of fact, no injury resulted to the Government from those irregularities, or from the making of the contract with such a person. On the contrary, it was conclusively shewn, in the investigation which took place on the subject in the House of Representatives, in May, 1822, that, previous to the formation of the contract, notice was actually given, and inquiries made, at all the points where suitable stone could be procured, and that Colonel Armistead, to use his own words, "made experiments, by having the stone quarried near Georgetown by laborers hired by the United States, and found that it could not be procured and carried to Old Point Comfort for less than $3 50 per perch, together with the great uncertainty of getting vessels to transport it." The testimony of Commodore Rodgers, General Mason, Mr. Baker, of Georgetown, and various other witnesses, all concured in the uncontradicted statement, that $3 50 per perch was the lowest sum for which the stone could be delivered; and, accordingly, $3 50 was the lowest bid, except that of Elijah Mix. It is apparent, therefore, that the contract at $3 per perch would have been ruinous to Mix, but for "the very unexpected and rapid fall in the price of labor and transportation," adverted to by the witnesses in the former examination. Such was the conclusive force of this testimony in 1822, that the bare reading of it, without a single word of commentary or argument, induced the House of Representatives, by a vote of 131 to 20, to reject the report and resolution of the select committee, which recommended a suspension of all appropriations for the fulfillment of that contract. Although, therefore, the character of Mix was, even at the date of the contract, stamped with infamy, the fact was then wholly unknown to Mr. Calhoun, and, I believe, to every officer of the Engineer Department; and however much some of those officers may have suffered from having to deal with a man so profligate and unprincipled, it is clear that the Government has actually saved $75,000 in the whole contract, by accepting his bid. And I cannot but remark, in concluding this part of the subject, that the vigilant regard for the public interest with which Mr. Calhoun has invariably enforced upon Mix the performance of this contract, has evidently brought upon him the infamous calumny which has given rise to this investigation.

I cannot bring this communication to a close without formally and distinctly protesting against blending the examination and trial of charges against the subordinate officers of the War Department with the present investigation. The injustice of such a course to those officers has been already stated. It would be, literally, condemning them without trial. The injustice to Mr. Calhoun is equally great, though not quite so obvious. Upon principles of association, which the committee will readily comprehend, it woud be visiting upon Mr. Calhoun, by a most severe and cruel dispensation, the guilt of these subordinate officers, established by a mode of proceeding having none of the forms of legal accusation and trial, but assuming the most odious of the prerogatives of those inquisitorial tribunals, fortunately known to us only by the history of less favored countries.

Finally, I cannot but express my sincere regret, at the extraordinary delay which has characterized this proceeding, and at the great injustice and injury which have unavoidably resulted to Mr. Calhoun, from that circumstance alone. It is now more than four weeks since the

Committee was charged to inquire whether the Vice President of the United States had been guilty of the infamous offence of participating, while Secretary of War, in the profits of a contract, made with an individual, by the Department, over which he presided. The atrocious character of the charge, and the high station of the individual, implicated, naturally excited, in every portion of the Union, the most lively interest in the proceedings of the Committee; and the people of the United States, at a loss to account for the delay, upon any other supposition than that *some* evidence of guilt had been exhibited, have been looking, day after day, and week after week, with the most intense anxiety, for the result of an investigation, involving, not only the honest name of a public servant, who has been, for fifteen years, honorably and eminently identified with the political history of the country, but involving, also, in no small degree, the reputation of that country, whose rights and whose honor he has so largely contributed to defend; whose character he has so largely contributed to elevate; and whose institutions he has so successfully labored to establish and mature. If, from the high honor and unsuspected purity, which have characterized every action of his life, all who knew him, whether friends or enemies, have looked, with equal confidence, to his entire acquittal of the charge presented, it can scarcely be doubted that a large portion of the people of the United States, who do not know him, must have regarded the unexpected procrastination of the inquiry, as a circumstance inexplicable, if not suspicious. And while I am under the necessity, from the course pursued by the Committee, of still farther protracting the investigation, I shall use every effort, in which I earnestly solicit their co-operation, to bring this long labor to a speedy termination.

I have the honor to be,
With very great respect,
Your obedient servant,
GEO. M'DUFFIE.

No. 62.

Letter from Elijah Mix to the Engineer Department, laid before the Committee by Mr. McDuffie.

GEORGETOWN, 12*th May*, 1825.

SIR: I take the liberty of applying to the Department, and am convinced I think that the justice of my cause gives me right to expect a decision founded on the principles of justice. My contract with the Department, in July, 1818, has nearly been closed, under many disadvantages. In the first place, by purchasing a quarry on York River, Virginia, which cost me two thousand dollars for ten acres. After delivering twenty loads of stone from these quarries, the commanding officer at the Point rejected it, as being unfit for the purpose for which it was intended, and it was rendered useless to me. I then purchased quarries on the Appamatox, after giving to Colonel Armistead a sample of the stone, and getting him to approve of the quality. Those quarries cost me two thousand five hundred dollars; and, after delivering sixteen hundred perch, they shared the same fate as the others, and were condemned at the time I had stone on board of vessels, and at the Point, amounting to six hundred dollars.

Since that time, (1819,) I have been delivering stone from this neighborhood, and have closed my contract, except fourteen thousand perch, and have purchased quarries that have cost me more than four thousand dollars, and am now required by the Colonel to deliver no stone of a less size than one thousand pounds. I find, on attempting to fulfill such an order (however unjust,) that my quarries will not turn out stone which will answer the demand. Not more than one-fourth of the stone now quarried will pass, and the balance have to be removed, and the transportation of them is enormous, and will oblige me to again abandon my quarries, and purchase or hire new ones, at an extra expense. You will perceive that I have already expended eight thousand five hundred dollars, for that purpose; and, at this late day in my contract, it would be unjust in the extreme, to oblige me to again resort to purchasing, for so small a quantity as I have to deliver. I have no redress but to apply to the Department for justice, founded upon the rights of man to man. You will see that my contract only mentions quality, not size. The quality has already been changed for the pleasure and advantage of the Government, at a loss of at least three thousand dollars to me. Can this be justice? The only reason that the commanding officer at Old Point states for demanding from me stone of the above size, is that he does not want the size formerly received; he has forgotten, perhaps, that, for the relief of a defaulting contractor, and for the benefit of the Government, that twenty thousand perches of stone were received at the Rip Raps, and deposited to fill up the plan stated for my stone, which was contracted for two years before. The Government, by this, secured an advance of twenty thousand dollars, and now are obliging me to deliver stone, which, if contracted for at the time my contract was made with the Government, could not have been furnished for six dollars per perch. There is another evil: the stone are of such a size, that no vessel, or but few, that has been in the habit of handling small stones, will take them on freight, and I am obliged to purchase vessels for that purpose.

I have only to ask, that I may be put upon a footing with other contractors, and deliver such size stone as is allowed to them; and should that size not be wanted, that a compensation may be made to me, for increasing the size from fifty to one hundred and fifty pounds, and from one hundred and fifty to one thousand pounds. I am at present paying three times the price of quarrying. I am paying more freight, and I am obliged to expend at least one thousand dollars for machinery to handle those large stone.

I have to request that I may be allowed to deliver some part of my stone of a size that are usually quarried from those shores; and that an order may be given to the Colonel to that effect, as he is now receiving, from Messrs. Goldsborough, stone of the size usually received. He cannot object to receive them from me, upon the grounds that he does not want them.

I have the honor to be, Sir,
With the highest respect,
Your very obedient servant,
E. MIX.

GEN. ALEX. MACOMB.

No. 66.

Chairman of the Committee to Major Vandeventer.

CAPITOL, COMMITTEE ROOM,
January 15, 1827.

SIR: I am directed by the Committee to whom was referred the communication of the Vice President, of the 29th of December last, to request you to furnish them with the original of the account current between yourself and Samuel Cooper, of which you exhibited a transcript on your first examination—as, also, the original accounts upon which that account current was raised; together with the vouchers in support of the items charged in said accounts.

I am, Sir,
Respectfully,
Your obedient servant,
JOHN FLOYD,
Chairman Select Committee.

Major C. VANDEVENTER,
Department of War.

No. 64.

Major Vandeventer to Chairman.

WASHINGTON, JANUARY 26th, 1827.

SIR: I have received your letter of the 25th instant, requesting me to furnish the Committee over which you preside, with the original account current between myself and Samuel Cooper, of which I left with the Committee a transcript; also, the original accounts upon which the account current was raised, together with the vouchers in support of the items charged in said account; and, in reply, transmit, herewith, the original account current, and have to state, that the other papers required by the Committee, in relation to this account current, are not in my possession.

I have the honor to be,
Your most obedient servant,
C. VANDEVENTER.

Hon. JOHN FLOYD,
Chairman Select Committee on the
Letter of the Vice President, &c. &c.
House of Representatives.

No. 65.

Chairman to Secretary of War.

CAPITOL, COMMITTEE ROOM,
January 24, 1827.

SIR: I am directed by the Committee to whom was referred the communication of the Vice President, of the 29th of December last, to request you to furnish them the original letter of J. Lewis & Co. to

the Honorable John C. Calhoun, dated Havre de Grace, 21st June, 1821, and for any letter from the Treasurer of the United States to Elijah Mix, covering a check or draft, dated 8th of August, 1818, in favor of Mix, for the 10,000 dollars advanced on his contract. Also, the original order from the War Department, directing the first advance of 10,000 dollars to Elijah Mix, under his contract, the time when that order was given, and in whose hand writing the order appears.

I have the honor to be, Sir,
Your obedient servant,
JOHN FLOYD,
Chairman of Select Committee.

The Hon. JAMES BARBOUR,
Secretary of the Department of War.

No. 66.

Secretary of War to Committee.

WAR DEPARTMENT, *January* 25th, 1827.

SIR: I have received your letter of the 24th instant, stating, that you are directed by the Committee to whom was referred the communication of the Vice President, of the 29th of December last, to request me to furnish them with the original letter of J. Lewis & Co. to the Honorable John C. Calhoun, dated Havre de Grace, 21st June, 1821; and any letter from the Treasurer of the United States to Elijah Mix, covering a check or draft, dated the 8th of August, 1818, in favor of Mix, for 10,000 dollars, advanced on his contract; and, also, the original order from the War Department, directing the first advance of 10,000 dollars to Elijah Mix, under his contract, the time when that order was given, and in whose hand writing the order appears.

In compliance with the first request, I enclose, herewith, the original letter of J. Lewis & Co. referred to.

Upon inquiry of the Treasurer of the United States for any letter from him to E. Mix, covering a check or draft, as mentioned in your communication, the printed form of the letters, in which drafts given in payment of warrants are remitted by the Treasurer, was furnished; a copy of which form, filled up to-day at the Treasurer's Office as a transcript or representative of the letter to E. Mix, covering the draft alluded to, is enclosed, with the Treasurer's statement subjoined to it, that no copies of such letters are kept in his office. The draft itself was produced from the office of the Register of the Treasury, and is also enclosed, under the belief that it is embraced by the spirit of that request. The draft, as received from the Treasurer's office, was attached to the original warrant by a wafer. It is drawn by the Treasurer of the United States, in favor of Captain Elijah Mix or order, for $10,000, dated on the 8th of August, 1818, payable at sight at the Branch Bank of the United States, in New York, and endorsed by Elijah Mix; and a receipt for the payment, given on the back of it, by Samuel Cooper. The original warrant, which is also communicated as attached to the draft, is drawn by J. C. Calhoun, Secretary of War, upon the

Treasurer of the United States, for the same amount, bears the same date, and is payable to the same person, as the draft.

In answer to so much of the request of the Committee as relates to information in regard to the original order from the War Department, respecting the first advance of the 10,000 dollars to Elijah Mix, &c. &c., on examination of the files, no requisition is to be found on which the warrant issued.

I will thank you to cause the draft and warrant to be returned to this Department, as soon as it may suit the purposes of the Committee to dispense with them, in order that they may be restored to the Treasury, where they belong.

I am, very respectfully, Sir,
Your obedient servant,
JAMES BARBOUR.

Hon. JOHN FLOYD,
Chairman Committee, &c. Washington.

[PRIVATE]

Hon. JOHN C. CALHOUN.

Sir: We have the honor to transmit to you a synopsis, by which it will appear that the affairs of Jacob Lewis & Co. are rendered desperate by the studied management of the Engineer Department.

The enclosed statements of annual deliveries are certainly inexplicable, but alone goes to show that the Company are on the wide road to *infallible ruin*, and nothing but your interference can prevent its being *immediate*.

Most, if not all, of the named vessels, had been measured, perched, and marked, under the inspection of Capt. *Smith's brother, while Inspector at Old Point Comfort*, in the year 1819 and '20; compare the receipts for deliveries with 1821, when the vessels were loaded, to the same marks, and it will be found, Sir, that the difference made is incomprehensible, if the mode of measurement is insisted on as correct.

It is known to me as a nautical man, that all vessels, constructed for burthen, will carry a perch to a ton; (that is to say,) a vessel of 90 tons will carry 90 perches: the sloop Halcyon has carried fifteen perches more than her tonnage. The Navy Commissioners will confirm my assertion, or Mr. Homans, who is an old sailor, and knows these things, that all flat burthensome vessels, in rivers, will carry at least perch for ton. All the Captains of the freighting vessels declare it, and leave the employ in consequence of short measurement, and other difficulties, that are thrown in their way.

The Quarrymen have quit their quarries, in consequence of hearing of the exaction respecting Rip Rap stone, which is contrary to justice; the nature of the Rip Rap contract, contrary to custom, and, in our opinions, contrary to good judgment.

We have seen the massive works of Europe, such as Cherbourg, and many others, where fortifications have been built in the water, upon (*pierreperdu,*) we have always observed that the stone to be from the size of an orange to a barrel. Diamond Fort, at New York, has for its foundation, stones of every size, in the same manner—but it is necessary to observe that Major Vandeventer's father furnished the stone.

But, sir, suppose that some of 150 lbs. were really preferable, which every man will deny who is acquainted with such work, have the Engineer Department, from custom, and the nature of the contract, a right to make the exaction? Ought they not to make another contract, specifying the kind of stone, &c? Instead of which, after we have got out a vast quantity of what was *agreed* to be the Rip Rap stone, we are told they are not the kind; they must be of 150 lbs. weight, and our vessel sent back with the cargo to Havre de Grace. This circumstance, after what has happened before, has ruined the Company's credit again. We have on the shores, $15,000 in Rip Rap stone, as fine for its purpose as ever was seen, and it might all have been delivered; the men who have quarried it call on us to take it away, as we had agreed to do, and do not hesitate to say they will sell it, if we do not, as they have determined to go away; but it is necessary that the stone goes to Old Point to be measured; we had agreed to pay, according to receipts, before we can settle accounts. Judge, therefore, Sir, of the embarrassed situation in which we are placed. While writing this, there are six quarrymen in our presence who boldly declare that they will sell the stone, and murder the man who shall attempt to prevent the delivery of them. Pray how are we to act, Sir, under such embarrassments? In vain do we tell them that justice will be done to them. Their answer is that they cannot stay here and starve; they have *nothing;* and justice travels too slow, and is too often impeded by malice and intrigue.

It may be asked, why does the Engineer Department wage hostilities against Jacob Lewis & Co.? What interest can the Department have, or any of the corps, in so doing? In answer, it must be told, that this feeling commenced from the moment the contract was taken by J. Lewis & Co. The Company were not aware that they would have to contend with the father, two sons, and a [word ineligible] *the latter the private contract points at.* If they had, they would not have been so hardy as to have taken the field; (however,) it was not long before we discovered that the father was in Washington, and had put in his proposals for the group, and they supposed they had the contract, and they became outrageous when they found their disappointment. The first attempt, then, was to discourage us. Gen. Swift went to Doct. Le Baron, and endeavored to prevail on him to give up the contract; that he would be ruined; that we had taken it too low &c.; although these gentlemen were *within half a cent of us.*

Swift said, there were persons ready to take it off our hands; Major Vandeventer said the same; the father went to our bondsmen, and endeavored to discourage them, and advised them to prevail on us to give up the contract; that there were persons stood ready to take it off our hands. Finding all would not do, the next thing was to destroy us by every possible means. Swift used his influence; for, although an *imbecille*, he had cunning enough to make great friends with the officers. Vandeventer, from his situation, had great power in many ways. Mix, this unprincipled fugitive, he stuck at nothing; he offered a quarter of a dollar more per perch than we were giving. The men employed by him were in the habit of hailing vessels in our employ, and telling the Captains not to work for J. Lewis & Co.; that they would never be paid; every obsticle was produced at Old Point Comfort. Col. Armistead's brother, a sutler, was in the habit of saying, that J. Lewis & Co. would

be ruined; they had better give up the contract; there are persons ready to take it off their hands, &c.

The measurers, when the Captains found fault, always were in the habit of saying, tell J. Lewis & Co. they had better give up the contract; *there are persons ready to take it off their hands.* There were no landing places prepared to give that facility in landing the stone, *which, by contract, we were entitled to.* A fleet of our vessels were sent back, with their cargo. All these circumstances combined, must inevitably have produced our ruin, had not your timely intervention prevented it.

After finding all attempts to ruin us proved abortive, then other expedients were thought of; we received information that Col. Armistead had entered into a contract with a Messrs. Pomfry and Baker, of Georgetown, which those persons said was part of the contract of Jacob Lewis & Co.; it was hinted to us, that this an understanding between the Colonel and these persons, who, Gen. Mason will tell you, are base characters.

In a few days I received a letter from Colonel Armistead, which confirmed my suspicious, the substance of which you will find in my answer thereto, herewith enclosed. I heard no more of the business. The next thing I hear, is requiring our Captains should transport the stone 30 to 40 yards from the sides of the vessel, then put them on a high pile; this was calculated to drive all the Captains away; the next thing was refusing to receive the cargoes as marked by Mr. Smith, and marking them over again, to our great *prejudice;* the cap sheaf, is that of requiring that all Rip Rap stone should be 150 lbs. I *presume avoirdupoise.*

It is remarkable, that they took from the deck load *only*, if the vessel they sent back, six perches of building stone, at Point Comfort, yet refused the cargo for the Rip Raps, which must have been half fine building stone, although sent down for Rip Raps; this answered their great purpose; the vessel was freighted, and belonged to a person who had three others, all of them he withdrew, in consequence of it, from our service, and none others will come into it, and if they should, they run but one trip.

We will undertake to prove, that Colonel Armistead was concerned with the mason at Old Point, in the contract for brick; we know not who is concerned with him in building the work; but when we are left in the wide field of conjecture, we have a right to draw our own inferences.

We have related all these facts with simplicity and freedom, in the same manner that we should have done viva voce: for their *correctness we pledge ourselves when called on.* We conclude, by supplicating your immediate interposition.

While writing this, we are handed a copy of a letter from Colonel Gratiot, which we take to be a quiz; however, it goes to show the spirit of the times.

I herewith enclose it for your perusal.

We have the honor to assure you of our high consideration and profound respect.

J. LEWIS & CO.

Havre de Grace, June 21, 1821.

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TREASURY OF THE UNITED STATES,
Washington, August 8th, 1818.

SIR: Enclosed you will find my draft, No. 2,617, on the Branch Bank of the United States, at New York, for $10,000, the amount of warrant, No. 2,443, issued by the Secretary of War, on receipt whereof be pleased to favor me with an early acknowledgement, specifying the sum received.

With due consideration,
I am, sir, your obedient servant,
THS. T. TUCKER,
Treasurer of the United States,

Capt. ELIJAH MIX.

January 25, 1837.

Above is the form of the letters that are transmitted from the Treasurer's Office, in which letters drafts are enclosed for the payment of warrants. No copies of such letters are kept in the office.

THS. T. TUCKER, *T. U. S.*

FORTIFICATIONS.

TO THOMAS TUDOR TUCKER,
Treasurer of the United States.

Pay to Captain Elijah Mix, at New York, (out of the moneys deposited with you on account of the Military Department,) the sum of ten thousand dollars, on account of Fortifications, for which sum he is accountable.

For which payment this shall be your warrant.

No. 2,443.

Given under my hand, and the seal of the War Office of the United States, this eighth day of August, 1818.

$10,000.

J. C. CALHOUN, *Secretary of War.*

Countersigned,
RICHARD CUTTS, *2d Comptroller.*
Registered—For the Third Auditor.
J. THOMPSON, *Chief Clerk.*

Draft 2,617 payable at the Branch Bank, New York.
No. 2,617—Registered August 8, 1818.

For the Register,
C. DAWSON.

No. 2,617—$10,000.

TREASURY OF THE UNITED STATES,
Washington, August 8, 1818.

SIR: At sight, pay to Captain Elijah Mix, of the Army, or order, ten thousand dollars, value received.

THS. T. TUCKER, *Treasurer U.S.*

TO JONA. SMITH, ESQ.
Cashier Bank United States.

Payable at the Branch Bank, New York.
Endorsed by E. Mix.
Received payment.

SAMUEL COOPER.

I have no recollection of receiving a written acknowledgment from Mr. MIX.

TIL. D. DASHDELL, Clerk.

January 25, 1927.

No. 67.

Chairman of the Committee to the President of the United States.

CAPITOL, COMMITTEE ROOM,
January 30, 1827.

SIR: I am directed by the committee, to whom was referred the communication of the Vice President of the 29th of December last, to desire you to inform them whether "the private statement prepared at Engineer Department, in relation to charges preferred against certain officers of the War Department, by Commodore Lewis, for the information of the President of the United States, remains among the papers in the President's possession; and, if so, to request you to forward the same to the committee."

I have the honor to be, sir,
Your obedient servant,
JOHN FLOYD,
Chairman Select Committee.

The PRESIDENT *of the United States.*

No. 68.

President of the United States to the Committee.

JOHN FLOYD, Esq. *Chairman*
of a Select Committee House of Representatives, U. S.

WASHINGTON, *30th, January, 1827.*

SIR: In answer to your letter of this day, I readily state, that the paper to which you refer is not, and never has been, in my possession.

With respectful consideration, &c.

JOHN QUINCY ADAMS.

No. 69.

Chairman to Secretary of War.

COMMITTEE ROOM, CAPITOL U. S.
February 8, 1827.

SIR: I am directed by the Committee to which has been referred the letter of the Vice President to the House of Representatives, dated the

29th of December last, to inquire of you "whether, at any time, it was the practice of Government to make advances without written instructions from the officers who asked for advances; and whether there are any instances in the Department where the practice has been dispensed with; and, if there are, to request you to state such instances to the Committee."

I have the honor to be,
Very respectfully, Sir,
Your most obedient servant,
JOHN FLOYD,
Chairman Select Committee.

Hon. JAMES BARBOUR, *Secretary of War.*

No. 70.

Secretary of War to Committee.

DEPARTMENT OF WAR,

February 10th, 1827.

SIR: In compliance with your letter calling for the usage of this Department in the issue of warrants, I beg leave to enclose the report of the Clerk charged with that duty. The usage of the Department at this time, which I found established when I came into it, is, for the officers superintending the different branches of service, to address a letter to the Head of the Department, stating the sum required, and the object. The Head of the Department signifies his assent by putting his initials on this requisition. It is then sent to the warrant Clerk, who draws a warrant on the Secretary of the Treasury, which is signed by the Secretary of War; It is then countersigned by one of the Auditors, and the Second Comptroller. The letter of the subordinate officer is then registered and filed in this Department.

In the report of the warrant Clerk, it will be seen that the usage formerly was not regulated, and hence, in the months of July, August, and September, 1818, while requirements were generally made, the instances referred to in his report present the exceptions.

I have the honor to be,
Your obdient servant,
JAMES BARBOUR.

Hon. JOHN FLOYD,
Chairman of the Select Committee,
on the Letter of the Vice President, Ho. of Reps.

The following sums have been advanced to sundry persons, for which no written requisitions appear on the files of this Department.

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Date		Amount
1818	Passed through the Third Auditor's Office:	
July 1	To Lt. Tho. W. Maurice, Engineer, on account of Fortifications	$20,000
	To Lt. Wm. H. Chase	3,000
	To Charles Higgins, Cont. for Subsistence	5,000
2	To Benj. G. Orr, Cont. for Subsistence	10,000
8	To Wm. P. Rathbone, Cont. for Subsistence, Bill of Exchange	50,000
	To Matthew L. Davis, Cont. for Subsistence	10,000
10	To Capt. J. D. Hayden, Quartermaster's Department	1,000
16	To Col. Jacob Hindman, Fortifications	5,000
20	To Brig. Gen. Thos. A. Smith, Quartermaster's Department	3,000
22	To Capt. Saml. Babcock, Engineer, Fortifications	5,000
23	To Saml. Cooper, Agent of Fortifications, New York	15,000
28	To Lt. Col. A. Eustis, Fortifications	1,500
Aug. 1	To Benj. G. Orr, Cont. for Subsistence	13,000
8	To Elijah Mix, Cont. Fortifications	8,000
10	To Lt. Col. J. G. Totten, of Eng., Fortifications	10,000
13	To Brig. Gen. T. A. Smith, Quartermaster's Department	2,000
14	To Richard Harris, Fortifications	30,000
15	To Lewis Morgan, Agent of Fortifications	1,200
17	To Lt. Col. A. Eustis, Fortifications	1,500
21	To Lt. T. W. Maurice, of Eng., Fortifications	20,000
22	To Capt. Saml. Babcock, of Eng., Fortifications	3,000
25	To Col. Jacob Hindman, of Eng., Fortifications	3,000
Sept. 2	To Brig. Gen. T. A. Smith, Quartermaster's Department	3,000
7	To Darby Noon, Dep. Com., Quartermaster's Department	5,000
11	To Robinson & Taylor, Cont., for Subsistence	10,000
	Passed through Second Auditor's Office:	
July 8	Lt. W. C. Lyman, Arsenal at Augusta, Geo	5,000
15	Capt. Geo. Talcott, Arsenal at Watertown, Ms	15,000
25	Major J. Dalaby, Arsenal at Watervliet, N.Y	8,000
Aug. 4	Daniel Bussard, Cont. for Powder	10,000
8	Lt. John Symington, Ordnance	3,500
10	Capt. R. L. Baker, Ordnance	5,000
	Lt. W. C. Lyman, Arsenal at Augusta	10,000
11	Alex. McRae, Richmond, Cont. for Muskets	15,000
17	John Clarke & Co., Richmond, Cont. for Cannon, etc	15,000

It may be proper to state that, at this period, and previously, warrants were issued by the Secretary of War, upon verbal as well as written recommendations; and the latter was not invariably established, until after the Chiefs of the several disbursing branches of the Staff were fixed at Washington, and attached to the War Department, in the Autumn of 1818, and were held responsible for the disbursements of the appropriations for their branches of service, respectively. Written recommendations for advances, fect., were then uniformly required; and, sometime afterwards, the approval of the Secretary of War, by fixing the initials of his name to the recommendation, was established, before a warrant could be issued.

WAR DEPARTMENT, *February 10, 1827.*

L. EDWARDS,
Warrant Clerk.

VIEWS OF THE MINORITY

Of the Select Committee appointed on the 29th December last, on the letter addressed to the House of Representatives of the United States by John C. Calhoun, Vice President of the United States, in the shape of a report of that committee.

FEBRUARY 13, 1827

Read and laid upon the table.

The Select Committee to whom was referred the Communication of the Vice-President, of the 29th of December last, have had the same under consideration, and

REPORT:

That the committee convened as soon after their appointment as could be done with convenience, to consider the subject referred to them. The first step which they thought it advisable to take, was, to inform the Vice President that the committee was organized, and would receive any communication he might think proper to make. This was accordingly done on the 2d of January last.

In reply to which, the committee received a letter on the 3d, stating, that his communication to the House, of the 29th of December last, would make known to the committee his motive for soliciting an inquiry, that he had nothing further to add than to reiterate his desire to have a full investigation; and that, in order to avoid the inconveniences and delay of communicating by letter, he had requested Mr. M'Duffie to act as his friend before the committee. Upon the receipt of this letter, Mr. M'Duffie was admitted accordingly.

The committee then proceeded to inquire, whether there were any charges on file in the Department of War, or any paper or document which went to show that the Vice President had been, whilst Secretary of that Department, engaged in any contract, or in the profits of which he in any way participated. The result of this inquiry was, that there were no charges or other evidences of any kind against him.

Yet, as a confidential letter, signed by E. Mix, and addressed to the author of "Hancock," who was known to be Major Satterlee Clark, a paymaster who had been dismissed from the service whilst Mr. Calhoun was Secretary of the Department of War, for not settling his accounts, as will be more distinctly seen by reference to the testimony of Colonel Towson, had appeared in one of the newspapers printed in this District, and the Vice President, in his communication to the committee of the 3d of January last, having referred to it, and desiring a full investigation, the committee felt it their duty to examine the whole subject, fully and freely, as containing the foundation of his letter to the House of Representatives.

From an inquiry into this subject, it was ascertained by the committee, that Howes Goldsborough and Elijah Mix were competitors for a contract with the Government of the United States, in December last, and on Goldsborough's arriving in this City, he procured from Major Satterlee Clark, the author of the publications signed "Hancock," a copy of the confidential letter from Mix to the author of Hancock, to be used in depriving Mix of the contract, should he find it necessary.

From this copy, a transcript was taken by Wm. F. Thornton, the junior editor of the Phoenix Gazette, and published by him in that paper the next day, which was the 28th of December last, accompanied with his editorial remarks. This letter of Mix, to the author of Hancock, is an exhibit among the files of the committee, and was acknowledged by him to be in his own hand writing. The motives which induced him to make this communication, he has himself developed. To

extort money seems to have been his aim, without any scruples as to the means by which his object was to be accomplished.

From a view of the whole evidence on this part of the subject, the committee are unable to find any thing warranting the belief that the officer of the head of the Department of War had any agency in the publication of this letter in the Phoenix Gazette.

It is due, however, to Mr. Calhoun, that the committee should state, that his communication to the House of Representatives was founded exclusively on the publication in the Phoenix Gazette, of the 28th of December, and that the facts assumed in that communication, viz: that the letter of Mix, to the author of Hancock, had been made the basis of an official act, and would of course be filed among the records of the Department, were professedly stated; the first upon the authority of that paper, and the second as an inference from the statement contained in it.

In the early stages of this investigation, the committee discovered, from the letter of Major Vandeventer to E. Mix, dated the 7th of August, 1818, and to which they refer, that a person, whose name was to have been kept secret, was interested in the contract, commonly called the Mix, or Rip Rap contract.

On making this discovery, the committee felt bound, if possible, to bring to light this hidden associate; and in following up their inquiries they have been led into a much wider field than could at first have been anticipated. They have, in short, found it necessary to go thoroughly into the origin and history of the Rip Rap contract, which involved the necessity of summoning numerous witnesses, from distant parts, who were believed to possess knowledge of this contract; consequently requiring much time for their examination.

The committee, are, however, unanimously of opinion, that there is nothing in the evidence to warrant a belief, or even the slightest suspicion, that the Vice President was interested in any contract made with the Department War, whilst he was entrusted with the discharge of its duties; or that he, either directly or indirectly, participated in the profits of any such contract; or that he connived at such participation in any of his subordinate officers.

The prominent figure which Elijah Mix makes in this transaction, throughout, occupying the two fold attitude of an informer and a witness, seems to demand of the committee a direct expression of the opinion they have formed of his general character for veracity, as well as of the specific opinion they have formed in relation to some of the most prominent parts of his testimony.

On the subject of his general character for veracity, they have no hesitation in saying, that he is entirely destitute of the slightest claim to be believed upon his oath.

They have come to this conclusion, not only from the testimony of respectable witnesses, going to establish the general infamy of his character, but from the total disregard for truth which he manifested during the progress of his examination, and the numerous contradictions in which he involved himself, whilst giving in his testimony in the presence of the committee.

Without attempting to detail the numerous instances in which it is apparent to the committee, that he has sworn to willful and deliberate falsehoods, they have confined themselves to parts of his testimony,

which demand a separate and distinct consideration on other grounds.

On his first examination he produced a letter, written by Major Vandeventer to him, dated the 7th of August, 1818; commencing with the following mutilated sentence. "I am very sorry that the ——— are concerned in the contract, will not agree to admit George on the terms you have stated." The letter then goes on to state that the writer, (Vandeventer) had informed Major Cooper, his father-in-law, that there was one other person concerned in the contract, whose name was not to be mentioned, and the letter seems to be designed to prevail upon Mr. Cooper to become one of the sureties for the fulfillment of the contract, without the condition on which it appears, he was insisting—that his son George should have one fourth of the contract. Mix states, that this letter was obliterated when he received it and that he does not know, what were the words that have been erased. The committee are decidedly of opinion, that the erasure was made by Mix, for the purpose of throwing a mystery over the matter, and of exciting suspicion that the person alluded to in the part obliterated was Mr. Calhoun.

That the obliteration was not made by the writer of the letter is clear, from several obvious considerations. If he had been so desirous to conceal the words erased, the obvious and natural course would have been, to have omitted them altogether, instead of first writing them down, and then making an erasure that rendered the sentence unintelligible.

Another circumstance that tends to satisfy the committee that the erasure was made by Mix, is, the manifest difference between the ink with which the letter is written, and that with which the erasure is made, and the equally striking resemblance between the ink used in making the erasure in question, and that used in making other erasures in the same letter, which Mix acknowledges were made by himself. It is obvious to the committee, that the word "the" is left unobliterated immediately preceding the erasure, in order to raise a suspicion that the word "Secretary," or "Secretary of War," occupied the space which followed: but, not understanding the rules of grammar, which, otherwise, is an ingenious device, has left visible the words "who are concerned," immediately after the erasure, from which it is evident that the definite article preceding the erasure must have agreed, not with "Secretary," but with some common substantive in the plural number, such as "the other gentlemen," "the rest of the gentlemen" according to the explanation given by Major Vandeventer. This explanation of the words obliterated, which is almost self-evident, conclusively shows, that Vandeventer could have no motive to make the obliteration, and as clearly shows the base motives by which Mix must have been actuated in making it.

If, to these circumstances, we add the oath of Major Vandeventer, that he did not make the erasure, the fact that Mix did, is established by a conclusive weight of evidence.

On his first examination, Mix stated, that, previous to the 13th of April, 1821, he presented to Mr. Calhoun, among other papers explanatory of his claims, a letter from Major Vandeventer to him, (Mix,) written whilst they were both in the city of New York, dated the 1st of April, 1821, and containing a copy of a confidential letter which Vandeventer had that morning written from New York to

Mr. Calhoun. In the first instance, Mix stated to the committee that he could not recollect the contents of the confidential letter, further than that it informed Mr. Calhoun that Mix had been brought to terms, and would consent to the transfer to Goldsborough. He afterwards, during the same examination, stated that it contained something about Vandeventer's going abroad upon a foreign mission. A member of the committee perceiving that he had a paper in his hand, to which he occasionally referred, asked if that was a copy of the letter in question. He said that it was not a correct copy, but that he had two others at home, one of which was correct, or nearly so. On being requested to give up the paper he held in his hand, he refused, stating it was too incorrect to be exhibited as a copy. The next day he produced the two other alleged copies, together with the one he had refused to give up the day before. On being asked which of the three was the most correct copy, he said he could not tell, but stated that they were all copied from the original while it was in his possession. He now stated that he lost the letter in the Department of War, five or six months or a year before Mr. Calhoun left it.

He further stated, that Mr. Calhoun, in the presence of General Macomb and Captain Smith, of the Engineer Corps, took the bundle of papers, laid them on his table before him, and said he would attend to them. That he (Mix,) retired, but returned from five to ten minutes, and wrote a note to Mr. Calhoun from the audience room, requesting either to see him or have his papers returned. That the bundle was presented to him by the Messenger, and on examining it, he perceived that the letter of the 1st of April, 1821, was missing; that he immediately went into Mr. Calhoun's room and stated the fact that a paper was missing, upon which Mr. Calhoun called Major Vandeventer and asked him if he knew any thing of it. Major Vandeventer answered promptly, no; and Mr. Calhoun, looking sternly, first at Vandeventer and then at Mix, said he knew nothing of it.

On examining the three copies, they are all found to agree tolerably well in substance, but differ, both in the arrangement and construction of the sentence, and in the words used to express the same idea. The composition is evidently that of an illiterate man, who does not understand the rules of grammatical construction.

Major Vandeventer denies unequivocally that he ever wrote such a letter to Mr. Calhoun, and also states, that on the occasion alluded to by Mix when he states the loss of the letter in the Department of War, he had nothing further to do with the bundle of papers than to take them from Mr. Calhoun's table, in compliance with his order, and deliver them to the Messenger at the door, to be handed by him to Mr. Mix. He also states, that the bundle appeared not to have been opened at all, and Captain Smith also says, that Mr. Calhoun was engaged in official business with him, during the whole time the papers remained there.

The committee have no hesitation in pronouncing these alleged copies of a confidential letter from Major Vandeventer to Mr. Calhoun, to be gross fabrications, and that the whole story about receiving such a letter from Vandeventer, and losing it in the Department of War, is a tissue of falsehoods throughout.

To say nothing of Mix's character, and the postive denial of Vandeventer, both as to the fact of writing such a letter, and as to the

fact of taking it out of the bundle, in the Department of War, the story is in itself so improbable, and contains so many internal evidences of fabrication, that the committee feel bound to reject the papers presented, as forgeries.

It appears that Major Vandeventer had gone to New York to prevail upon Mix to consent to the transfer to Goldsborough, and had succeeded in that object, by personal communication. It is quite likely, therefore, that he used all the arguments he could suggest, in the conversations he had with Mix on the subject, previous to obtaining his consent; and it is particularly to be presumed, that, if he had any thing confidential, he would have communicated it verbally, and not in writing. Nothing can be more unnatural and improbable upon the face of it, than that he would have formally reduced to writing, and sent to a man who was in the same city with him, confidential matter, which he must have previously stated in conversation, if the whole be not a fabrication. In addition to the improbability of the story itself, the papers presented as copies of the confidential letter, have internal evidences of their having been fabricated by Mix. He swears that they were all taken from the original whilst in his possession. If he had merely taken copies from the original, it would have been much easier to take a true copy than an incorrect one, and all the objects of copying would be defeated by not making the copy accurate. Now it is found that all the three copies taken, as he says, from the same original, differ from each other, in the construction, composition, and arrangement of the sentences.

But the most conclusive badge of forgery stamped upon the papers themselves, is their composition. They are evidently composed by an illiterate man, who does not understand the art of writing good English, and corresponds, in this respect, with the general character of Mix's composition. On the contrary, from the letters of Major Vandeventer, it is obvious that he writes correctly and grammatically. Moreover, it is highly improbable, in the nature of things, that Mix should have taken three separate copies, unless we suppose he had a foresight of its loss, and even if that had been the case, he would have taken one correct copy, instead of three incorrect ones. The story relative to the loss of the original, is equally improbable, and is accompanied by palpable contradictions. He first stated that he lost it previous to the 13th of April, 1821, and afterwards that it was five or six months or a year before Mr. Calhoun left the Department of War. That he should have left the papers with Mr. Calhoun to be deliberately examined and returned, and asked for them in five or ten minutes, can only be accounted for upon the supposition that his object, from the beginning, was to give a plausible face to the story he was inventing.

The whole of his evidence relative to this letter is contradictory and suspicious. He stated, in the first instance, that one of the copies was nearly correct, but that the one he then had with him was so inaccurate that he would not present it. The next day, when he produced all three of the copies, he could not tell which was the most accurate, or whether the one which he had refused to give up, as being too inaccurate, was less accurate than the rest. That copy, in fact, contains all that the others contain, and is at least equally as full as they are.

The next portion of the testimony of Mix which the Committee think proper to notice separately, is the letter of Major Vandeventer, of the 17th of October, 1820, which he produced on his second examination, with the accompanying testimony given by him as to the execution of the second bond. Major Vandeventer had stated that the second bond was executed a short time after the first, to wit: some time in the early part of the Fall of 1818.

Mix produced this letter of the 17th of October, 1820, written by Vandeventer to him at New York, in which Mix is requested to "attend to the bond." Seizing upon this expression in Vandeventer's letter, to give color to his story, he swears that the bond was executed in New York about the date of the letter, and that the reference in that letter was to the executing of the bond. After repeatedly swearing to this fact, in answer to several questions, he was asked if he distinctly recollected to have signed the bond, and to have seen the sureties sign it, in the latter part of 1820. To this he answered, that he distinctly recollected signing the bond, but not in the Fall of 1820. He then admitted that the second bond was executed a short time after the first. Major Vandeventer states, that the request in the letter of 17th of October, 1820, about the bond, referred to the procurement of the certificate of the Recorder as to the sufficiency of the securities; and General Swift swears, that the second bond was lodged in the Engineer Department in the Fall of 1818, before he left the office of Chief Engineer. It is evident, therefore, that the whole of Mix's testimony, relative to the execution of the second bond in 1820, is wantonly and maliciously false, and intended to discredit Vandeventer.

The last piece of the testimony of Elijah Mix, upon which the committee deem it necessary to pronounce a separate and specific opinion, is the letter of Major Vandeventer of the 3d of August, 1818, with the accompanying explanations. His letter was produced at the close of his second examination, after he had repeatedly stated that he had no other letters of Vandeventer in his possession. The letter was multilated in several places by cutting out words, and as these mutilations render the letter unintelligible, to a certain extent, the committee feel it their duty to express their opinion, both as to the person who made them, and as to the object for which they were made. They have no hesitation in saying they were made by Mix, for the purpose of exciting suspicion against Mr. Calhoun, and that he is not to be credited when he says it was done by Vandeventer. That the House may have the means of estimating the character of this witness, the committee have thought it expedient to state briefly and distinctly the circumstances connected with this part of his testimony. Near the close of his last examination, he voluntarily stated to the committee, that since his first examination Major Vendeventer had come to him and requested to know whether he could find the letter of the 3d of August, stating that he desired permission to cut out or erase certain words that were in it. That he, Mix, found the letter the next day, and carried it to Vandeventer, at the Department of War, who requested him not to speak about it there, for that they were watched and would be overheard, and proposed to go to the house of Mix that night to converse with him on the subject; that Vandeventer came to his house accordingly, and prevailed upon him, by importunity, to permit the letter to be mutilated, and that it was

mutilated accordingly, by Vandeventer. In answer to repeated questions seeking to ascertain the words cut out, he always answered that he did not know any thing of them; yet stated that the words cut out in two separate places were, he believed, the same.

Major Vandeventer, on being recalled, stated that he had never seen the letter in question since he wrote it; that Mix never had been to see him at the Department of War, since his first examination.

Independently of the established infamy of Mix's character, and the positive denial of Major Vandeventer, this story has all the characteristics of a fabrication. Nothing is more improbable than that Major Vandeventer should have placed himself completely in the power of an enemy who was using every effort to destroy his character; and if he had ever done so, he would rather have obtained possession of the letter and destroyed it, than have left it in the hands of his enemy, just so far mutilated as to excite suspicion, and no further. For it is to be remarked that the word "the" is artfully left immediately preceding two or three of the excisions, with the view, no doubt, of making the impression that the word "Secretary" existed in the space cut out; though Mix repeatedly said that he did not know what were the words cut out. The committee, therefore, cannot entertain a doubt that the mutilations in the letter were made by Mix.

This contract, though formed on the 25th of July, 1818, between General J. G. Swift, Chief Engineer, on the part of the United States, and Elijah Mix, for himself, for the delivery of one hundred and fifty thousand perches of stone at the Rip Raps, in Hampton Roads, was, soon afterwards, divided into four parts, as will be shown by the letters of Major Vandeventer, bearing date the 3d and 7th of August, 1818, in the manner following: One-fourth part to Mix, one-fourth part to Vandeventer, one-fourth part to Jennings, and one-fourth part to a person whose name was to be kept secret.

The only explanation on this part of the subject which it is in the power of the committee to give, is, that they believe the erasures and excisions in the letters of the 3d of August, 1818, and the 17th of October, 1820, contained the words "the General," or "General Swift," as at the time of writing them, Major Vandeventer believed General Swift was concerned in the contract; which impression he now swears was made by the representations of Mix, and was retained until pending the investigation in 1822, when the General made oath that he never had been interested in that contract. Mr. Jennings also swears, that he was informed by Mix, that General Swift was interested in his contract. Mix also admits that he might have told Vandeventer so.

Immediately after this contract was closed, a bond was given for the fulfilment of its conditions, in the sum of twenty thousand dollars, dated the 5th of August, 1818, and signed by Elijah Mix, George Cooper, Samuel Cooper, and James Oakley; sealed and delivered in presence of John Martin and Simon Hillyer. To which is attached the following certificate of the Recorder of New York:

"The sureties having been by me duly sworn, I do hereby approve of them, as good and sufficient.

New York, 5th August, 1818. R. RIKER."

Upon this bond's being received at the Engineer Department, an advance of ten thousand dollars upon the contract was made to Mix,

by a draft upon the Branch Bank of the United States at New York. After this period, it was discovered that there were two errors in the bond: first, that it was for the delivery of one hundred thousand perch of stone, instead of one hundred and fifty thousand, which the contract called for; next, that the name of George Cooper was placed in the bond, as one of the contractors, when Mix alone was the contractor.

Some time after the date of this bond, it was cancelled, and one formed to suit the provisions of the contract, in all particulars, and was forwarded to the Engineer Department, which second bond was dated the fifth of August, 1818, the same day on which the first was dated. At what precise period this bond was received at the Engineer Department is not known: but if the testimony of General Swift and Major Vandeventer is correct, it must have been early in the Fall of 1818.

The sum of ten thousand dollars was drawn from the Treasury, it is supposed, upon a verbal requisition, as there is nothing written upon the subject; this however, previous to the date of this transaction, was sometimes the case, as appears from the testimony of General Swift, and from the communication of the Secretary of the Department of War, to the Committee, dated the 10th day of February, 1927.

The Committee think it further necessary to state, that the certificate of the Recorder of New York, which was attached to the first, or the cancelled bond, is not attached to the second or new bond; but that when a copy of this bond was sent to a committee of the House, in the year 1822, the copy of the certificate of the old, was attached to the new bond, and certified by an officer to be a true copy. The manner in which this irregularity happened, is accounted for in the testimony of Captain Smith. It does not appear in any part of this inquiry, that the United States sustained any injury, although there were some irregularities.

After taking all the testimony which could be had, calculated to throw light on the subject, the Committee feel it their duty to state to the House, that there is nothing in the evidence warranting a belief, or that tends to induce even the slightest suspicion, that Mr. Calhoun was, either directly or indirectly, concerned in any contract made with the Department of War, whilst he was Secretary of that Department, or that he participated in the profits of any such contract, or that he connived at any such participation, in any of his subordinate officers; and that, in their opinion, there are no grounds for any farther proceedings.

Report of the Committee on the Judiciary, 42d Congress, 1873, on Inquiry as to Impeachment in Credit Mobilier Testimony (Regarding Schuyler Colfax, Vice President of the United States)

HOUSE OF REPRESENTATIVES

42d Cong., 3d sess. Report No. 81

INQUIRY AS TO IMPEACHMENT IN CREDIT MOBILIER TESTIMONY

FEBRUARY 24, 1873.—Ordered to be printed

Mr. B. F. BUTLER, from the Committee on the Judiciary, submitted the following

REPORT

The Committee on the Judiciary, to which was referred the resolution of the House passed February 20, 1873, in the words following:

Resolved, That the testimony taken by the committee of this House of which Mr. Poland, of Vermont, is chairman, be referred to the Committee on the Judiciary, with instructions to inquire whether anything in such testimony warrants articles of impeachment of any officer of the United States not a member of this House, or makes it proper that further investigations should be ordered in his case—

having fully considered the matter, pray leave to submit the following report:

It is apparent that this resolution brings before the House subjects of the gravest moment, involving most important considerations of fact and law thereto applicable. There can be no more delicate and sometimes painful duty devolved upon the House of Representatives and no higher prerogative is given to it by the Constitution than its power to be exercised as the grand inquest of all the nation by presenting articles of impeachment against civil officers of the Government. The very fact that one is accused who has so far possessed the confidence of his fellow-citizens the Executive, as to have had the interest of the Government confided to his charge as a civil officer of the United States, brings always before the House derelictions of duty, which, if found, involves consequences to the individual, as well as to the country, of the most serious character. Wherefore, your committee have entered upon this subject with the intent to give it the fullest deliberation possible to us, in the waning hours of the session, and for that purpose they have deliberated upon it in special sessions.

The resolution it will be observed refers to your committee "the testimony taken by the committee of this House of which Mr. Poland is chairman, with instructions to inquire whether anything in such testimony warrants articles of impeachment of any officer of the United States *not* a member of this House, or makes it proper that further investigation should be ordered in his case."

The question first presented is the conduct of what civil officers of the United States is brought into question by this testimony?

Your committee take leave to observe that a member of the House of Representatives is not an officer of the United States to whom the constitutional remedy of impeachment applies. This was long ago decided in Blount's case by the Senate of the United States where an attempt was made to impeach him because of alleged offense. Your committee find but two civil officers of the class liable to impeachment whose acts are called in question by the testimony submitted to us. One, the Vice-President of the United States, the other, Mr. Brooks, late Government director of the Union Pacific Railroad, who was an officer provided for by law, and appointed by the President. The first is still in office; the second has long since ceased to be such officer.

The case of Mr. Brooks, by the terms of the resolution, does not seem to be before us, as he is now a member of the House. If there were any doubt upon that subject your committee would resolve it by asking instruction of the House upon that point; but the fact that the conduct of Mr. Brooks in this regard was at the time of the passage of the resolution, and now is before the House upon a report of another committee, recommending his expulsion from the House because of the transactions set forth in the evidence referred to us, would seem to furnish a conclusive reason for the exception made in this case, and determine all doubts upon the matter. Wherefore your committee have given no further consideration to the evidence in that behalf.

For the purpose of applying the precedents and principles of law which regulate the presentation and trials of impeachment, your committee have found it convenient, in the case of the Vice-President, to assume, without expressing any opinion upon the facts to be found therein that the evidence proves all that can be possibly claimed to be inferred from it because of his being a holder directly or indirectly, and receiving the profits thereof of the stock of a corporation known as the Credit Mobilier of America, while a member of Congress. Giving, therefore, as in case of a demurrer to evidence, every possible intendment against Mr. Colfax, it would seem that it might be claimed from the evidence than that in the winter of 1867–'68 he became the owner by purchase, at par and interest on that value, of certain stock in the Credit Mobilier Company from Oakes Ames, when that stock was known to both to be worth very much more than par, and that he received the profits or dividends while Ames held the stock and still holds the same in trust for him, although the beneficial interest in the stock, if not the legal title, remains in Mr. Colfax down to to-day. That during the sessions of Congress of 1867–'68 and 1868–'69, while holding such interest in the stock, Mr. Colfax, as a member of the House of Representatives and its Speaker, presided over its deliberations. During which session certain matters of legislation in which his personal interest as such stockholder were involved, were attempted to be advantageously or injuriously affected by legislative action.

The Credit Mobilier of America and its connection with the Union Pacific Railroad, and the conjoint interests of the stockholders of both, have become so far matters of public notoriety, that your committee do not deem it necessary to go into any recital of its history in order to an understanding of their report. It may however, be convenient to have on record, if this report should ever be drawn into precedent, that the Credit Mobilier was a State corporation, organized by the principal stockholders of the Union Pacific Road to receive from themselves the contract of building that road, which had obtained by legislative grant large endowments of lands and bonds of the United States to be held in trust only for the construction and equipment of the road, large amounts of which, to a considerable number of millions of dollars, the stockholders of the Pacific Road, through the intervention of the Credit Mobilier and other devices had divided among themselves and confederates as pretended profits of building the road, while, in fact, they took to their own individual profit and use these very large sums belonging to the Government of the United States, and intrusted to them for a specific use only, in violation of that trust. Drawing such inferences as a jury might from the evidence if unexplained, it may be claimed that the stock was sold to Mr. Colfax to influence him as a member and Speaker of the House, and that it did so influence his action in favor of the Union Pacific Road, and incidentally in his own favor as a stock and bond holder in both companies.

Your committee lay aside for the purposes of this report anything which might be presented by the accused by way of mitigation of the facts, or which might extenuate in any degree the supposed guilt of the transaction, because we have desired, in examining the question submitted to us, to assume the facts as clearly and broadly against the accused as any inference from the evidence could possibly justify.

Assuming, then, for this purpose, the facts above stated to be proven, several questions of law meet your committee upon the threshold of the inquiry with which they are charged, "whether anything in such testimony warrants articles of impeachment against" Mr. Colfax as a civil officer.

It is not in dispute that Mr. Colfax became interested in the Credit Mobilier stock before he was elected Vice-President, and whatever were the motives that impelled the transaction they were expected to operate upon him only as a member of the House. Upon the question whether a bribe given to a civil officer to influence his conduct as such officer is an impeachable offense your committee can have no doubt, as it is made such by the express words of the Constitution.

But we are to consider, taking the harshest construction of the evidence, whether the receipt of a bribe by a person who afterward becomes a civil officer of the United States, even while holding another official position, is an act upon which an impeachment can be grounded to subject him to removal from an office which he afterwards holds. To elucidate this we first turn to the *precedents*.

Your committee find that in all the cases of impeachment or attempted impeachment under our Constitution, there is no instance where the accusation was not in regard to an act done or omitted to be done while the officer was in office. In every case it has been heretofore considered material that the articles of impeachment should allege in substance that, being such officer, and while in the exercise

of the duties of his office, the accused committed the acts of alleged inculpation.

In the earliest case of impeachment by the House, that of Judge Pickering, of New Hampshire, the accusation was not even for official acts or misconduct, but he was held impeachable by both House and Senate because of his habits of intoxication while in office. But the gravamen of complaint in that case was that those habits and their effect went with him and affected him in the performance of his official duties.

The case of Judge Chase, which brought out, in the prosecution and defense, all the legal learning and ability of the most brilliant bar of our country, was founded wholly upon alleged acts of malfeasance and misfeasance while actually sitting as a judge.

The case of Judge Peck was for an alleged improper order upon the bench to imprison Mr. Lawless for contempt of court.

In the more recent case of the judge of the eastern district of Tennessee, the accusation was that he abandoned his duties and took part in the rebellion while he was judge, and that official act alone was imputed to him as the offense.

In the still more recent case of a late President of the United States the acts were all imputed to him as such officer of the United States, and the committee who prepared the articles of impeachment were careful to allege each act charged upon him as being done in the exercise of his office.

Your committee have looked with some care to the precedents of impeachment under State constitutions, which are generally framed upon the model of the Constitution of the United States in this regard, and they are not aware of any case wherein an act has been held to be impeachable, or impeachment even attempted, because of it, unless that act so alleged to have been done was in the course of official duty in the office held by the accused, to remove him from which the constitutional remedy was proposed to be applied.

The very recent cases of Judges Barnard and McCunn, of New York, may be claimed to be an exception to this statement in some of the specifications under the articles presented; and, if so, they are the only cases of even limited exception thereto, and of the legal value of that action taken under the state of high political excitement in which those cases were conducted, as precedents the House will judge. To your committee they would seem to serve as warnings, not as guides.

Going back to the Parliament of England, from whose system of parliamentary and common law we have drawn all the principles which have heretofore governed the House and Senate in matters of impeachment, we find no case since the rights of the subject and principles of law and justice have become established, wherein a like rule is not followed.

Your committee are not unmindful that under the claim of omnipotent power by the Parliament of England to make laws, without any substantial negative on the part of the executive, in times of high party feeling the power of impeachment, residing in the Commons, has been used as a punitive power as well as a remedial one, and, in some instances, has extended to offenses alleged to have been committed while the officer was holding another office. But your commit-

tee would also call attention to the fact that in some cases impeachment was used as a method of punishing a subject who held no office at all.

In short, when the Commons of England held the power as against the executive, they punished the king's favorites by impeachment, while the Stuarts held the power as against the Commons, they punished the favorites of the people by the Star Chamber. Our Constitution, in the judgment of the committee, has furnished a safeguard against both of these sources of oppression. Both were well known and considered by our fathers in framing the Constitution. Turning to the debates, meager as they are, it will appear that apprehension was felt that impeachment might be used against the citizen as a punitive power, and therefore words strictly guarding the extent to which the judgment might operate find place in that charter, enacting that the punishment of crime should be left to the ordinary tribunals of justice.

Finding so nearly an invariable current of precedent and authority, your committee next turned to see in how far the rule drawn from precedent accords with the plain and immutable principles of law and justice, and also in how far this rule seems to be necessary to shield the officer from what might happen again, as it has happened before, parliamentary oppression under the pressure of high party and other excitement, as well as to protect the rights of the constituency as to an elective office from being deprived of the services of their officer by his removal by impeachment because of alleged crimes or misdemeanors committed by such officer before the people had chosen him to serve them, and which the electors well might have held not to have been a disqualification of the officer, if such charges had been made against him before the election.

Your committee, therefore, are led to inquire, what is the nature and what the objects of impeachment under our Constitution?

Are they punitive or remedial? Or, in other words, is impeachment a constitutional remedy for removing obnoxious persons from office, and preventing their again filling office, or a power given for punishing an officer, while he is an officer, for some crime alleged to have been committed by him before he was such officer? Your committee are very strongly inclined to the opinion that impeachment was intended by the framers of the Constitution to be wholly remedial and not punitive, except as an incident to the judgment, because we find that the Constitution limits the judgment in impeachment by strongly restrictive words:

> Judgment in cases of impeachment shall not extend further than to removal from office and disqualification to hold and enjoy any office of honor, trust, or profit, under the United States.

If such judgment is a punishment for an alleged high crime and misdemeanor, then why does the same article provide for the punishment of the accused a second time for the same offense? Because the words we have quoted are followed by the provision:

> But the party convicted shall, nevertheless, be subject to indictment, trial, judgment, and punishment according to law.

This, therefore, would leave the party who had been removed from office and disqualified from holding office by the judgment of impeachment, if that is a punishment for his crime, to be the second time pun-

ished for the same offense, which is contrary to natural justice, against Magna Carta, and is most positively forbidden by the fifth article of amendment to the Constitution.

This article also throws some further light on this subject, because in its nervous language it enacts that

> No person shall be held to answer for a capital or otherwise infamous crime, unless upon presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger.

Nor does it appear that this view is affected by the exception in section two, article three, of the Constitution, that the trial of all crimes, except in cases of impeachment, shall be by jury; this exception being necessary only to make the instrument consistent in all its parts with itself, as it had already provided that the impeached could be tried by jury for his crime.

Again, we find impeachment to be remedial in this, that it only provides as a further consequence disqualification for office, by which the evil is cured; that thereafter the Government may not have an officer who has so far forgotten his obligations to his official oath, and to his duty as a citizen, as to have been removed from office for high crimes and misdemeanors, again, by vote of the electors or appointment by the Executive, put in place of honor or trust.

We are also inclined to believe that proceedings of impeachment were intended to be remedial and not punitive, because we have already seen that if punitive at all an entirely inadequate punishment has been provided by the judgment; because the very highest offenses are triable by impeachment, such as treason and bribery, and the sentence may be only removal from an office whose term extends for a few days only, as in the case under consideration.

Again, we are brought to the conclusion that proceedings of impeachment are remedial and not punitive, because, in the case of Judge Pickering, before referred to, impeached for habitual intoxication, the officer was condemned because he became incapacitated for the performance of the duties of his office, and we find that impeachment is the only means known to our Constitution by which a civil officer of the United States elected by the people, or a judge appointed by the Executive, can be removed from office. And certainly habitual intoxication, while it may not be a crime at common law, or by statute, in a private person, may readily enough seem to be a very high crime and misdemeanor in a high civil officer, wholly incapacitating him from performing all his duties; so much so as to be made by the articles of war a ground for removing an officer from the military service.

Again, your committee are inclined to believe that impeachment is not punitive, because, although an officer may have been tried and convicted of a high crime, yet he may be impeached for that very crime as a remedy for public mischief, and thus, in the converse of the proposition above stated, be twice punished for the same offense.

If the conclusions to which your committee have arrived in this regard are correct, it will readily be seen that the remedial proceedings of impeachment should only be applied to high crimes and misdemeanors committed while in office, and which alone affect the officer in discharge of his duties as such, whatever may have been their effect

upon him as a man, for impeachment touches the office only and qualifications for the office, and not the man himself.

It will be seen from a few illustrations that it hardly could have been the intendment of the Constitution that an officer could be impeached for a crime committed by him before his entry into the office from which he is to be removed because, if this were so, there is no constitutional, and, thus far, no legal limitation as to the time during which he may be held so amenable to such impeachment.

One may have committed a high misdemeanor in his early youth, repented it, outlived it, or may have been pardoned, and, in the language of the law, by that pardon "made as white as snow," and yet, without limitation, years afterwards may be impeached for that crime and deprived of an office by him afterward held, which he has filled to the entire satisfaction of all good men. Indeed, impeachment may in this way be used as a means of removing from the possibility of election a popular candidate whom the people desire to elect to the highest office within their gift, if an opposed House of Representatives chose to impeach for a high misdemeanor of many years' standing and present that to the Senate, who, upon finding the fact, are bound to give judgment, or, if not bound, might be willing to give judgment of disqualification from office forever, from the effect of which judgment no power under the Constitution could relieve; for cases of impeachment are expressly excepted, and no law could avail, nor even the unanimous election of the whole people could give absolution.

Your committee are not unmindful that the report of the learned committee of the House made upon the testimony which has been referred to our consideration, has, in the course of its reasonings, likened the cause for which a member may be expelled to the cause for which an impeachment would lie, and argue that "the close analogy between this power and the power of impeachment is deserving of consideration, upon the question whether the House may expel a member for acts done by him before his election."

If this analogy is as perfect as that committee evidently supposes it to be from the stress of argument which they impose upon it, then it becomes our duty carefully to examine the precedents in case of expulsion to ascertain the nature of that constitutional power vested in both Houses of Congress and the class of offenses upon which it may operate, and what, if any, distinction there may be between the consequences following a judgment in impeachment and a vote of expulsion.

That committee thereupon assert "it has never been contended that the power to impeach for any causes enumerated," i.e., treason, bribery, or other high crimes, "was intended to be restricted to those which might occur after appointment to civil office."

Your committee have been unable, from their investigation, to find warrant for this assertion. We have already shown that all the precedents under the Constitution show impeachments to have been for acts done in the very office from which the accused was sought to be removed. We are unaware that there is any case to the contrary in the later decisions in England, or in any States of the Union, and we grieve that the committee, for whom we have so high a respect, have not seen fit to give authority to the House for this so grave and important a proposition of constitutional laws.

Knowing the accurate learning and exhaustive research of that committee, and the long time which they have had this matter under consideration, the Committee on the Judiciary feel quite sure that if any such case in precedent could have been found it would have been stated in support of a proposition of such moment. In the more limited knowledge of your committee, and in the little time they have had to give to this investigation, we have been unable to find any authority or precedents for so broad an assertion of unquestioned power. And your committee take leave to suppose that the immense labors of the committee on the Credit Mobilier in their investigation alone must have permitted them to enunciate a proposition for which it would seem to be difficult to find either precedents or authority.

And we are emboldened on our opinion upon this point, because we do not fail to observe that the learned committee in the analogy which they draw between impeachment and expulsion have not adverted to, but have overlooked in their exposition of the subject the very wide distinction of the effect of proceedings by impeachment and the effect of expulsion of a member for whatever cause.

That constitutional distinction is this: That impeachment may disqualify the impeached from ever after holding office, while expulsion never has been held, except under a statute of England long since fallen into disuse, by which alone the case of Wilkes was for a time attempted to be justified in a limited degree to have such effect. The expelled member may be, and has been, frequently, re-elected after expulsion. The impeached officer never can be elected or appointed to office, after impeachment and a full judgment upon the finding of the fact.

Considering therefore that that committee have overlooked so important a difference, we are permitted to believe that they may not have carefully observed other differences between expulsion and impeachment, which will show the analogy which they have drawn in their argument may aid our own conclusion. Your committee feel that this analogy, whatever it may be, strengthens our argument that an officer may not be impeached for an act done before his election to office, because before we heard the report of the learned committee on Credit Mobilier we had not been led to doubt that no man could or ought to be expelled for any act done by him before his election as a member of Congress.

Our first reason for not doubting upon this point, which we desire to recall to the House and the country, is the plain words of the Constitution, which seem to us clearly to indicate that the power of expulsion is a protective, not a punitive provision of the Constitution. It is found in section 5 of the first article:

> Each House may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two-thirds, expel a member.

Expel for what? For disorderly behavior, *i. e.*, for that behavior which renders him unfit to do his duties as a member of the House, or that present condition of mind or body which makes it unsafe or improper for the House to have him in it? We submit, with some confidence, that the House might expel an insane man, because it might not be safe or convenient for the House to have him within the legislative hall. They can also clearly expel a man for disorderly proceedings in the body, or for such acts outside of the body as render it at the time

manifestly improper for him to be in the House. But your committee are constrained to believe that the power of expelling a member for some alleged crime, committed it may be years before his election, is not within the constitutional prerogative of the House.

We do not overlook the argument presented by the learned committee, upon whose report we are observing, by the phrase:

> Every consideration of justice and sound policy would seem to require that the public interests be secured and those chosen to be their guardians be free from pollution of high crimes, no matter at what time that pollution had attached.

But the answer seems to us an obvious one that the Constitution has given to the House of Representatives no constitutional power over such considerations of "justice and sound policy" as a qualification in representation. On the contrary, the Constitution has given this power to another and higher tribunal, to wit, the constituency of the member. Every intendment of our form of government would seem to point to that. This is a Government of the people, which assumes that they are the best judges of the social, intellectual, and moral qualifications of their Representatives whom they are to choose, not anybody else to choose for them; and we, therefore, find in the people's Constitution and frame of government they have, in the very first article and second section, determined that "the House of Representatives shall be composed of members chosen every second year by the people of the States," not by Representatives chosen for them at the will and caprice of members of Congress from other States according to the notions of the "necessities of self-preservation and self-purification" which might suggest themselves to the reason or caprice of the members from other States in any process of purgation or purification which two-thirds of the members of either House may "deem necessary" to prevent bringing "the body into contempt and disgrace."

Your committee are further emboldened to take this view of this very important constitutional question, because they find that in the same section it is provided what shall be the qualifications of a Representative of the people, so chosen by the people themselves. On this it is solemnly enacted, unchanged during the life of the nation, that "No person shall be a Representative who shall not have attained the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State in which he shall be chosen."

Your committee believe that there is no man or body of men who can add to or take away one jot or title of these qualifications. The enumeration of such specified qualifications necessarily excludes every other. It is respectfully submitted that it is nowhere provided that the House of Representatives shall consist of such members as are left after the process of "purgation and purification" shall have been exercised for the public safety, such as may be "deemed necessary" by any majority of the House. The power itself seems to us too dangerous, the claim of power too exaggerated, to be confided in any body of men; and, therefore, most wisely retained in the people themselves, by the express words of the Constitution.

One need not have a lively imagination to divine how, if that power of "purgation and purification" can be used as a two-third majority shall "deem the public safety requires" so as to absorb all other powers or branches of the Government, and it may be the rights and powers

of the people themselves. For example, the election of President of the United States in certain contingencies, which have more than once arisen in our history, is to be exercised by the House of Representatives voting by States; and in one of those very instances—in the case of the contest between Jefferson and Burr—a single Representative in a single State determined that contest. How easy to change that vote, and the election of the President of the whole people, by the use of this process of "purgation and purification," under the plea of the public safety, which has been the foundation of the throne of every tyrant and the justification of every usurper and dictator!

We can foresee also this possible, nay, probable, danger from the "purgation," by a majority of the House of the Representatives from Nebraska, Nevada, Kansas, Oregon, Florida, and Delaware, on the ground that has been sometimes stated here by Representatives from the larger States, that they are "rotten boroughs," too small to be made States, and thus the vote of six States out of the thirty-seven would be thrown out in a presidential election by States; and this claim that those States are too small to be States would furnish a ready excuse when such an excuse is desired to accomplish a political end, to say nothing of the use of this power to expel a single member from one or more of the balanced States where one majority in the delegation would turn the election of a President and Vice President, under the claim of purgation and purification—for public safety.

And the learned committee seems to us to have been equally unfortunate in finding precedents for this claim of power of expulsion of a member for acts done before his election, and as a member of the House.

The committee have cited but two precedents in that behalf—one the case of John Smith, a member of the Senate from the State of Ohio, from which case they quote only the somewhat rhetorical report of Mr. Adams, in part these words:

> The power of expelling a member for misconduct results on the principles of common sense, from the interests of the nations that the high trust of legislation shall be invested in pure hands.

The case of Smith, however, was an allegation that, while a Senator, during the very term at which he was held to answer, he had been complicated in the alleged treason of Aaron Burr. It is difficult to see how that can be cited as authority, as to a crime committed before the accused was a member. That case was not before the Senate. It is observable that the learned committee forget to cite the resolution of expulsion which concludes Mr. Adam's report, and shows the facts in the following words:

> That John Smith, a Senator from the State of Ohio, by participation in the conspiracy of Aaron Burr against the peace, union, and liberties of the people of the United States, has been guilty of conduct incompatible with his duty and station as a Senator of the United States, and that he be, and therefore, is, expelled from the Senate of the United States.

And further, during the discussion no Senator claimed that Mr. Smith could have been expelled for any act done by him before his election. But, on the contrary, Mr. Hillhouse, the able Senator from Connecticut, characterizes the report of Mr. Adams as "one containing principles which I can never sanction by my vote; principles which would plant a dagger in the bosom of civil liberty."

We also take leave to suggest that the learned committee might have given, in their report, a little more prominence to the case of Humphrey Marshall, of Kentucky, which they only casually mention, wherein the

same Senate refused to take cognizance of the charge of perjury as a ground of expulsion, because the imputed offense had been committed before the election of the Senator.

In their only other citation your committee are happy to find that they draw their inspiration from the same source with the learned committee on Credit Mobilier, which cites the case of John Wilkes as establishing the doctrine that the House of Commons, of England, by the common lex parliamentaria, may expel a member for acts committed before he was a member of that house. Your committee had come to an entirely different conclusion upon this case. They had supposed, if anything was settled in the case of John Wilkes, it was that such act of expulsion was "contrary to the liberties of the Commons of England." It certainly cannot be held an authority for the proposition that a member may be expelled for acts done before he was a member of the body, because the several acts of John Wilkes for which he was expelled were done after his election to that same session of Parliament to which he was elected and reelected. But *à fortiori*, because Wilkes was sustained by every lover of the principles of freedom, and the acts of the House of Commons in his case have always been cited as an instance of the tyranny of parliamentary bodies.

Your committee had believed, until they read this report, that since the vote of the House of Commons, under the lead of the liberals of England, had blotted out the offensive record (by ordering it to be expunged from the journal, "as subversive of the rights of the whole body of the electors of this kingdom") of the proceedings of a body led by the same ministry who made war upon American rights and liberties and conducted the aggressions which produced the American Revolution, the conduct of such a ministry would never find a defender, much less in a committee of freemen, to cite it as a precedent for the action of a constitutional representative body of a free people.

Your committee believed and still do believe, and therefore aver, that the case of Wilkes was the cause of the limitations upon the qualifications of members, put into our Constitution, and the guarded power of expulsion therein given to both Houses. The case of Wilkes was as familiar to our revolutionary fathers when they framed our Government as Credit Mobilier is to us. They had seen and felt the effects of parliamentary oppression, and they guarded themselves sedulously from it in their constitution of Government.

Nor are your committee shaken in our opinion by the reasoning of that report, that the difference of Wilkes's case, to distinguish it from the case they had under advisement is, that Wilkes's was only a case of a political offense, to wit, libel, and therefore not *malum in se;* because we are brought to contemplate, when that distinction is raised, what might be the condition of some members of the present House of Representatives, in the opinion of other members of this House, and probably some one of that learned committee itself. It will be conceded that there is no higher crime than treason known to a government of laws. It has always been visited by the direct punishment, and in the country from which we received the body of our laws the traitor was not allowed to be buried. Dismembered and disemboweled, he saw his entrails burned before his eyes while yet living, and his head was put upon a pike, in its decay grinning terror to like evil-doers, and his blood was held attainted to the latest generation, so that no pure drop could

descend to his posterity. Yet in the present House of Representatives there are men of whom some of the other members may be of opinion that they committed treason against our Government some ten or twelve years since, and might claim that one cause of the election of some of them was that their constituencies knew that they had committed such treason, sympathized with them in it, and chose them as their representatives because of that sympathy; and we of the House of Representatives would be on our part obliged to admit that, in order that they might be our associates, we removed constitutional disabilities to permit them to sit with us by virtue of that election. Therefore, for this reason, your committee might find itself compelled to dissent from the proposition stated in that report, that "it is hardly a case to be supposed that any constituency, with a full knowledge of a man's guilt or moral turpitude, will elect him." That depends upon the definition which the constituency gives to the act done as to its guilty quality.

We must remember that this power of expulsion has been most frequently used for political purposes, and may be so again. Not many years ago the House of Representatives witnessed a motion for expulsion of the "old man eloquent," once a President of the United States, as "tainted with crime," because he presented a petition for the abolition of slavery. Nay, more a movement for expulsion, changed to a vote of censure, passed by 125 to 60, against Joshua R. Giddings, of Ohio, as a tainted man, unfit for association with his fellow-members, because he presented a series of resolutions declaring that some African negroes, who, having endured the horrors of the middle passage in a slave-ship, had the natural and inherent right to rise upon their captors and oppressors at sea, and regain their liberty taken from them by fraud and force.

No life can be so blameless, no services so exalted, no action so just as always to guard the man against the blasts of passion and prejudice which sometimes sweep over a deliberative assembly.

What, then, becomes of the doctrine put forward in that report, that the right of this process of purgation and purification must be maintained to prevent those tainted by crime from sitting with us; or, as pressed in that report, "that it seems to us absurd to say an election has given a man political absolution for an offense which was unknown to his constituents?"

The offense of which we have spoken was known, not only to the constituents, but to the House, but an election has followed, notwithstanding.

But the learned committee further declare, as a reason why no fixed rule of law should be adopted by the House in cases of expulsion, as follows: "That no rule, however narrow and limited," can prevent exercise of this power of purgation and purification, if two-thirds of House shall see fit to expel a man because they do not like his religious or political principles or without any reason at all. They have no power, and there is no remedy, except by an appeal to the people."

The minds of your committee very much reluct at such a doctrine. We deny the power, that is, the legal power; while we admit the brute force. We deny the right, and there can be no legal power where there is no legal right.

It is for us now to make the precedent that shall restrain bad men in bad times from an exercise of an assumed wrongful power. The only

safety, either for the constituency or the Representative, must be found in a steady line of precedents guiding the action of the House in the matter of expulsion, founded on principles of justice and legal rights carefully restrained within the limits of constitutional law. Nay, "who shall vote as a precedent for any exercise of this claimed power of purification and purgation?" May not the next House of Representatives, composed in two-thirds of its members of republicans of the most pronounced type, under a precedent established by the report of the learned committee, if sanctioned by the House, come back at the next session and undertake the work of purgation and purification from the House of men whom they may believe committed treasonable acts ten years ago? And they will find no legal impediment; for pardon or removal of disabilities does not extend to cases of impeachment by express constitutional exception, and the learned committee insist that the causes justifying impeachment and expulsion are inseparable. Who, then, will dare assert that for offenses committed ten years ago, yea, five years, or one year ago, before the election of a member, the House has power to expel at its caprice, under a constitutional provision which declares "the House may punish its members for disorderly behavior, and, with the concurrence of two-thirds, expel a member?"

The case of Matteson, cited by the learned committee, it seems to your committee is peculiarly unfortunate to sustain the postulate. But Matteson's case is in so many respects like that under consideration, that it deserves more than the passing notice that the report gives it.

Matteson had been engaged in a case of bribery, and had been re-elected the charge had been made during the re-election and had been denied; and in the last days of the short session, before he was to take his seat in the next House, a resolution of expulsion was brought against him for the crime of being engaged in bribery while a member of, and for slandering the then present House. Before a vote was taken upon the resolutions, he sent in his resignation, so that the resolution of expulsion was laid upon the table, while the other two resolutions finding him guilty of the crime were passed.

At the session of the next Congress another resolution of expulsion was introduced for the same cause, and in the same words, but was antagonized because the act was done while Matteson was a member of a former Congress, and after the fullest discussion, was laid on the table by the decisive vote of 96 ayes to 69 nays, in a House where there were such parliamentarians as Campbell, Covode, Winter Davis, Dawes, Farnsworth, Giddings, Grow, Harlan, Olin, Pike, Seward, John Sherman Wade, Walbridge, and Washburn, voting in the affirmative, in a case where the guilty act was proved and admitted. So that we dissent from the conclusion of the learned committee, that this case of Matteson furnishes no precedent because, as "the whole subject was ended by being laid on the table," it is impossible to say what was decided by the House.

We find ourselves, therefore, from the entire lack of precedents, and upon the reason of the case, compelled to differ in the fullest manner from the doctrine of that report in regard to purification and purgation, and because, among other reasons, your committee cannot well see how the fact of the knowledge of the constituency, that their representative has heretofore committed a crime, can prevent his "presence

bringing odium and reproach upon the body of which he is a member," which would attach to it because of the same crimes, if his constituents did not know them at the time of his election. It seems to us the impure man would need purification and purgation in equal degree irrespective of the knowledge of his constituents.

Our opinion upon the whole matter, therefore, is that the right of representation is the right of the constituency, and not that of the representative; and so long as he does nothing which is disorderly or renders him unfit to be in the House while a member thereof, that except for the safety of the House, or the members thereof, or for its own protection, the House has no right or legal constitutional jurisdiction or power to expel the member. We see no constitutional warrant for his expulsion upon any other ground, and especially not upon the ground of purgation and purification as set forth in the report of the learned committee, against which your committee must earnestly and respectfully protest.

Your committee do not feel themselves called upon to discuss in this connection the legal consequences following from the doctrine of continuation of the offense in a man once receiving a bribe, because if it may be laid with a *continuando* at all the offense, it must continue to affect him ever after, and therefore, having once taken a bribe, he is always deemed to be under the effect of it, for the reason that we are inclined to believe that at some time the effect of the bribe might have spent its force, and it would hardly be a safe rule of legal action to undertake to determine whether that would not happen in five years and might happen in ten. Certainly such considerations would not apply to one who had given a bribe, because the virtue thereof all went out of him when he parted with his money, and there was nothing left continuing in him save the loss of it.

For the reasons so hastily stated, and many more which might be adduced, your committee conclude that both the impeaching power bestowed upon the two Houses by the Constitution, and the power of expulsion, are remedial only, and not punitive, so as to extend to all crimes at all times, and are not to be used in any constitutional sense or right for the purpose of punishing any man for a crime committed before he becomes a member of the House, or in case of a civil officer, as just cause of impeachment; but we agree the analogy stated by the learned committee on Credit Mobilier is in so far perfect. Both are alike remedial, neither punitive.

We have, therefore, come to the opinion that, so far as receiving and holding an interest in the Credit Mobilier stock is concerned, there is nothing in the testimony submitted to us which would warrant impeachment in the case of the Vice President.

In view of all the circumstances, your committee do not deem that we are now required to make any further inquiry, under the resolution referred to us, and therefore report back the same, and ask to be discharged from the further consideration thereof, and that the same lie on the table.

JNO. A. BINGHAM.
BENJ. F. BUTLER.
CHAS. A. ELDREDGE.
J. A. PETERS.
L. D. SHOEMAKER.
D. W. VOORHEES.

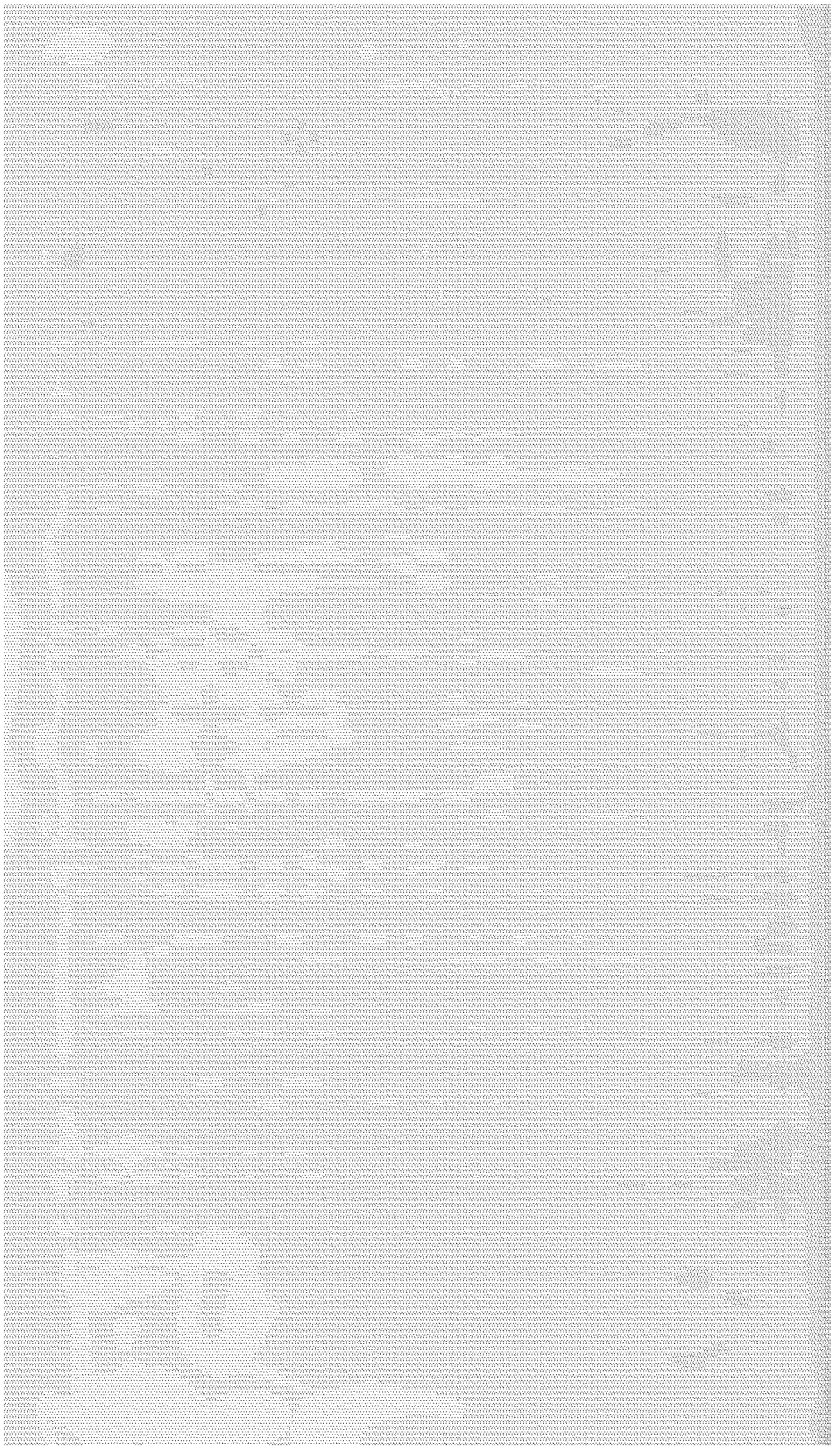
I dissent from the report, but I concur in the recommendation to discharge the committee for want of time to make further investigation, and for the reasons expressed in views submitted herewith.

CLARKSON N. POTTER.

FEBRUARY 24, 1873.

I concur in the conclusions of the foregoing report so far as the same have reference to the question of impeachment. I do not feel called upon, by the resolution submitted by the House to this committee, to express any opinion in regard to the power of the House to expel for acts committed before election, and express no opinion in relation thereto.

J. M. WILSON.



"Impeachment for 'High Crimes and Misdemeanors'", Raoul Berger

Impeachment for "High Crimes and Misdemeanors"**

Raoul Berger*

When Congressman Gerald R. Ford proposed in April, 1970, the impeachment of Justice William O. Douglas and asserted that an "impeachable offense" is what the House, with the concurrence of the Senate, "considers [it] to be,"[1] he laid claim to an illimitable power that rings strangely in American ears. For illimitable power is alien to a Constitution that was designed to fence all power about.[2]

Article II, § 4 of the Constitution provides that

> [t]he 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 . . . .

Despite a plethora of discussion, the scope of the power thus conferred has not received adequate analysis.[3] Many questions remain unanswered. Did the Framers intend to confer unlimited power to

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[1] "What, then, 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. . . . there are few fixed principles among the handful of precedents." 116 Cong. Rec., H 3113–14 (daily ed. April 15, 1970).

[2] James Iredell, "mastermind" of the North Carolina Ratification convention, 2 G. Bancroft, History of the Formation of the Constitution of the United States of America 348 (1882), and later a Justice of the Supreme Court, stated in an address published in 1786 respecting the formation of the North Carolina constitution,

> It was, of course, to be considered how to impose restrictions on the legislature . . . [to] guard against the abuse of unlimited power, which was not to be trusted, without the most imminent danger, to any man or body of men on earth. We had not only been sickened and disgusted for years with the high and almost impious language from Great Britain, of the omnipotent power of the British Parliament, but had severely smarted under its effects. We . . . should have been guilty of . . . the grossest folly, if in the same moment when we spurned at the *insolvent despotism* of Great Britain, we had established a *despotic* power among ourselves.

2 G. McRee, Life and Correspondence of James Iredell 145–46 (1857–1858). The Colonists were unceasingly concerned with the aggressiveness of power, "its endlessly propulsive tendency to expand itself beyond legitimate boundaries." Its "necessary victim," they thought, "was liberty, or law, or right." B. Bailyn, The Ideological Origins of the American Revolution 56–57 (1967) (hereinafter cited as Bailyn). Fear of the Congress led to repeated assurances in the conventions that it was adequately "fenced" about. R. Berger, Congress v. The Supreme Court 8–15 (1969) (hereinafter cited as Congress v. Court).

In the oft-quoted words of Jefferson: "173 despots would surely be as oppressive as one . . . An *elective despotism* was not the government we fought for." 3 Jefferson, Writings 222–24 (P. Ford ed. 1892). Madison quoted these remarks in The Federalist No. 48, at 324 (Modern Lib. ed. 1937) (hereinafter cited as The Federalist). For similar expressions by other Founders, see Congress v. Court, *supra* 8–15, 34–35.

[3] Professor Kurland said with respect to removal of judges, "There is mere literature than learning." Kurland, *The Constitution and the Tenure of Federal Judges: Some Notes From History*, 36 U. Chi. L. Rev. 665, 668 (1969).

impeach? Do the words "high crimes and misdemeanors" presuppose conduct punishable by the general criminal law, an indictable crime? Does the Constitution contemplate that impeachment shall be a criminal proceeding in any sense? Criminal or not, do the words "high crimes and misdemeanors" have ascertainable limits? If they have such limits, is an impeachment and conviction outside these limits reviewable by the courts? Impeachment is too important in the Constitutional scheme to be left to the politicians; and we need to look beyond the Senate's own precedents to the roots and constitutional history of impeachment.

To understand what the Framers had in mind we must begin with English law, for nowhere did they more evidently take off from that law than in drafting the impeachment provisions. The very terms "impeachment," "treason, bribery, or other high crimes and misdemeanors" were lifted bodily from the English law. The age-old division of functions which assigned the role of prosecutor to the Commons while the Lords sat in judgment was the "model" of the parallel division of functions between the House of Representatives and the Senate.[4] Aware, in the words of James Wilson, that "numerous and dangerous excrescences" had disfigured the English law of treason, the Framers delimited and defined treason and thereby, as Wilson told the Pennsylvania Ratification Convention, put it beyond the power of Congress to "extend the crime and punishment of treason."[5] They banned the related bill of attainder and corruption of blood;[6] they replaced an unimpeachable King with an impeachable President; and, profiting from Charles II's pardon of the Earl of Danby,[7] they withheld from the President power to pardon an impeached officer.[8] And of far-reaching importance, they separated impeachment from subsequent criminal prosecution so that political passions no longer could sweep an accused to his death. As the Framers proceeded in the task of adapting impeachment to the American scene, the common law was for them indeed a "brooding omnipresence."[9]

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[4] The Federalist, *supra* note 2, No. 65 (A. Hamilton), at 425.

[5] 2 Wilson, Works 663 (R. McCloskey ed. 1967); (hereinafter cited as Wilson); 2 J. Elliot, Debates In the Several State Conventions on Adoption of the Constitution 469 (2d ed. 1836) (hereinafter cited as Elliot).

[6] U.S. Const. art. I, § 9(3); art. III, § 3(2). For discussion of bills of attainder, see Z. Chafee, Three Human Rights in the Constitution 90 *et seq.* (1956) (hereinafter cited as Chafee); J. Bellamy, The Law of Treason in England in the Later Middle Ages 177–205 (1970).

[7] In the midst of his impeachment proceeding, the Earl of Danby produced a pardon from the King. The incident is recounted in Chafee, *supra* note 6, at 129–33. The Commons were outraged for, as Sir Francis Winnington, former Solicitor-General, said, "An impeachment is of no purpose when a pardon shall stop our mouths." 11 Howell's State Trials 751, 755 (1809) (hereinafter cited as Howell). In 1700 the Act of Settlement, 12 & 13 Will. III, ch. 2, § 3, barred the pleading of a pardon to an impeachment, but not a pardon issued after conviction. 1 J. Chitty, Criminal Law 763 (5th Amer. Ed. 1847).

[8] U.S. Const. art. II, § 2(1).

[9] Bayard's great statement on behalf of the Managers in the Blount impeachment (1797) deserves to be remembered:

> On this subject, the Convention proceeded in the same manner it is manifest they did in many other cases. They considered the object of their legislation as a known thing, having a previous definite existence. Thus existing, their work was solely to mould it into a suitable shape . . . . And, therefore, ... it remains at common law, with the variance only of the positive provisions of the Constitution . . . . That law was familiar to all those who framed the Constitution. Its institutions furnished the principles of jurisprudence in most of the States. . . . The members of the south would never have agreed to receive the local institutions of the north, as the common law of the States. But the first source from which all the colonies originally derived the principles of their law, was the only point of resort to which it could be expected that all would have recourse. We accordingly find many terms which cannot be understood, and many regulations which cannot be executed without the aid of the common law of England.

F. Wharton, State Trials of the United States 264 (1849). As Harper asked in the same trial, where else shall we "search, but in the common law . . . for the nature and extent of the power of impeachment, which our Constitution has borrowed from that law?"

The view that impeachment must rest upon a violation of existing criminal law [10] has the imprimatur of Blackstone; and impeachment, he stated, "is a prosecution of the already known and established law." [11] His successor as Vinerian lecturer, Richard Wooddeson,[12] said that impeachments "are not framed to alter the law, but to carry it into more effectual execution"; they "are founded and proceed upon the law in being." [13] On the eve of President Andrew Johnson's impeachment, Professor Theodore Dwight put the matter more forcibly: "The decided weight of authority is, that no impeachment will lie except for a true crime . . . a breach of the common or statute law, which . . . would be the subject of indictment. . . ." [14]

It is quite clear that this view has not won the assent of the Senate, for in a succession of "guilty" verdicts it has tacitly "settled" that impeachment lies for non-indictable offenses.[15] Let the impeachment of District Judge Halsted Ritter in 1936 serve as an example. Ritter was convinced under article 7 of the articles of impeachment, which

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Id. at 230. Ingersoll, Counsel for Blount, agreed that "Ideas derived from English jurisprudence are ingrafted into all our Constitutions. Hence the propriety of reasoning by analogy from the books of the law." *Id.* at 202.

[10] This argument was developed and repeatedly pressed in the English treason impeachments which turned on the effect of the great treason statute, 25 Edw. III. Chapter I in my forthcoming book will be devoted to the treason cases.

No comparable statute purported to define "high crimes and misdemeanors" either in England or the United States; and I found no English impeachment for "high crimes and misdemeanors" in which it was held that the impeachment must fail for lack of an indictable crime. *But see* note 41 *infra*.

[11] 4 W. Blackstone, Commentaries on the Laws of England 259 (1765) (hereinafter cited as Blackstone).

[12] 2 R. Wooddeson, Laws of England 619 (1792) (hereinafter cited as Wooddeson) devoted a chapter to impeachment, which he thought the first "methodical compilation . . . on this subject." These were the Vinerian Lectures, commencing in 1777. He was much cited in this country, *see, e.g.*, Jefferson, A Manual of Parliamentary Practice (1803), reprinted in Senate Manual (55th Cong. 1899) 150–53; The Trial of Judge Alexander Addison 123n, App. S (1803); Impeachment of Justice Samuel Chase, 14 Annals of Cong. 505, 607 (1805); 1 J. Story, Commentaries on the Constitution of the United States, 582n, 585n (5th ed. 1905) (hereinafter cited as Story).

[13] 2 Wooddeson, *supra* note 12, at 611–12.

[14] Dwight, *Trial by Impeachment*, 6 Am. L. Reg. (N.S.) 257, 264 (1867). And, he continued, "It is asserted, without fear of successful contradiction, both upon authority and principle, notwithstanding a few isolated instances apparently to the contrary, that no impeachment can be had where the King's Bench would not have held that a crime had been committed. . . ." *Id.* He relied chiefly on the treason cases, *supra* note 10. Chafee, *supra* note 6, at 148, stated, "so far as I know the Senate has faithfully adhered to the criminal character of impeachments when trying members of the Cabinet and judges."

[15] For a summary of the early cases, see Lawrence, *The Law of Impeachment*, 6 Am. L. Reg. (N.S.) 667–75 (1867). Among them were district judge John Pickering (1804), insane and habitually drunk, who entered orders contrary to statute, refused to allow appeal, appeared in court in a state of total intoxication. A. Simpson, A Treatise on Federal Impeachments 192–94 (1916) (hereinafter cited as Simpson); Robert W. Archbald (1912), judge of the Commerce Court, who corruptly influenced a litigant before him to sell property to him and the like. *Id.* at 207–13.

On the other hand, Justice Samuel Chase was acquitted after a trial in which the indispensability of an indictable crime was strenuously argued. 14 Annals of Cong. 116 (1805). Charles Warren apparently concluded that the acquittal constituted an endorsement of that argument. 1 C. Warren, The Supreme Court in United States History 293 (1922) (hereinafter cited as Warren). But I would agree with Henry Adams that "the acquittal of Chase decided no point of law except his innocence of high crimes and misdemeanors." 2 H. Adams, History of the United States 242–44 & 77 (rep. ed. 1962). *See also*, Lillich, *The Chase Impeachment*, 4 Amer. J. Leg. Hist. 49, 72 (1960). In great part the debate centered on legal rulings in trials over Justice Chase had presided. Certainly the earlier impeachment of Pickering and the later impeachments of Archbald and Ritter did not proceed for indictable crimes.

Chief Justice Taft said, in an address to the American Bar Association in 1913, "By the liberal interpretation of the term 'high misdemeanors' which the Senate has given there is now no difficulty in securing the removal of a judge for any reason that shows him unfit." Otis, *A Proposed Tribunal: Is It Constitutional?* 7 Kan. City L. Rev. 3, 22 (1938) (hereinafter cited as Otis). So too, C. Hughes, The Supreme Court of the United States 79 (1928), stated "According to the weight of opinion, impeachable offenses include, not merely acts that are indictable, but serious misbehavior which may be considered as coming within the category of high crimes and misdemeanors." Most commentators are in accord: W. Rawle, A View of the Constitution of the United States 213 (2d ed. 1829); Story, *supra* note 12, at § 800; 2 G. Curtis, History of the Constitution of the United States 260–62 (1858); Simpson, *supra*, at 41–45; Otis, *supra*, at 33; Potts, *Impeachment as a Remedy*, 12 St. Louis L. Rev. 15, 25–26 (1927); Ion Brock, *Partisan Politics and Federal Judgeship Impeachment Since 1903*, 23 Minn. L. Rev. 185, 193–94 (1938).

charged that he had received large gifts from substantial property-holders in his district, though it was not alleged that they had cases pending before him. The charge was that he "was guilty of misbehavior and of high crimes and misdemeanors in office," and that the consequence of his action "as an individual and such judge, is to bring his court into scandal and disrepute, to the prejudice of said court and public confidence in the administration of justice therein, and to the prejudice of public respect and confidence in the Federal judiciary and to render him unfit to serve as such judge." Hatton Sumners, Chairman of the House Judiciary Committee, who was perhaps the leading Manager of the impeachment for the House, emphasized, "We do not assume the responsibility . . . of proving that the respondent . . . is guilty of a crime as that term is known to criminal jurisprudence. We do assume the responsibility of bringing before you a case, proven facts, the reasonable and probable consequences of which are to cause people to doubt the integrity of the respondent presiding as a judge. . . ." By its judgment of guilty the Senate ratified that claim.[16]

To derive from the undeniably criminal terminology of the impeachment and associated provisions the proposition that impeachment may be based on non-criminal conduct is somewhat startling,[17] and one may therefore be indulged in the inquiry whether the convictions by the Senate have constitutional warrant. And if impeachment be in fact the sole avenue for removal of judges, we ought to know more about its elements and scope than can be derived from the cryptic Senate verdicts of "guilty" or "not guilty." The historian, as Plucknett said, "is left heir to the lawyer's unsolved conundrums."[18]

I. IMPEACHMENT AND INDICTABLE CRIMES

Because "crimes and misdemeanors" are familiar terms of criminal law,[19] it is tempting to conclude that "high crimes and misdemeanors" are simply ordinary crimes and misdemeanors raised to the *n*th degree. Apparently this is what Christian had in mind when, in a note to Blackston, he explained that when used in impeachments the words "high crimes . . . have no definite signification, but are used merely to give greater solemnity to the charge."[20] In this he went astray. The

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[16] 80 Cong. Rec. 5385, 5606, 5469 (1936).

[17] So reasoned a scholar as Charles Warren said of the Chase proceedings, "Its gravest aspect lay in the theory which the Republican leaders in the House has adopted, that impeachment was not a criminal proceeding but only a method of removal, the ground for which need not be a crime or misdemeanor as these terms were commonly understood." 1 Warren, *supra* note 15, at 293. On the other hand, Henry Adams earlier stated that a conclusion restricting impeachment "to misdemeanors, indictable at law" is "not to be resisted if the words of the Constitution were to be understood in a legal sense," but he considered that "Such a rule would have made impeachment worthless for many cases where it was most likely to be needed; for comparatively few violations of official duty, however fatal to the State, could be brought within this definition." Adams, *supra* note 15, at 223. He thought it an absurdity that "unless a judge committed some indictable offense the people were powerless to protect themselves." *Id.* at 155–56.

[18] Plucknett, *Impeachment and Attainder*, Royal Hist. Soc. (5th Ser. v. 3, 1953) 145, 155. Senator George Wharton Pepper boldly stated at the Bar of the Supreme Court, "When this great tribunal declares the law we all bow to it; but history remains history, in spite of judicial utterances upon the subject." Myers v. United States, 272 U.S. 52, 79 (1926). Or as Justice Frankfurter said, "legal history still has its claims." Federal Power Comm. v. Natural Gas Pipe Line Co., 315 U.S. 575, 609 (1942) (concurring opinion).

[19] Blackstone stated that "Crimes and misdemeanors . . . properly speaking, are more synonymous terms, 4 Blackstone *supra* note 11, at 5, but he was speaking far too loosely, for crimes comprise both felonies and misdemeanors. Felonies were anciently punishable by death, *Id.* at 94, "while smaller faults, and omissions of less consequence [than offenses "of a deeper and more atrocious dye"] are comprised under the gentler name of 'misdemeanors' only." *Id.* at 5.

[20] Christian's note to 4 Blackstone, *supra* note 11, at 5.

phrase "high crimes and misdemeanors" is first met not in an ordinary criminal proceeding but in an impeachment, that of the Earl of Suffolk in 1388.[21] Impeachment itself was conceived because the objects of impeachment, for one reason or another, were beyond the reach of ordinary criminal redress. It was "essentially a political weapon," [22] an outgrowth of the fact that from an early date the King and his Council were the "court for great men and great causes." [23] Before the Commons assumed the role of accuser, late in the reign of Edward III, of those charged with "high treason or other high crimes and misdemeanors" against the State, private persons had been wont to turn to the Crown to institute proceedings before the High Court of Parliament when they were aggrieved by officers of the Crown in "high trust and power, and against whom they had no other redress than by application to Parliament." Such officers were persons of the "highest rank and favour with the Crown" or they were "in judicial or executive offices, whose elevated station placed them above the reach of complaint from private individuals." Before long the Commons became the prosecutor of the "highest and most powerful offenders against the State." [24] And in 1388 the Peers categorically asserted exclusive jurisdiction to try a peer for a high crime against the realm in the landmark proceedings against the Earl of Suffolk, and this not by the common law but by the course of Parliament.[25] The House of Lords was reminded of this history by Serjeant Pengelly during the impeachment of Lord Chancellor Macclesfield in 1725:

> your lordships are now exercising a power of judicature, reserved in the original frame of the English constitution, for the punishment of offences of a public nature, which may affect the nation; as well in instances, where the inferior courts have no power to punish the crimes committed by the ordinary rules of justice; as in cases within the jurisdiction of the courts of Westminster-hall, where the person offending is by his degree, raised above the apprehension of danger, from a prosecution carried on in the more usual course of justice; and whose exalted station requires the united accusation of all the Commons . . . .[26]

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[21] Howell, *supra* note 7, at 89, 91; Simpson, *supra* note 15, at 86.

[22] Clarke, *The Origin of Impeachment*, in Oxford Essays in Medieval History 164, 185 (1934).

For its subsequent use in the struggle to make ministers of the Crown accountable to Parliament, *see* text accompanying notes 192–99, *infra*.

[23] 1 W. Holdsworth, History of English Law 380 (3d ed. 1922).

[24] 4 J. Hatsell, Precedents of the Proceedings of the House of Commons 63 (1796) (hereinafter cited as Hatsell). Notwithstanding his definition of impeachment as a prosecution of the "already known and established law" (text accompanying note 11 *supra*), Blackstone stated that an administrator of "public affairs may infringe the rights of the people, and be guilty of such crimes, as the ordinary magistrate either dares not or cannot punish," for which situation impeachment furnishes the remedy. 4 Blackstone *supra* note 11, at 260–61. Roberts explains that though "medieval kings could prevent the prosecution of their servants in the ordinary courts of the land, three of them, Edward III, Richard II, and Henry VI, could not *prevent the impeachment of their ministers in Parliament*." C. Roberts, The Growth of Responsible Government in Stuart England 7 (1966) (hereinafter cited as Roberts). Clarke, *supra* note 22, at 166, proffers another explanation: in the 14th century there was a steadily increasing demand for satisfaction of wrongs done by the king's servants" which led to redress by "proceedings against the Crown, outside the common law." "To devise a routine procedure for the trial of the king's ministers was perhaps the crowning achievement of Parliament in the fourteenth century." *Id.* at 185. In the early 17th century, says a recent English historian, impeachment was seen merely "courts of law could solve." J. Kenyon, The Stuart Constitution 1603–1688, 93. (1966); as a "practical means of dealing with an immediate problem which none of the normal courts of law could solve." J. Kenyon, The Stuart Constitution 1603–1688, 93. (1966). *See also* Plucknett, *State Trials Under Richard II*, Royal Hist. Soc. (5th Ser. v. 2, 1952) 159–71.

[25] The Lords declared "That in so high a crime . . . perpetrated by persons who are peers . . . the cause cannot be tried elsewhere but in parliament, nor by any other law or court except that of parliament," distinguishing the "process or order used in inferior courts . . . [only] intrusted with the execution of the ancient laws and customs of the realm, and the Ordinances and establishments of parliament" from the "laws and course of parliament" by which the Lords would decide. 1 Howell, *supra* note 7, at 113.

[26] 16 *Id.* at 1330. Almost fifty years later this was the lesson drawn from the State Trials by John Adams: "without this high jurisdiction it was thought impossible to defend the

When the phrase "high crimes and misdemeanors" is first met in the impeachment of the Earl of Suffolk in 1388, there was in fact no such crime as a "misdemeanor." Lesser crimes were prosecuted as "trespasses" well into the 16th Century, and only then were "trespasses" supplanted by "misdeameanors" as a category of ordinary crimes.[27] As "trespasses" itself suggests, "misdemeanor" derived from torts or private wrongs; and Fitzjames Stephen stated in 1863 that "prosecutions for misdemeanor are to the Crown what actions for wrongs are to private persons." [28] In addition, therefore, to the gap of 150 years that separates "misdemeanor" from "high misdemeanors" there is a sharp functional division between the two. "High crimes and misdemeanors," as will appear, were a category of *political* crimes against the states,[29] whereas "misdemeanor" described criminal sanctions for *private* wrongs. An intuitive sense of the difference is exhibited in the development of English law, for though "misdemeanor" entered into the ordinary criminal law, it did not become the criterion of "high misdemeanor" in the Parliamentary law of impeachment.[30] Nor did either "high crimes" or "high misdemeanors" find their way into the general criminal law of England.[31] As late as 1757 Blackstone could say that, "The first and principal [high misdemeanor] is the *mal-administration* of such high officers, as are in the public trust and employment. This is usually punished by the method of parliamentary impeachment." Other high misdemeanors, he stated, are contempts against the king's prerogative, against his person and government, against his title, "not amounting to treason," in a word, "political crimes." [32] Treason is plainly a "politcal" crime, an offense against the State; so too bribery of an officer attempts to corrupt administration of the State. Indeed, early in the common law bribery "was sometimes viewed as High Treason." [33] Later Hawkins referred to "great Bribes . . . and . . . other such like Misdemeanors"; and Parliament itself regarded bribery as a "high crime and misdeameanor." [34] In addition to this identification of bribery, first with "high treason" and then with "misdemeanor," the association, as a matter of construction, of "other high crimes and misdemeanors" with "treason, bribery," which

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constitution against princes, nobles, and great ministers, who might commit high crimes and misdemeanors which no other authority would be powerful enough to prevent or punish." 2 Adams, Works 330 (1850).

[27] 2 Holdsworth, *supra* note 23, at 357, 365 (4th ed. 1936); 3 *Id.* at 263 n.1 (1st ed. 1909); 4 *Id.* at 512 (1924). *See also* T. Plucknett, Concise History of the Common Law 458–59 (5th ed. 1956); *cf.* J. Stephen, The Criminal Law of England 58 (1863) (hereinafter cited as Stephen).

[28] Stephen, *supra* note 27, at 60.

[29] For England, *see* text accompanying notes 32–35, 37–38, 62–91; for United States, *see* text accompanying notes 111–12, 133 and note 112 *infra*.

[30] Appreciation of the difference was later exhibited by Governor Johnston in the North Carolina convention: "If an officer commits an offense against an individual, he is amenable to the courts of law. If he commits crimes against the state, he may be indicted and punished. Impeachment only extends to high crimes and misdemeanors in a public office. It is a mode of trial pointed out for great misdemeanors against the public." 4 Elliot, *supra* note 5, at 48. See similar remarks by James Wilson, text accompanying note 112 *infra*.

In a fairly extensive reading of English impeachment cases, I found no argument, with the possible exception of the *Macclesfield* case, *infra* note 41, that a "high crime and misdemeanor" was or was not made out because it was or was not a misdemeanor at common law.

[31] At least I could turn up no instance in a search of the texts of Holdsworth, Russell, Stephen, Chitty, Viner, Bacon and Comyns.

[32] 4 Blackstone, *supra* note 11, at 121–123. Since the word "political" also appears in "political weapon," it needs to be noted that the latter describes the use of impeachment by Parliament to make ministers accountable to it whereas "political crimes" describes misconduct in office as distinguished from ordinary crimes.

[33] 1 W. Hawkins, Pleas of the Crown, Ch. 67, § 6 at 169 (1716).

[34] *Id.* Ch. 67, § 7, at 170; 4 J. Campbell(Lives of the Lord Chancellors 55 (3d ed. 1849).

are unmistakably "political" crimes, lends them a similar connotation under the maxim *noscitur a sociis*.[35]

In sum, "high crimes and misdemeanors" appear to be words of art confined to impeachments, without roots in the ordinary criminal law, and which, so far as I could discover, had no relation to whether an indictment would lie in the particular circumstances.[36] For this Wooddeson himself furnishes collateral evidence when he states that impeachments are framed to execute the law where it is "not easily discerned in the ordinary course of jurisdiction by reason of the peculiar quality of the alleged crimes." [37] What lends a "peculiar" quality to these crimes is the fact that they are not encompassed by criminal statutes or, for that matter, by the common law cases, as his own illustrations disclose:

> . . . if the judges mislead their sovereign by unconstitutional opinions, . . . where a lord chancellor has been thought to put the seal to an ignominious treaty, . . . a privy councillor to propound or support pernicious and dishonourable measures, or a confidential adviser of his sovereign to obtain exorbitant grants . . . these imputations have properly occasioned impeachments; because it is apparent how little the ordinary tribunals are calculated to take cognizance of such officers, or to investigate and reform the general polity of the state.[38]

One would search in vain for a statute that made it a crime to render an "unconstitutional" opinion, or to obtain large grants such as an over-indulgent sovereign was wont to make to a spoiled favorite, *e.g.*, the Duke of Buckingham.[39] And there are no common law cases which declare such acts to be criminal if only because the circumstances involved great ministers who were in the Parliamentary preserve.

The cases which declared misconduct in office to be criminal are not to the contrary. Misconduct in office is first met as a common law crime late in the 17th Century,[40] but the crime was apparently confined to lesser officials who were almost never the subjects of impeachment. No case turned up in my search of the Abridgments in which a Minister had been indicted for misconduct in office; and one may fairly con-

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[35] Neal v. Clark, 95 U.S. 704, 708–09 (1877).

[36] The Solicitor General reminded the Lords in the trial of Lord Arundel (1678) that the "trial of a Peer in Parliament is more ancient than by Indictment." Hatsell, *supra* note 24 at 141n.

In the 14th century redress for "wrongs done by the king's servants" was outside the sphere of the common law." Parliament was dissatisfied with the niceties of an indictment and a "system which served to shelter offenders who were either highly placed or guilty of offenses beyond the plain man's understanding." Clarke, *supra* note 22, at 166, 173. *See also* note 24 *supra*. The analogy of trial by Parliament to "Trial upon Indictment," remarks Plucknett, was "clearly" not obvious to the 14th century lawyer. Plucknett, *The Impeachments of 1376*, Royal Hist. Soc. 153 (5th Ser. v. 1, 1951). In Grantham v. Gordon, 24 Eng. Rep. 539, 541, 1 Peere Williams 612, 616 (1719), the court stated, "impeachments in Parliament differed from indictments, and might be justified by the law and course of Parliament." Wooddeson, *supra* note 12, at 606, suggests that this refers solely to matters of procedure, a matter by no means clear. But my own study of the treason impeachments convinced me that the hotly debated issue was whether the power of Parliament extended to retrospective declarations of treason, i.e. substantive law. In the 14th century treason cases, Parliament laid claim to "a supreme jurisdiction, in the exercise of which it was bound by none of the law and rules which restricted the *power* and regulated the procedure of the other courts." (emphasis added). Kezneck, *The Early History of the Parliamentary Declaration of Treason*, 42 Eng. Hist. Rev. 497, 510 (1927). Chapter I in my forthcoming book will be devoted to the treason cases.

[37] 2 Wooddeson, *supra* note 12, at 611–12.

[38] *Id.* at 602–03.

[39] *See* Article 12 of the articles of impeachment of the Duke of Buckingham, 2 Howell, *supra* note 7, at 1307, 1316–1318; Simpson, *supra* note 15, at 101–04.

[40] "If a man be made an officer by Act of Parliament, and misbehave himself in his office, he is indictable for it at common law; and any publick officer is indictable for misbehavior in his office." Anonymous, 87 Eng. Rep. 853, 6 Mod. 96 (1704). *See also* Regina v. Wyat, 91 Eng. Rep. 331, 1 Salk. 380 (1706) (neglect of duty); Rex & Regina v. Barlow, 91 Eng. Rep. 516, 2 Salk. 609 (1694); Rex v. Davis, 96 Eng. Rep. 839; Sayer 163 (1754).

clude that indictability was not the test of impeachment of a minister.[41] Nor was it the test of impeachment of a Justice, Caesar Rodney could justly twit counsel for Justice Chase with not having "adduced a single case where a judge of one of their [England] superior courts has been indicted for any malconduct in office," and "defy them to show an example of the kind,"[42] for Martin had in truth failed to make out the contrary.[43] In part, this may be traced to the fact that the Justices were a very small "elite group," originally a part of the King's entourage who accompanied him on his travels, only later came to rest at Westminster Hall,[44] and like the Ministers of the King were deemed triable only by the Lords.[45] In part, the continuing absence of such indictments may be due to over-broad dicta of judicial immunity uttered by Coke in *Floyd v. Barker*. That was a private action against a Judge of Assize for conspiring to injure the plaintiff, and it was held that neither such a judge, nor "any other judge . . . of record" could be charged for "that which he did openly in Court as Judge." His conduct could not be drawn in question "at the suit of the parties" nor, said Coke by way of dictum, "before any other Judge at the suit of the

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[41] The treason cases do not, in my view, shake this proposition. *See* note 10 *supra*.

For his assertion that impeachment requires an indictable crime, Dwight, *supra* note 14, at 266–67, also invoked two English cases which proceeded for "high crimes and misdemeanors." In the first, Lord Chancellor Macclesfield was charged in 1725 with the sale of offices of Master of Chancery against the "laws and statutes" of this realm, 16 Howell, *supra* note 7, at 770–75, but it no more follows that impeachment lies only for violations of statute than it would follow that "high misdemeanors" are not impeachable because one case proceeded for high treason. Nevertheless, though Lord Campbell later commented that "There can be no doubt that the sale of all offices touching the administration of justice (with a strange exception in favor of Common Law Judges) was forbidden by the statute of Edward VI," 4 Campbell, *supra* note 34, at 536–37, the issue was strenuously argued, and in my judgment remains subject to considerable doubt, which would require an extensive excursus to set forth.

Let it suffice that Sergeant Pengelly, sensible of the weight of the argument for Macclesfield, stated in rebuttal that

> If the misdemeanors of which the Earl impeached stands accused, were not crimes by the ordinary rules of law in inferior courts, as they have been made out to be; yet they would be offenses of a public nature, against the welfare of the subject, and the common good of the kingdom, committed by the highest officer of justice, and . . . would demand the exercise of the extraordinary jurisdiction vested in your judicature for the public safety, by virtue whereof your lordships can inflict that degree and kind of punishment which no other Court can impose.

16 Howell, *supra* note 7, at 1360. That the Lords proceeded under their own broad power rather than either statute or common law is again inferable from their rejection of "a friendly motion . . . that the opinion of the Judges be asked, 'whether the sale of an office that hath relation to the administration be an offence against the common law?'" 4 Campbell, *supra* note 34, at 534, a question that suggests doubt whether the statute applied.

The second Dwight citation, the impeachment of Lord Melville in 1805, involved the charge that as Treasurer of the Navy, Melville permitted the use of navy moneys for other purposes. The Lords sought the opinion of the judges upon three questions, the nature of which adequately appears from the answers. First, the judges stated that the lodging of navy moneys in a private bank for the purpose of paying assigned bills "upon the Treasurer" was not a crime. Second, they stated that money may not be withdrawn by the Treasurer for the purpose of deposit in a private bank, but if such "intermediate deposit . . . is made, bona fide, as the means . . . of more conveniently applying the money to navy services" such withdrawal was lawful. Third, they stated that the Treasurer might lawfully apply navy funds "to any other use whatsoever, public or private, without express authority to do so." 29 Howell, *supra* note 7, at 1468–71. Melville was acquitted. *Id.* at 1482. In light of what Hallam called an "undisputed principle," that "supplies granted by Parliament, are only to be expended for particular objects specified by itself," note 72, *infra*, the third answer is inexplicable, particularly in its blessing for use of Navy money for "private" purposes. Perhaps the explanation lies in the practicalities: at the time of the trial the alleged offence was 24 years old; the Commons itself had been badly split — his impeachment was only carried in the House of Commons by the deciding vote of the Speaker; the Members voting 216 for and 216 against, the younger Pitt, then Prime Minister, doing all in his power to defeat the impeachment." Then too, Melville had resigned his post as First Lord of the Admiralty as soon as his conduct had been arraigned in the Commons, 29 Howell, *supra*, note 7 at 53 so that the proceeding smacked of beating a dead horse. Simpson *supra*, note 15, 59–60. At best, the Melville acquittal is but one against a string of convictions for "high crimes and misdemeanors" which plainly fell short of indictable offenses.

[42] 14 Annals of Cong., 593–600 (1805) (Gale & Seaton ed. 1852); the point had earlier been made by Representative Campbell *id.* at 342.

[43] For Martin, see *id.* at 434–35. *See* Appendix *A infra*, for analysis of Martin's citations.

[44] J. Dawson, Oracles of the Law 1–2 (1968).

[45] See text accompanying notes 23–26 *supra*, and text accompanying note 52 *infra*.

King." Although Coke put to one side the case of a judge who had conspired "out of court" as "extra-judicial," although he leaned heavily on the sanctity of the record—"records are of so high a nature, that for their very sublimity they import verity in themselves"—he undercut his circumspection by saying that "for any surmise of corruption" the judge should be answerable only "before the King himself." [46] Complaint should be made to Parliament, later said Chief Justice Vaughan, for "corrupt and dishonest judgments," [47] a view reaffirmed still later by Chief Justice Wilmot. [48]

Coke's "verity of the record" was translated into a rule that no indictment of a judge could be allowed to "defeat the record," a phrase anticipated by Fitzherbert's "it seemeth he might be indicated for taking of money . . . which doth not destroy and defeat the Record." [49] One might therefore expect to find indictments against high court Justices for bribery, particularly because statutes had from earliest times penalized judicial bribery, [50] indeed for a long time the offense was criminal only when judges and judicial officers were involved. [51] But here too I found no indictments against Justices of the high courts. Two of the earliest cases, of Chief Justice Hengham (1289) and Chief Justice Thorpe (1349), which antedate the use of impeachments, were brought before the Lords, [52] as was then customary in the case of high officers of the Crown. Broad statements by Hawkins and others that bribery was punishable by fine and imprisonment will be found to refer to impeachments, [53] as when Lord Chancellor Bacon was charged with bribery. [54]

While the protection of "the Superior Courts is absolute and universal," said Chief Justic Grey in 1764, "with respect to the Inferior

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[46] 77 Eng. Rep. 1305–1307, 12 Co. 23–25 (Star Chamber 1608).

[47] Bushell's Case, 124 Eng. Rep. 1006, 1008, Vaughan 135, 139, (1673).

[48] Rex v. Almon, 97 Eng. Rep. 94, 101, Wilm. 243, 259 (1765). See also Hammond v. Howell, 96 Eng. Rep. 1035, 1036–37, 2 Mod. 218, 220–21 (1678) (per Hale, C. J.). In an extensive review of the cases, Taafe v. Downes (1813), published as a note to Calder v. Halkett, 13 Eng. Rep. 16, 28, 3 Mod. P.C. 37, 48 (1839) concluded that the judges of the superior courts are "only answerable for their judicial conduct in the high Court of Parliament."

[49] A. Fitzherbert, Natura Brevium 243 (Eng. trans. 1652) 605 (hereinafter cited as Fitzherbert).

[50] It is one of the curiosa of history that these statutes were probably ineffective, so that Stephen justifiably states that there is "no statute against" bribery, but that "it has ever been an offence against common law." 2 J. Stephen, A History of the Criminal Law of England 250 (1883). The statutes will be discussed in an Appendix of my forthcoming book.

[51] Bribery, stated E. Coke, 3 Institutes 147, is "only committed by him that hath a judicial place . . . ." ; and see 1 Hawkins, *supra* note 33, at ch. 67, §§ 1, 2, at 168.

[52] 1 Campbell, Lives of the Chief Justices of England, at 76, 91–92 (Amer. ed. 1874).

[53] 1 Hawkins, *supra* note 33, at Ch. 67, § 7 at 170. Among Hawkins citations is J. Rushworth, Historical Collections, Pt. 1, fol. 31 (1659), which deals with the impeachment of Bacon for bribery. Jenkins 162, 145 Eng. Rep. 104 (Exch. Ch. undated), states that "if a judge of record takes bribes, he shall be indicted for it," citing Fitzherbert, *supra* note 49, at 243, 8 Hen. VI, c. 12, and 27 Edw. III. Fitzherbert cites no case for the statement that in a case which does not "defeat the record" "it seemeth" the offense is indictable. 8 Hen. VI, c. 12(3) makes the stealing of a judicial record by a "Clerk or other person," indictable, the judges to hear such cases; but Coke, 3 Inst. 72, states that "This act does not extend to any judge of the court." Nothing contained in 27 Edw. III has any bearing on the indictment of a judge for bribery.

[54] 2 Howell, *supra* note 7, at 1087–88. Apparently the current shifted in the 19th century. When Sir Jonah Barrington, Judge of the High Court of Admiralty in Ireland, was under investigation by the Commons, his counsel Denman, later Chief Justice, urged that a criminal information "could have been filed." The Solicitor General explained that no criminal prosecution was instituted because of the "advanced age and . . . many infirmities" of the judge. 24 Parl'ty. Debates 966 (Hansard, N.S. 1830). Holdsworth stated that the offices of the judges of the High Court who hold during good behavior, "may, it is said, be determined for want of good behavior without an address to the Crown, either by scire facias . . . criminal information or impeachment." In Part VI, 6 Holsbury, Laws of England 609 (Hailsham ed. 1932) (This section on "Constitutional Law" is attributed to Holdsworth on the page preceding the Table of Contents.)

[courts], it is only while they act within their jurisdiction." [55] Lesser judges, and among that category were some we should scarcely recognize as such today—e.g. censors of the College of Physicians, a coroner [56]—were prosecutable for acts done outside their jurisdiction.[57] Even when they acted within their jurisdiction, lesser judges were punishable at the suit of the King if they acted corruptly,[58] and if what they did was illegal, they were indictable "without the addition of any corrupt motives," despite the presence of jurisdiction.[59] Additionally they were punishable by Attachment. King's Bench, said Bacon's *Abridgment*, "exercises a Superintendency over all inferiour Courts, and may grant an attachment against the Judges of such Courts for oppressive, unjust, or irregular Practice, contrary to the obvious Rules of natural justice." [60] Such conduct was viewed as a contempt; and Chief Justice, Holt recalled that "The Mayor of Hereford was laid by the heels for sitting in judgment in a cause where he himself was lessor of the plaintiff in ejectment [and "gave judgment for his own lessee"] though he by the Charter was the sole Judge of the Court." [61] Thus it results that Justices, who were *not* the subject of indictment were impeachable and in fact impeached, whereas the indictable lesser judges, so far as I could find, were not impeached. What the Framers might have made of this dichotomy is hereafter discussed.

A. The Scope of "High Crimes and Misdemeanors"

Although English impeachments did not require an indictable crime they were nonetheless criminal proceedings because conviction was punishable by death, imprisonment or heavy fine. The impeachable offense, however, was not a statutory or ordinary common law crime but a crime by "the course of Parliament," the *lex Parliamentaria*. The appended charges drawn from impeachment cases disclose that impeachable misconduct was patently not "criminal" in the ordinary sense; they furnish a guide to the "course of Parliament"; and they give content to the phrase "high crimes and misdemeanors."

> Chancellor Michael de la Pole, Earl of Suffolk (1388) (high crimes and misdemeanors): applied appropriated funds to purposes other than those specified.[62]
>
> Duke of Suffolk (1450) (treason and high crimes and misdemeanors): procured offices for persons who were unfit and unworthy of them; delayed justice by stopping writs of ap-

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[55] Miller v. Seare, 96 Eng. Rep. 673, 675, 2 Bl. W. 1141, 1145 (1764); *cf.* Calder v. Halkett, 13 Eng. Rep. 12, 15, 3 Moo. P.C. 28, 35 (1839).

[56] Groenvelt v. Burwell, 91 Eng. Rep. 343, 1 Salk. 396 (1701) (censors "are Judges of Record because they can fine and imprison."); "The Court of the Coroner is a Court of Record of which the Coroner is the Judge." Garnett v. Ferrand, 108 Eng. Rep. 570, 581, 6 B. & C. 611, 625 (1827); *cf.* Ashby v. White, 87 Eng. Rep. 810, 811, 6 Mod. 46–47 (1704) (vote counting sheriff is "quasi a judge").

[57] Rex v. Jones, 95 Eng. Rep. 462, 1 Wils. K.B. 7 (1743); *cf.* King v. Holland & Forster, 90 Eng. Rep. 1324, 1 Term. R. 692 (1787).

[58] 2 Hawkins, *supra* note 33, ch. 13, § 20, at 85. In 1827 Tenterden, C. J. stated, "Corruption is quite another matter; so, also, are neglect of duty and misconduct in it. For these, I trust, there is and always will be some due course of punishment by public prosecution." Garnett v. Ferrand, 108 Eng. Rep. 576, 582, 6 B. & C. 611, 626 (1827).

[59] King v. Saintsbury, 100 Eng. Rep. 1113, 1117, 4 T.R. 450, 457 (1791).

[60] 3 M. Bacon, Abridgment, "Officers & Officers" (N) 744 (3d ed. 1768).

[61] Anonymous, 91 Eng. Rep. 343, 1 Salk 396 (1699); Anonymous, 91 Eng. Rep. 180, 1 Salk. 201 (1702).

[62] 1 Howell, *supra* note 7, at 89, 93, Item 3. In each of the listed cases, the charge or charges are selected from a larger group.

peal (private criminal prosecutions) for the deaths of complainants' husbands.[63]

Attorney General Yelverton (1621) (high crimes and misdemeanors): committed persons for refusal to enter into bonds before he had authority so to require; commencing but not prosecuting suits.[64]

Lord Treasurer Middlesex (1624) (high crimes and misdemeanors): allowed the office of Ordnance to go unrepaired though money was appropriated for that purpose; allowed contracts for greatly needed powder to lapse for want of payment.[65]

Duke of Buckingham (1626) (misdemeanors, misprisions, offenses and crimes): though young and inexperienced, he procured offices for himself, thereby blocking the deserving; neglected as Great Admiral to safeguard the seas; procured titles of Honor to his mother, brothers, kindred, and allies.[66]

Justice Berkley (1637) (treason and other great misdeameanors): reviled and threatened the grand jury for presenting the removal of the communion table in All Saints Church; on the trial of an indictment, he "did much discourage" complainants' counsel . . . and did "overrule the cause for matter of law."[67]

Sir Richard Gurney, Lord Mayor of London (1642) (high crimes and misdemeanors): thwarted Parliament's order to store arms and ammunition in storehouses.[68]

Viscount Mordaunt (1666) (high crimes and misdemeanors): prevented Tayleur from standing for election as a burgess to serve in Parliament; caused his illegal arrest and detention.[69]

Peter Pett, Commissioner of the Navy (1668) (high crimes and misdemeanors): negligent preparation for the Dutch invasion; loss of a ship through neglect to bring it to mooring.[70]

Chief Justice North (1680) (high crimes and misdismeanors): assisted the Attorney General in drawing a proclamation to suppress petitions to the King to call a Parliament.[71]

Chief Justice Scroggs (1680) (treason and high misdemeanors): discharged grand jury before they made their presentment, thereby obstructing the presentment of many Papists; arbitrarily granted general warrants in blank.[72]

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[63] 4 Hatsell, *supra* note 24, at 80n. Several treason charges are included because charges that fell short of treason might yet amount to misdemeanor. Charles I, attempting to save Strafford from the deadly charge of treason, told the assembled Lords and Commons, "I cannot condemn him of High Treason; yet I cannot say I can clear him of Misdemeanor . . . for matter of Misdemeanor I am so clear in that . . . that I do think my Lord of Strafford is not fit hereafter to serve Me or the Commonwealth in any place of trust . . . ." 8 J. Rushworth, Historical Collections, 734 (1721) (hereinafter cited as Rushworth).

[64] 2 Howell, *supra* note 7, at 1136–37, Articles 1 and 6.

[65] *Id.* at 1182, 1239.

[66] *Id.* at 1307, 1308, 1310, 1316, Articles 1, 4 and 11.

[67] 3 *id.* at 1283, 1287, 1288, Item 3.

[68] 4 *id.* at 159, 162–63, Article 4.

[69] 6 *id.* at 785, 7–19, 89, Articles 1 and 5.

[70] 6 *id.* at 865, 866, 867, Articles 1 and 5.

[71] Hatsell, *supra* note 24, at 115–116.

[72] Originally Scroggs was charged only with "high Misdemeanors," among them browbeating witnesses, prejudicing the jury against them by disparaging remarks, 8 Howell, *supra* note 7, at 163–69, Articles 2 and 3. The charges were enlarged to "High Treason and other great Crimes and Misdemeanors," *id.* at 197.

Sir Edward Seymour (1680) (high crimes and misdemeanors): applied appropriated funds to public purposes other than those specified.[73]
Duke of Leeds (1695) (high crimes and misdemeanors): as president of Privy Council accepted 5500 guineas from the East India Company to procure a charter of confirmation.[74]

In addition to the foregoing, there is the familiar summary by Wooddeson, paraphrased by Story in his discussion of impeachment:[75]

> lord chancellors and judges and other magistrates have not only been impeached for bribery, and acting grossly contrary to the duties of their office, but for misleading their sovereign by unconstitutional opinions and for attempts to subvert the fundamental laws, and introduce arbitrary power. So where a lord chancellor has been thought to have put the great seal to an ignominious treaty;[76] a lord admiral to have neglected the safeguard of the sea;[77] an ambassador to have betrayed his trust; a privy councillor to have propounded or supported pernicious or dishonorable measures;[78] or as confidential adviser to his sovereign to have obtained exorbitant grants or incompatible employments;[79] these have all been deemed impeachable offenses.

The foregoing examples by no means exhaust the list which might be adduced to illustrate that English impeachments proceeded for misconduct that was not "criminal" in the sense of the general criminal law.[80]

These charges fulfill an even more important purpose, for they also serve to delineate the outlines of "high crimes and misdemeanors." They are reducible to intelligible categories: misapplication of funds (Earl of Suffolk, Seymour), abuse of official power (Duke of Suffolk,

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[73] *Id.* at 127–32. Article 1. This impeachment and that of the Duke of Suffolk, discussed in the text accompanying note 63 *supra* are of special interest in light of a recent law prohibiting use of appropriated funds for introduction of American troops into Cambodia. Special Foreign Assistance Act Pub. L. No. 91–652, § 6(b) (Jan. 1, 1971). After 1665, remarks Hallam, it became an "undisputed principle" that "supplies granted by parliament are only to be expended for particular objects specified by itself . . . ." 2 H. Hallam, Constitutional History of England 357 (1884). That principle, I suggest, found expression in our own Constitution: art. I, § 9(7) provides that "No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." Should Congress bar the use of appropriated funds for employment of all forces in Cambodia the use of such funds for that purpose by the Secretary of Defense would be contrary to law, unless the powers of the President as "Commander in Chief" of the armed forces override the express provision of art. I, § 9(7).

Blackstone stated that impeachment was provided so "that no man shall dare to assist the crown in contradiction to the laws of the land." 1 Blackstone, *supra* note 11, at 244. Hamilton regarded impeachment as "a bridle upon the executive servants of the government." The Federalist *supra* note 2, No. 65 at 425 "an essential check in the hands of [the legislative body] upon the encroachment of the executive." *Id.* No. 66, at 430. *See also* text accompanying note 169 *infra*. Chief Justice Chase asked in Mississippi v. Johnson, 71 U.S. (4 Wall.) 475, 501 (1867), if the President "refuses to execute the acts of Congress . . . may not the House of Representatives impeach the President for such refusal?" The answer should not be different were the President to shelter a member of his cabinet who acted in defiance of an appropriation bill. See note 235 *infra*.

[74] Howell, *supra* note 7, at 1265, 1269, Article 1.

[75] 1 Story, *supra* note 12, at § 800; 2 Wooddeson, *supra* note 12, at 602. In some of these cases the charge was treason.

[76] Lord Chancellor Somers sealed the Partition Treaties at the King's command. 4 Campbell, *supra* note 34, at 142; Roberts, *supra* note 24, at 811 (high crimes and misdemeanors).

[77] Duke of Buckingham as Great Admiral, 2 Howell, *supra* note 7, at 1267, 1307, 1310, Art. 4 (1626) (misdemeanor).

[78] *See* text accompanying note 91 *infra*. "The author of *The Method of the Proceedings in the Houses of Lords and Commons in Cases of Impeachment for High Treason* (3d ed. 1715) observed 'That almost in every considerable and legal impeachment since Charles the First, the giving of "evil advice" to the Prince has been the foundation of the accusation and has bore hardest upon the person accused.'" Roberts, *supra* note 24, at 396 n. 1.

[79] Duke of Buckingham, 2 Howell, *supra* note 7, at 1308, Art. 1. So too, the Duke of Suffolk was impeached for advising the grant of a peerage to the husband of his niece, for procuring offices for persons who were unfit and unworthy of them. 4 Hatsell, *supra* note 24, at 59–60 (treason).

[80] Other charges of similar import may be found in Simpson's convenient summary of English impeachments, *supra* note 15, at 81–190.

Buckingham, Berkley, Yelverton, Mordaunt, Scroggs), neglect of duty (Buckingham, Pett),[81] encroachment on or contempts of Parliament's prerogatives (Gurney, North, the "Ship Money Tax" opinions).[82] Then there are a group of charges which may be gathered under the rubric "corruption," as when Lord Treasurer Middlesex was charged with "Corruption, shadowed under pretext of a New Year's-Gift . . ."; and with "using the power of his place, and countenance of the king's service, to wrest [from certain persons] a lease and estate of great value."[83] So too, Middlesex, and much earlier the Earl of Suffolk, were charged with obtaining property from the King for less than its value;[84] Buckingham, Danby, the Earl of Arlington, Earl of Orford, Lord Somers and Lord Halifax were charged with procuring large gifts from the King to themselves;[85] Buckingham, Sir William Penn, Seymour, and Orford were charged with conversion of public property;[86] and Lord Chancellor Macclesfield was charged with the sale of public offices.[87] Lord Halifax was accused of "opening a way to all manner of corrupt practices in the future management of the revenues" by appointing his brother to an office which was designed to be a check on his own, the profits to be held in trust for Halifax.[88] There were charges of betrayal of trust, as when Buckingham put valuable ships within the grasp of the French,[89] and when Orford weakened the navy while invasion threatened.[90] And there were charges against Orford, Somers, Halifax, Viscount Bolingbroke, the Earl of Strafford, and the Earl of Oxford of giving pernicious advice to the Crown.[91] Broadly speaking these categories may be taken to outline the boundaries of the phrase "high crimes and misdemeanors" at the time the Constitution was adopted.[92] The importance of these categories for

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[81] The Earl of Orford was charged in 1701 with neglect of duty in that he permitted French ships to return safely to their harbors. 14 Howell, *supra* note 7, at 241, 243–44, Article 8.

[82] Justice Berkley and other Justices were impeached for uttering opinions that Charles I could obtain "Ship Money Taxes" without resort to Parliament. 3 *id.* at 1233, 1285–86 (1637), Articles 4–7. *See also* note 176 *infra*, and the impeachment of Sir Thomas Gardiner, Recorder of London, 4 *id.* at 167–68, Article 1 (1642). Other encroachments may be exemplified by Gardiner's efforts to hinder the calling of Parliament, Article 5, and his threats against those who sought to petition Parliament, Article 6, *id.* at 169; and by Sir Richard Halford's resistance to arrest under a warrant of Parliament. *Id.* at 171 (1642).

[83] *Id.* at 1228, 1139 (1624). There is also a charge of corruption in that Middlesex bought assets conveyed by the King for the benefit of creditors at much less than their value. *Id.* at 1232–44.

[84] *Id.* at 1230; Suffolk, 1 *id.* at 89, 91 (1388), Article 1.

[85] Buckingham, 2 *id.* at 1307, 1315, 1318 (1626), Article 12; Arlington, 6 *id.* at 1053, 1055 (1674), Article 2; Danby, 11 *id.* at 599, 626 (1678), Article 6; Orford, 14 *id.* at 241 (1701), Article 1; Somers, *id.* at 250, 255–58 (1701), Article 8; Halifax, *id.* at 293–96 (1701), Articles 1 and 3.

[86] Buckingham, 2 *id.* at 1307, 1311–12 (1626), Article 5; Penn, 6 *id.* at 873–74 (1688), Articles 1–3; Seymour, 8 *id.* at 127, 136–37 (1680), Article 4; Orford, 14 *id.* at 241–42 (1701), Articles 2–4.

[87] *See* note 41 *supra*.

[88] 14 Howell, *supra* note 7, at 293, 296–97 (1701), Article 5.

[89] 2 *id.* at 1307, 1312–14 (1626), Article 7.

[90] 14 *id.* at 241, 243 (1701), Article 6. *See also* charges of betrayal of trust against the Earl of Arlington, 6 *id.* at 1053, 1056 (1674), Article 3.

[91] Orford, 14 *id.* at 241, 244 (1701), Article 9; Somers, *id.* at 250, 253, Article 1; Halifax, *id.* at 293, 297–98 Article 6; Bolingbroke, 15 *id.* at 994, 997 (1715), Article 2; Strafford, *id.* at 1013, 1023–24 (1715), Article 6; Oxford, *id.* at 1045, 1063–66 (1717), Articles 2 and 3. Additionally Bolingbroke and Oxford were charged with high treason. *See* note 78 *supra*.

In the North Carolina convention, James Iredell noted that the King could not be reached, and that "[e]verything . . . that the King does, must be done by some advice, and the advisor is of course answerable." 4 Elliott, *supra* note 3, at 102.

[92] Mention must be made of impeachment charges for out-of-court misconduct, a subject that would spill over the confines of an already over-long article and that will be the subject of a separate chapter in my forthcoming book.

Setting aside several cases in which no charges exist, several impeachment of non-officers, and some combined charges of "high treason and high crimes and misdemeanors" which stress traitorous conduct, there were in all eighteen impeachments for high crimes and misdemeanors listed by Simpson in what purports to be a complete list of impeachments. Simpson, *supra* note 15, at 87–190.

American law rests not alone on the fact that when the Framers employed language having a common law meaning, it was expected that those terms would be given their common law content,[93] but because they were aware that the phrase had a "limited," "technical meaning." [94]

Today impeachment and severe punishment for giving "bad advice" seems extravagant. It was part of the struggle to make Ministers accountable to the Parliament rather than the King, to punish them for espousing policies disliked by the Parliament. And it was rooted in a deep distaste for "favorites," understandable enough when one views the luckless adventures upon which Buckingham, for example, had embarked the nation.[95] When Oxford, Bolingbroke and Strafford were impeached (1715) [96] for giving "bad advice" to the King, the Commons "really sought to condemn policies which they believed pernicious to the realm," [97] the negotiation of a separate "treacherous peace," the Treaty of Utrecht.[98] The nation, said Trevelyan, "little liked the secret negotiations with France behind the backs of the allies . . . the disgrace of Marlborough, and the withdrawal of the British armies from the field in the face of the enemy." [99]

Not all of the cited impeachments eventuated in verdicts of guilty by the House of Lords. Some did result in convictions; [100] in some cases the accused was saved by the intervention of the King, who prorogued or dissolved Parliament. The odious Scroggs was thus rescued by the abrupt dissolution of Parliament, as were Mordaunt, Seymour and Buckingham. Is the impeachment of Buckingham robbed of precedential value because it was thwarted by a foolishly obstinate King who was beating his own path to the scaffold? [101] On a number of occasions the Commons stayed its hand, as when Chief Justice Kelynge grovelled in abject apology before its bar; [102] or when it referred the trial of the Earl of Orrery to the criminal courts,[103] evidence that it did not auto-

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[93] *See* text accompanying note 161 and notes 161, 162 *infra*.

[94] *See* text accompanying notes 158–60 *infra*.

[95] This dissolute Duke of Buckingham, whose "boundless influence over both James I and Charles I was one of the greatest calamities which ever hit the English throne," Chafee, *supra* note 6, at 46, illustrates why, in the words of Macaulay, "favorites have always been highly odious" in England. 2 Macaulay, Essays 817 (G. Trevelyan ed. 1890). His "utter inefficiency for the high position he occupied" was beyond question. S. R. Gardiner, History of England under James I and Charles I, quoted Chafee, *supra* note 6, at 108. He abused his office to obtain titles of honor for his mother, brothers and kindred, text accompanying note 56 *supra*; he sought to promote a match between Charles I and the Spanish Infanta, which the English people "clearly saw, would lead to Spanish heirs and Catholic Kings who would endeavour to undo the work of Elizabeth." G. Trevelyan, Illustrated History of England 388–89 (1956) (hereinafter cited as Trevelyan). When that dangerous project broke down, he embarked upon a series of war-like expeditions that resulted in a row of "disasters disgraceful" to English arms, and worse yet, "led to unparliamentary taxation, billeting, arbitrary imprisonment and martial law over civilians." *Id.* at 389.

[96] Oxford, 15 Howell, *supra* note 7, at 1045 (1717); Bolingbroke, *id.* at 994 (1715); Strafford, *id.* at 1013 1715.

[97] Roberts, *supra* note 24, at 395.

[98] *Id.* at 385.

[99] Trevelyan, *supra* note 95, at 499; W. Churchill, Marlborough, His Life and Times 990 (abr. ed. 1968) (hereinafter cited as Churchill), states, "Forty years later, William Pitt . . . feeling the odium which still clung to England and infected her every public pledge, pronounced the stern judgment that 'Utrecht was an indelible reproach to the last generation.'"

[100] Earl of Suffolk, text accompanying note 62 *supra*; Lord Treasurer Middlesex, text accompanying note 65 *supra*; Sir Richard Gurney, text accompanying note 68 *supra*; the Duke of Suffolk was banished by the King. 1 Howell, *supra* note 7, at 271, 274–75 (1451).

[101] Scroggs, 8 Howell, *supra* note 7, at 216; Mordaunt, 6 *id.*, at 806; Seymour, 8 *id.* at 162; Buckingham, 2 *id.* at 1446–47. In Buckingham's case, "Charles preferred to invite a challenge to his sole control of executive power than to surrender a favourite." Roberts, *supra* note 24, at 441.

[102] 2 J. Campbell, Lives of the Chief Justices of England 170 (Amer. ed. 1874) (hereinafter cited as Campbell, Chief Justices); Churchill, *supra* note 99, at 861. So too, the Commons turned down a proposal to impeach the Duke of Leeds, Lord Treasurer. 4 Hatsell, *supra* note 24, at 235n.

[103] 6 Howell, *supra* note 7, at 913, 920 (1689).

matically grind out impeachments. If the House of Lords did not always see eye to eye with the Commons, it was not so much because the Lords were worthier sentinels of the law [104] as because of factional differences that arose from time to time.[105] In a moment untroubled by political agitation, the Lords noted that impeachments by the Commons "are the groans of the people . . . and carry with them a greater supposition of guilt than any other accusation. . . ."[106] For the most part the Lords parted company with the Commons in cases that proceeded "for blood," "high treason," and such acquittals do not cast doubt on the charges of "high crimes and misdemeanors" here collected.

B. The American Scene

Article II, § 4 of the Constitution provides that,

> 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 . . .

The path by which the Framers arrived at this language is traceable in the records of the Convention.[107] Initially impeachment was to be based upon "malpractice or neglect of duty." In the Committee on Detail this became "treason bribery or corruption," and was then reduced by the Committee of Eleven to "treason or bribery." When Mason suggested on the floor of the Convention the addition of "maladministration," Madison remarked that it was "so vague," whereupon Mason substituted "high crimes and misdemeanors" which was adopted without demur.[108] The special nature of "high misdemeanors" had already been recognized by the Convention. As reported by the Committee on Detail, article XV provided that a fugitive from justice

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[104] For example, it has been indicated that the Commons moved from the impeachment of the Earl of Strafford, 3 *id.* at 380–81 (1640), to a bill of attainder, because the issue of guilt was for the Lords "a judicial question, which must be legally proved." J. Tanner, English Constitutional Conflicts of the Seventeenth Century 94–95 (1928). Notwithstanding that the impeachment and attainder both proceeded from all but identical grounds—Strafford "endeavoured to subvert the fundamental laws and government . . . and instead thereof, to introduce an arbitrary and tyrannical government against law"—3 Howell, *supra* note 7, at 1480; *cf. id.* at 1518; 8 Rushworth, *supra* note 63, at 8, 661, 666, 678, 681, 756, the Lords joined in the bill of attainder, a legislative condemnation to death. It does the Lords little credit to attribute to them a readiness to acquit after a full-dress trial only to turn about and join in a legislative lynching, whereby, Lord Campbell later said, "the forms of law and the principles of justice might more easily be violated." 2 Campbell, Chief Justices, *supra* note 102, at 117.

[105] 2 Wooddeson, *supra* note 12, at 620, concluded that impeachments "have been too often misguided by personal and factious animosities, and productive of alarming dissensions between two branches of the legislature."

[106] 4 Hatsell, *supra* note 24, at 343, 333, 342.

As Trevelyan noted of the Long Parliament—the cradle of English liberties—"it was the Commons who led, and the Lords who followed." Trevelyan, *supra* note 95, at 401.

The pioneer Wooddeson, and Story, who followed in his path, included impeachments that did not eventuate in convictions to illustrate the scope of the power. *See* Somers, text accompanying note 76 *supra*; Buckingham, text accompanying notes 79, 86 *supra*; the impeachment of Orford, Oxford et al. for giving pernicious advice, text accompanying note 78 *supra*; and note 91 (in the Virginia convention, Corbin and Pendleton considered that the giving of "bad advice" was impeachable, text accompanying note 170 *infra*); the obtention of exorbitant grants from the King, Buckingham, text accompanying note 79 *supra*; and Danby, et al., text accompanying note 85 *supra*.

[107] In this enterprise, both the Colonial materials and the early State constitutions played a very small role. For the Colonial materials, see M. Clarke, Parliamentary Privilege in the American Colonies 3943 (1943); the State constitutional provisions are discussed in Ziskind, *Judicial Tenure in the American Constitution: English and American Precedents*, 1969 Sup. Ct. Rev. 138147. *See also* G. Wood, The Creation of the American Republic, 1776–1787, 142 (1969); Berger, *Impeachment of Judges and "Good Behavior" Tenure*, 79 Yale L.J. 1475, 1492–96, 1512 (1970)

[108] 1 M. Farrand, The Records of the Federal Convention of 1787, 230 (1911) (hereinafter cited as Farrand); 2 Farrand, 64, 172, 186, 495, 550, 545. In his Philadelphia Lectures (1791), Justice Wilson, who had been a leading Framer, referred to "malversation in office, or what are called high misdemeanors." 1 Wilson, *supra* note 5, at 426.

charged with "treason, felony or high misdemeanor," should be returned to the State from which he had fled. In the Convention, "the words 'high misdemeanor' were struck out, and 'other crime' inserted, in order to comprehend all proper cases; it being doubtful whether 'high misdemeanor' had not a technical meaning too limited," [109] limited, inferably, to an impeachable offense as distinguished from a misdemeanor ordinarily coupled with a felony in criminal law. But for a few early statutes directed at "political" crimes,[110] "high crimes" found no place in the criminal law of this country. Like Blackstone, James Wilson referred to "malversation in office, or what are called high misdemeanors." [111] Impeachments, he states, "and offenses and offenders impeachable, come not, in those descriptions, within the sphere of ordinary jurisprudence. They are founded on different principles, are governed by different maxims, and are directed to different objects. . . ." Again, "impeachments are confined to political characters, to political crimes and misdemeanors, and to political punishments." [112]

Indictability of judges in English law, as we have seen, posed a special problem. Assuming that the learning pulled together above [113] was available to the Framers,[114] and that they had occasion to collate the authorities or did so out of scholarly curiosity, they would have found that lesser judges were held to strict account criminally, whereas Justices of the High Courts, according to dicta uttered by judges of great distinction, were deemed accountable only to Parliament. Since the Justices were not indictable and since they had been impeached, the Framers might conclude that indictability was not the test of their impeachment.[115] The federal judges were from the outset more numerous than the early English Justices,[116] and more widely dispersed than the Justices settled in Westminster Hall,[117] with whom

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[109] 2 Farrand, *supra* note 108 at 174, 443. This confirms that the word "high" in "high crimes and misdemeanors" modifies both "crimes and misdemeanors." *See also* King's remarks, *id.* at 318; Blackstone's definition of "high misdemeanor," discussed in the text accompanying note 32, *supra*; Wilson, *supra* note 108. Initially Scroggs, C.J. was charged with "high misdemeanors," then with high treason. 8 Howell, *supra* note 7, at 163, 197 (1680). See also note 111 *infra*.

[110] Statutory "high misdemeanors": Act of June 5, 1794, ch. 50 § 1, 1 Stat. 381–82 (1861), acceptance by a citizen of a commission to serve a foreign state; Alien & Sedition Act, Act of June 14, 1798, ch. 74, 1 Stat. 596, unlawful combination to oppose measures of government; Act of January 30, 1799, ch. 1, 1 Stat. 613, correspondence by citizens with foreign government in order to influence its measures in disputes with United States.

The practice of law by a federal judge, and his failure to reside at the place required by law, were made "high misdemeanors" 28 U.S.C. §§ 1, 373, Jud. Code 1, 258 (1911).

[111] 1 Wilson, *supra* note 5, at 426. In 1797 Senator William Blount was expelled by the Senate for a "high misdemeanor entirely inconsistent with his public trust and duty as a Senator." Wharton, *supra* note 9, at 202.

[112] 1 Wilson, *supra* note 5, at 324, 426. Story approved Bayard's statement that "impeachment is a proceeding purely of a political nature. It is not so much designed to punish an offender as to secure the state against gross official demeanors. It touches neither his person nor his property, but simply divests him of his political capacity," *i.e.*, to hold office. Story, *supra* note 12, at § 803. Bayard made virtually the same statement in 1797 in the Blount impeachment, *see* text accompanying note 149 *infra*.

In the Virginia Convention Mason presumably noticed the distinction. After animadverting on the provisions that the Senators try themselves for impeachable crimes, he inquired, "in what court the members of the government were to be tried for the commission of indictable offences, or injuries to individuals." 3 Elliot, *supra* note 3, at 402, distinguishing between impeachment for crimes against the State and indictment for "injuries to individuals."

[113] *See* text accompanying notes 42–61 *supra*.

[114] *Cf.* Goebel, *Ex Parte Glen*, 54 Colum. L. Rev. 450, 455 (1954).

[115] *Cf.* dictum of Justice Field in Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 350 (1872).

[116] Chapter 20, § 1 of the Judiciary Act of 1789, 1 Stat. 72–73, [Ch. 20] provided for a Chief Justice and five Associate Justices; §§ 2 and 3 provided for thirteen district judges.

[117] For centuries the Justices of the High Courts—Common Pleas, Kings Bench, Exchequer—numbered seven or eight. As late as 1800, "the permanent judges of the central courts of common law and Chancery, all taken together, rarely exceeded fifteen." J. Dawson, The Oracles of the Law 2–3 (1968).

they were not altogether assimilable; but still less were they to be classed with the minor English judges who *were* indictable. It can hardly be postulated, however, that the Framers would demand a more stringent standard of impeachment, indictability for district judges, than for Supreme Court Justices.

In the United States the problem is further complicated by the doctrine that there is no federal common law of crimes, so that to constitute a "high crime or misdemeanor," it has been maintained, there must be a statute which creates an indictable crime.[118] One of the components of impeachment, "treason," is defined in the Constitution; "bribery" is not.[119] The Framers were content to look to the common law for a definition of bribery. So too, when the Convention adopted Mason's substitution of "high crimes and misdemeanors" for the "vague" "maladministration" he had at first suggested, the Framers inferably had the English cases in mind as giving content to the phrase.[120] A striking assumption by the Founders that English law would be applicable is exhibited by the First Congress' prohibition of resort to "benefit of clergy" as an exemption from capital punishment, an exemption first afforded by the common law to the clergy and then to such of the laity as could read.[121] Then too, the doctrine that there was no federal common law of crimes was a child of a later time. Professor Leonard Levy justly states that "All the early cases, excepting one in which the court split,[122] are on the side of the proposition that there was a federal common law of crimes." [123] According to Chief Justice Taft, six Justices and two Chief Justices of the Supreme Court shared his view, two of whom, Justices Wilson and Paterson were Framers,[124] presumably attuned to the thinking of the Convention.

The Supreme Court, to be sure, reversed this current of opinion in 1812,[125] but there is little warrant for the conclusion that as the Framers, 25 years earlier, drafted the impeachment provisions they intended to circumscribe them by an as yet unborn limitation.

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[118] As "there are under the laws of the United States no common law crimes, but only those which are contrary to some positive statutory rule, there can be no impeachment except for a violation of a law of congress . . . English precedents concerning *impeachable crimes* are consequently not applicable." Dwight, supra note 14, at 265–269.

[119] In the Act of April 30, 1970, ch. 9, § 21 1 Stat. 117, Congress following the common law definition of bribery, made punishable acceptance by a judge of money "or any other bribe" to influence his judgment in a pending case.

[120] *See* note 161 *infra*.

[121] 31, Radin, Anglo-American Legal History 230–31 (1936); Act of April 30, 1790, ch. 9 § 31, 1 Stat. 119.

[122] In that case, United States v. Worrall, 2 U.S. (2 Dallas) 384 (1798), Justice Chase held there is no federal common law of crimes; District Judge Peters was of the contrary opinion. Said Levy, "Chase's opinion remained unique until it was later adopted by the Supreme Court in 1812." L. Levy, Legacy of Supression 241 (1960).

[123] L. Levy, *supra* note 122, at 239.

[124] In *Ex Parte* Grossman, 267 U.S. 87, 114–15 (1925), Chief Justice Taft stated, "It is not too much to say that, immediately after the ratification of the Constitution, the power and jurisdiction of federal courts to indict and prosecute common laws crimes within the scope of federal judicial power was thought to exist by most of the then members of this Court," among them Chief Justice Jay, and Wilson and Iredell, JJ. Taft also quotes Charles Warren to the effect that "in the early years of the Court, Chief Justice Ellsworth and Justices Cushing, Paterson and Washington had also delivered opinions or charges of the same tenor. Justice Wilson and Paterson were members of the Constitutional Convention . . . ." *Id.* at 115. Ellsworth and Iredell were leading proponents of ratification in the Connecticut and North Carolina conventions respectively, and presumably had an informed opinion. See the encomium of Wharton on the early opinions as reflecting the "united opinion of the day." F. Wharton, Criminal Law 121 (6th ed. 1868).

[125] United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32 (1812). "[O]ur inquiry concerns the standard prevailing at the time of the adoption of the Constitution, not a score or more years later." United States v. Barnett, 376 U.S. 681, 693 (1964). For the view that the case was politically inspired see W. Crosskey, Politics and the Constitution 770–84 (1952).

Both Rawle and Story rejected the limitation on the ground that it would "render the power of impeachment a nullity . . . until Congress pass laws, declaring what shall constitute the other 'high crimes and misdemeanors'."[126] Theoretically it was open to Congress immediately to enact a complete Code of impeachable offenses, and given room for leisurely analysis it might have perceived that the English precedents were reducible to manageable categories.[127] But the Congress was engaged in weightier tasks, in erecting a novel structure of government, in fleshing out the bare bones of the Constitution. The meager role that criminal legislation played in this endeavor may be gathered from the negligible handful of criminal statutes that were enacted by a succession of early Congresses. Whatever the merits of the no-federal-common law-crimes doctrine, the Senate, itself the tribunal for impeachments, has not embraced it, as its Delphic verdicts of guilty in the absence of statutory offenses indicate.[128] Nor has the Congress, the alter ego of the Senate as impeachment tribunal and the House as Grand Inquest, ever felt called upon to supply a Code of impeachable offenses, a tacit judgment that it does not deem such a Code necessary. These verdicts and that judgment seem to me to rest upon a sound historical basis.

Finally, a significant contrast exhibited by the terms of the impeachment provisions needs to be taken into account. Article I, § 3(7), provides

> Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification . . . but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment and punishment according to law.

The phrase "according to law" was omitted from article II, § 4,

> The President, Vice President, and all civil officers . . . shall be removed from Office on Impeachment for, and Conviction of Treason, Bribery, or other High Crimes and Misdemeanors.

That omission, when contrasted with the association of "indictments" and "according to law" in § 3, can be read to indicate an intention to demarcate criminal trials under traditional *criminal law* from impeachments which had been triable under the "course of Parliament," in order to insure that the measure of impeachable conduct would not be the criterion of punishment following conviction upon indictment. Conversely, indictment "according to law" was not to furnish the test of the curative removal from office by impeachment. Indictability, it is safe to say, was not made the measure of impeachment.

1. Is Impeachment a Criminal Proceeding?

A more arresting question, and one that has not received the attention it deserves, is whether the Constitutional impeachment provisions,

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[126] Rawle, *supra* note 15, at 213; Story, *supra* note 12, at § 798. For an earlier critique of the view that there was a federal common law of crime, see 1 Tucker's Blackstone, App. (part I), 378 (1803) (hereinafter cited as Tucker).

[127] *See* text accompanying notes 82–92 *supra*. I would therefore differ with Story's statement that "political offenses are of so various and complex a character, so utterly incapable of being defined or classified, that the task of positive legislation would be impracticable, if it were not almost absurb to attempt it. Story, *supra* note 12, § 797.

Nevertheless, Congress has never undertaken the task. So too, although authorized by article I, § 8(10) "To define and punish piracies and felonies committed on the high seas," Congress left the task to the courts. The Act of March 3, 1819, c. 77, § 5, 3 Stat. 513–14 (1846), provides a death penalty for one who is found "on the high seas [to] commit the crime of piracy, as defined by the law of nations." Thus it was left to the courts to select from the "law of nations." Again, "From 1799 to the present, Congress has made no definitive statement concerning grand jury powers." United States v. Cox, 342 F.2d 167, 186 (5th Cir. 1965) (Wisdom, J., concurring).

[128] *See* note 15 and text accompanying notes 15, 16 *supra*.

particularly when viewed in the context of the fifth and sixth amendments, set up a criminal proceeding at all. Undoubtedly English impeachments were criminal, though by the *lex parliamentaria*, because conviction could be followed by death, imprisonment or heavy fine. Our impeachment provisions may seem to point in the direction of criminality because they employ criminal terminology. For example, article II, § 4, provides for removal from office on "conviction of treason, bribery, or other high crimes and misdemeanors." Article III, § 2(3) provides that, "The trial of all crimes, except in cases of impeachment, shall be by jury." And article II, § 2(1), empowers the President to "grant pardons for offenses against the United States, except in cases of impeachment"; and the function of a pardon is to exempt from punishment for a crime.[129] Then there are the references by the Founders to impeachment in terms of punishment.[130] But article I, § 3(7), earlier quoted, sharply separates "removal from office" from subsequent punishment after indictment, in contrast to the English practice which wedded criminal punishment and removal in one proceeding. From the text of the Constitution there emerges a leading purpose: partisan passions should no longer give rise to political executions.[131] Removal would enable the government to replace an unfit officer with a proper person, a measure essential to maintenance of efficient government,[132] leaving "punishment" to a later and separate criminal proceeding. Anomalies remain and will be discussed: why the pardon, why the exemption from "trial" of all crimes by jury; but the starting point, to borrow from Story, is that impeachment is

> a proceeding purely of a political nature. It is not so much designed to punish an offender as to secure the state against gross official misdemeanors. It touches neither his person nor his property, but simply divests him of his political capacity.[133]

that is, it disqualifies him to hold office.

In a statement which anticipated Story, James Wilson came close to saying that the problem posed by double jeopardy is met by reading impeachment in non-criminal terms:

> Impeachments . . . come not . . . within the sphere of ordinary jurisprudence. They are founded on different principles; are governed by different maxims, and are directed to different objects; for this reason, the trial and punishment of an offense on impeachment, is no bar to a trial [and punishment] of the same offense at common law.[134]

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[129] United States v. Wilson, 32 U.S. (7 Pet.) 150, 159 (1833). So too, the "word 'offense' in its usual sense means a crime or misdemeanor, a branch of the criminal law." United States v. Krebs, 104 F. Supp. 670 (D. Neb. 1951); Dillner Transfer Co. v. Int'l Brotherhood, 94 F. Supp. 491, 492 n.2 (W.D. Pa. 1950); *cf.* Moore v. Illinois, 55 U.S. (4 How. 13, 19–20 (1852).

[130] McKean at the Pennsylvania Ratification Convention, 2 Elliot, *supra* note 5, at 538; Iredell at the North Carolina Ratification Convention, 4 *id.* at 32; Maclaine, *id.* at 34; Boudinot in the Annals of Cong. 375 (Gales & Seaton ed. 1834) (print bearing running page title "History of Congress") (hereinafter cited as Ann. Cong.); Livermore, *id.* at 478 (conviction of some crime); Hartley, *id.* at 480.

[131] As Vice President, Jefferson noted that "history shows, that in England, impeachment has been an engine more of passion than of justice." Wharton, *supra* note 9, at 315n.

[132] Long ago Hawkins said, "nothing can be more just than that he, who either neglects or refuses to answer the end for which his office was ordained, should give way to others, who are both able and willing to take care of it." It is "very reasonable," he continued, "That he who so far neglects a publick Office, as plainly to appear to take no manner of care of it, should rather be immediately displaced, than that the Publick be in danger of suffering that Damage which cannot but be expected some Time or other from his Negligence." 1 Hawkins, *supra* note 33, Ch. 66 § 1, at 167–68.

[133] Story, *supra* note 12, at § 803. Story borrowed this from the remarks of Congressman Bayard in the Blount proceedings. *See* text accompanying note 149 *infra*.

[134] 1 Wilson, *supra* note 5, at 324. The townspeople of Sutton criticized the proposed Massachusetts constitution of 1780 on the ground that impeachment involved double

In a word, the separation of removal from criminal prosecution poses the problem of double jeopardy unless the removal proceedings is read in non-criminal terms. If impeachment is not criminal, it may be asked, why was it deemed necessary to have a saving clause for subsequent indictment and punishment? Possibly the saving clause was designed to preclude an inference from the unmistakable criminal nature of the English impeachment that an impeachment could be pleaded in bar to a subsequent criminal prosecution, an excess of caution.[155] To read impeachment in criminal terms is to raise a constitutional doubt whether a subsequent indictment and trial offends against the fifth amendment ban of double jeopardy, a doubt which the courts are under a duty to avoid.[156]

Although Wilson tacitly assumed that but for the non-criminal nature of impeachment double jeopardy would apply, at common law *autre fois acquit* and *autre fois convict* were confined to jeopardy of life.[157] The fifth amendment also provides, "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb"; and early district courts therefore excluded "mere misdemeanors," and even an "infamous and severely punishable offense," from its protective scope.[158] But the Supreme Court, in 1873, noting *inter alia* that Chitty had dropped "life and limb" and substituted "placed in peril of legal penalties upon the same accusation," concluded that the "constitutional provision must be applied in all cases . . . ."[159] To the extent that impeachment retains a residual punitive aura, it may be compared to deportation, which is attended by very painful consequences, but which, the Supreme Court held, "is not a punishment for a crime . . . . It is but a method of enforcing the return to his own country of an alien who has not complied with the conditions" laid down for his residence,[160] precisely as impeachment is designed to remove an unfit officer for the good of the government.

Another problem is presented by the sixth amendment.

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury . . .

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jeopardy, because the impeached official could subsequently be tried in a court of law. O. Handlin & M. Handlin, The Popular Sources of Political Authority: Documents on the Massachusetts Constitution of 1780, 286 (1966).

[155] In The Federalist, *supra* note 2, No. 65, at 426, Hamilton asks, "Would it be proper that the persons, who had disposed of his fame and his most valuable rights as a citizen in one trial, should, in another trial, for the same offence be also the disposers of his life and his fortune?" But the House of Lords had long decided both issues in one trial, and I see no impropriety in dividing the issues for two trials before the same tribunal. Courts frequently hear civil cases which may be damaging to the defendant's reputation and then turn to the criminal side to try charges arising from the same facts.

[156] Richmond Screw Anchor Co. v. United States, 275 U.S. 331, 346 (1928); United States v. Jin Fuey Moy, 241 U.S. 394, 401 (1916).

[157] 2 Hawkins, *supra* note 33, Ch. 35, § 10, at 377; 4 Blackstone, *supra* note 11, at 335-36.

[158] United States v. Gilbert, 25 F. Cas. 1287, 1296-1297 (No. 15, 204) (C. Ct. Mass. 1834), per Story, Cir. J.; United States v. Keen, 26 F. Cas. 686, 687 (No. 15, 510) (C. Ct. Ind. 1839).

[159] *Ex Parte* Lange, 85 U.S. (18 Wall.) 163, 172-73 (1873). Judge Friendly stated, "The Fifth Amendment guarantees that when the government has proceeded to judgment on a certain fact situation, there can be no further prosecution of that fact situation alone." United States v. Sabella, 272 F.2d 206, 212 (2d Cir. 1959). *See also* Abbate v. United States, 359 U.S. 187, 196-98 (1959) (Brennan, J. concurring).

Is there inconsistency in principle in declining to read back into the impeachment provisions the later formulated "no federal common law crimes" doctrine while reading "life and limb" in the later and broader judicial fashion? First, James Wilson understood the removal provisions to be non-criminal and consequently considered the double jeopardy principle to be inapplicable. Second, the impeachment provisions conferred upon Congress an essential curative removal power which a subsequently *self-limiting* judicial doctrine, "no federal common law crimes," cannot curtail. Third, over the years Congress has tacitly considered the doctrine inapplicable to its impeachment function. The guarantee against double jeopardy, on the other hand, is for the benefit of the individual; it does not purport to cut down an essential power conferred upon one of the branches, and like other constitutional guarantees, *e.g.*, due process, has been broadened over the years.

[160] Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893).

If impeachment be deemed a "criminal prosecution," it is difficult to escape the requirement of trial by jury. Earlier, article III, § 2(3) had expressly exempted impeachment from the jury "Trial of all Crimes"; and with that exemption before them, the draftsmen of the sixth amendment extended trial by jury to "all criminal prosecutions," without exception, thereby exhibiting an intention to withdraw the former exception.[141] Either we must conclude that the Founders felt no need to exempt impeachment from the sixth amendment because they did not consider it a "criminal prosecution," or that jury trial is required if impeachment be in fact a "criminal prosecution." One who would make "all" mean less than "all" has the burden of proving why the ordinary meaning should not prevail.[142] Speaking in another context of the article III and sixth amendment jury trial provisions, the Supreme Court said, "If there be any conflict between these two provisions, the one found in the amendment must control, under the well-understood rule that the last expression of the will of the lawmaker prevails over the earlier one."[143] If impeachment be deemed criminal in nature, the problem is not to be solved by reading an exception from "criminal prosecution" into the sixth amendment. The companion fifth amendment clause, "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces," shows that the draftsmen knew well enough how to carve out exceptions. It is not for us to interpolate exceptions that they withheld. No need exists to read "exceptions" into the sixth amendment if impeachment is regarded merely as a removal procedure rather than a criminal trial, as the structure of the article I, § 3(7) impeachment provision itself indicates. And if, contrary to my view, impeachment is indeed a criminal proceeding, the task of reading an exception into the amendment is not for the Senate but for the Supreme Court.

Simpson tells us that the point "that criminal impeachments should be tried by a jury" was "made and overruled in the Blount impeachment,"[144] but he does less than justice to the facts. True, Jefferson, then Vice President, noted that a motion would be made to incorporate in a proposed bill for regulating impeachments in the Senate, "a clause for the introduction of juries into these trials." (Compare the paragraph in the Constitution which says, that all crimes,

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[141] Simpson, *supra* note 15, at 34, states that the "use of the word 'crimes' in Article III . . . tells for neither side of the controversy, for the reason that inasmuch as the proceedings in impeachment are a trial, and that a 'trial' may be for a 'crime,' it was necessary therein to exclude 'impeachments' in order to avoid the implication, which otherwise might arise, that criminal impeachments should be tried by a jury, . . ." But the exclusion of jury trial for impeachment posits that it proceeds for a "crime."

[142] Hart, *Book Review*, 67 Harv. L. Rev. 1456, 1465 (1954).

Simpson, *supra* note 15, at 66, dismisses the impact of the sixth amendment on the ground that it was adopted to secure jury trials "in the ordinary civil and criminal suits." He is plainly mistaken as to "criminal suits," for express provision had already been made by Article III, § 2(3) for the "trial of all crimes, except in cases of impeachment . . . by jury," and it was that provision that triggered the drive for the seventh amendment provision for jury trial in civil cases. For citations, see Berger, *Impeachment of Judges and "Good Behavior" Tenure*, 79 Yale L.J. 1475, 1489–90 (1970). Although that concern was preponderant, it was not necessarily exclusive. Provision for "ordinary" civil suits did not require a departure from the exception made for "cases of impeachment" in article III in favor of the all-inclusive "In all criminal Prosecutions" of the sixth amendment. Moreover, as the debate in North Carolina revealed in the very context of impeachment, there was distrust of Congress "dangerous latitude of construction"; *See* text accompanying note 301 *infra*. On the eve of the first impeachment, Jefferson thought the sixth amendment relevant to impeachment trials, *see* text accompanying note 135 *infra*. All this, of course, on the debatable assumption that impeachment envisaged a "criminal prosecution."

[143] Schick v. United States, 195 U.S. 65, 68 (1904).

[144] Simpson, *supra* note 15, at 34.

except in cases of impeachment, shall be by jury, with the eighth amendment [the sixth], which says, that in *all* criminal prosecutions, the trial shall be by jury.) There is no expectation of carrying this, because the division in the Senate is of two to one . . . ."[145] Apparently the motion failed,[146] but this by no means disposes of the issue. Many months after failure of the motion,[147] Blount filed what was in effect a plea to the jurisdiction, based on three points: 1) a right to trial by jury under the sixth amendment; 2) a Senator is not a "civil officer" within the meaning of the impeachment provision; and 3) he was not charged with misconduct in office,[148] but with actions in his private capacity. Opening for the Managers of the prosecution, Congressman Bayard halfheartedly argued that from the jury-trial claim "it must necessarily follow that the whole of their [the Senate] judicial authority is abolished . . . ." But he himself recognized that it was not at all a "necessary" deduction when he made his final observation on the point,

> impeachment is a proceeding purely of a political nature. It is not so much designed to punish an offender, as to secure the State. It touches neither his person nor his property, but simply divests him of his political capacity [office].[149]

In short, lacking punishment or impact on life or property, the proceeding was not the trial of a "crime," and hence the judicial authority of the Senate could be maintained and exercised. For whatever reason, Dallas, counsel for Blount, did not argue the jury-trial point but confined himself to the other two.[150] The Senate was persuaded by the plea "that this court ought not to hold jurisdiction,"[151] a statement that, as regards the jury-trial point, is to say the least equivocal. Virtual abandonment of that point on argument removed the necessity of ruling on it; and the Senate ruling is compatible with Bayard's argument that impeachment is unaffected by the sixth amendment because it is a non-criminal proceeding.[152]

Yet another difficulty arises, from article II, § 2 provision that excepts impeachments from the Presidential power to "grant pardons for offenses." Blackstone treats "offenses" as virtually synonymous with "crimes",[153] and a pardon comes into play to exempt from punishment for a crime.[154] Let me attempt an explanation for this confusing cross-

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[145] Wharton, *supra* note 9, at 314–315n. Parenthetically, Jefferson confirms my reading of the sixth amendment if impeachment be indeed criminal.

[146] *Cf. id.* at 315e.

[147] The motion was made in February, 1798, *id.* at 315–315n; the trial opened in December, *id.* at 259.

[148] *Id.* at 260. The most serious charge was that Blount had conspired to launch a military expedition to wrest Florida and Louisiana from Spain and to deliver it to England. *Id.* at 253. Before the impeachment, the Senate, by a vote of 25 to 1, expelled him as "guilty of a high misdemeanor, entirely inconsistent with his public trust and duty as a Senator." *Id.* at 251–52.

[149] *Id.* at 262–63.

[150] *Id.* at 262–63. Closing for the Managers, Harper followed suit and confined himself to those two points. *Id.* at 296.

[151] *Id.* at 310.

[152] Subsequent convictions by the Senate show that it does not regard the jury-trial requirement as a bar.

[153] 4 Blackstone, *supra* note 11, at *5 *et seq. See also* W. Russell, *Crimes and Misdemeanors* 58 (1819), and note 129 *supra*.

[154] *See* note 129 *supra*. Simpson, *supra* note 15, at 34, stated, "The only inference that can be fairly drawn from the use of the word 'offenses' in Article II, Section 2, instead of the word 'crimes,' is that it was recognized that there were 'offenses against the United States' which were not crimes, and all those, including fines, penalties, and forfeitures, could be pardoned by the President; but for 'offenses' resulting in a conviction upon impeachment, the President was not to be permitted to pardon." Apparently Simpson considers that impeachment is grounded upon an "offense" that is not a crime, *see also id.* at 32–37, 40–41.

Like Simpson, I consider that the American impeachment process is not criminal, but I can not as easily deprive "offenses" of its normal "criminal" connotations. *See*

current. The Framers had the English practice constantly before their eyes; doubtless they were aware that the Act of Settlement (1700) foreclosed the plea of pardon to an impeachment, though it remained open to the King to issue a pardon after conviction.[155] Here was a flaw to be avoided, and it is quite possible that the Framers did not pause to think though the impact of this exception upon the division they had instituted between impeachment and subsequent indictment. Since the Framers were following the English pattern in important respects, it was the counsel of prudence to bar a pardon after impeachment and conviction, notwithstanding that the separation of removal from subsequent indictment had rendered it unnecessary.[156] In the crowded effort to erect an unprecedented structure of government, the Framers might well have overlooked some lack of harmony in detail. Marks of haste are apparent on the face of the instrument, *e.g.*, the provision which enables Congress to punish treason is not found in article I, the legislative article, but in the judicial article III; the provision for impeachment of judges is inferentially included in the article II, executive article, phase "all civil officers." Words like "offense," "convict," "high crimes" had been employed in the English impeachment process; and a thorough-going attempt to clarify the non-penal aspect of removal would have required the Framers to coin a fresh and different vocabulary, perhaps an insuperable task in all the circumstances. They were content to furnish practical answers to manifest problems, to prevent, for example, a Presidential pardon from undoing the impeachment of a Presidential favorite. One need not be completely persuaded by such explanations and yet prefer them to the difficulties presented by the double jeopardy and trial by jury amendments. It is not given to the historian retrospectively to impose a tidy scheme upon the unruly facts; he must be content to take account of anomalies and to resolve ambiguity by making what appears to be the best available choice.

2. The Limits of "High Crimes and Misdemeanors"

Pressing for the impeachment of Justice Douglas, Congressman Ford, it will be recalled, asserted that an "impeachable offense" is whatever House and Senate jointly "consider [it] to be."[157] The Records make quite plain that the Framers, far from meaning to confer illimitable power to impeach and convict, intended to confer a *limited* power.

Before Mason moved to add "maladministration" to "Treason, bribery," he explained that,

> Treason as defined in the Constitution will not reach many great and dangerous offenses. Hastings is not guilty of Trea-

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note 129 *supra*; text accompanying note 153 *infra*. Simpson furnished no evidence for the assignment of a double meaning to "offenses," no explanation why penalties such as "fines and forfeitures" should be excluded from the norms of criminal sanctions. Where they were clearly "civil" in nature, the likelihood that a "pardon" would come into question was remote. The exemption of impeachment, in a word, is not explicable on the Simpson analysis.

[155] Act of Settlement, 12 & 13 Will. III, c. 2, § 3 (1700); 1 Chitty, *supra* note 7, at 763; *see also* note 7 *supra*.

[156] Another instance of superabundant caution is the prohibition of the bar to suspension of the writ of habeas corpus, article I, § 9(1), which arguably was unnecessary given the prevailing view that the Constitution created a government of enumerated and limited powers. *See* Berger, *Congressional Inquiry v. Executive Privilege*, 12 U.C.L.A. L. Rev. 1044, 1075–76 (1965). The point was raised by Tredwell in the New York Ratification Convention. 2 Elliott, *supra* note 5, at 398–99.

[157] *See* note 1 *supra*.

son. Attempts to subvert the Constitution may not be Treason as above defined . . . it is the more necessary to extend the power of impeachments.[158]

Thus Mason proposed to "extend the power of impeachment" to reach "great and dangerous offenses," "attempts to subvert the Constitution," by adding "maladministration." But Madison demurred because "so vague a term [as maladministration] will be equivalent to a tenure during the pleasure of the Senate," and "high crimes and misdemeanors" was accepted in its place. Manifestly, this substitution was made for the purpose of limiting, not expanding the initial Mason proposal.[159] Earlier the Convention had rejected "high misdemeanors" in another context because it "had a technical meaning too limited,"[160] so that adoption of "high crimes and misdemeanors" exhibits an intent to embrace the "limited," "technical meaning" of the words for purposes of impeachment. That consequence would attach in any event, for use of a technical term, "fully ascertained by the common or civil law" would require reference to that law "for its precise meaning."[161] If "high crimes and misdemeanors" had an ascertainable content at the time the Constitution was adopted—as was the fact—that content furnishes the boundaries of the power. It is no more open to Congress to stray beyond those boundaries than it is to include in the companion word "bribery" an offense such as "robbery" which had a quite different common law connotation.[162] The design of the Framers to confer

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[158] 2 Farrand, *supra* note 108, at 550.

[159] *Id.* Earlier, Mason had said in the Convention that the President as well as his coadjutors should be punished "when great crimes were committed." *Id.* at 65.

[160] *See* text accompanying note 109 *supra*.

[161] United States v. Jones, 26 F. Cas. 653, 655 (No. 15, 494) (C. Ct. Pa. 1813) (per Justice Bushrod Washington). Chief Justice Marshall said of the word "robbery" in a statute, that "it must be understood in the sense in which it is recognized and defined at common law." United States v. Palmer, 16 U.S. (3 Wheat.) 610, 630 (1818). So too, "the word 'jury' and the words 'trial by jury' were placed in the Constitution . . . with reference to the meaning affixed to them in the law as it was in this country and in England at the adoption of the Constitution." Thompson v. Utah, 170 U.S. 343, 344 (1898).

This was the common view, as is illustrated by Jefferson's transmittal of a draft of a Virginia criminal code to George Wythe, in which he explained that he sought to preserve "the very words of the established law, wherever their meaning had been ascertained by judicial decisions or rendered technical by usage," in order, as he added in a subsequent "Note," to give no occasion for new questions by new expressions." Quote in Hurst, *Treason in the United States*, 58 Harv. L. Rev. 226, 253–54 (1944).

It is reasonable to infer that the Framers were familiar with English impeachment trials. As early as 1731, William Smith, in an opinion rendered to the New York Assembly, quoted Article 3 of the Clarendon impeachment. Quoted, J. Smith, Cases & Materials on Development of Legal Institutions 440, 442 (1965). Several colonial libraries in New York had various collections of the State Trials. P. Hamlin, Legal Education in Colonial New York 188, 193, 196 (1939). For his *Manual of Parliamentary Practice* (1801), reprinted in the Senate Manual (53th Cong. 1899) 61–153 Vice President Jefferson combed the debates in Parliament and the State Trials. For impeachment materials, see *id.* at 149–153. In a letter to the Boston Gazette, January 4, 1768, Josiah Quincy, Jr. directed attention to the scope of impeachment in England and to the impeachment of leading English statesmen across the centuries, drawing on Selden's Jur. Par., Brushworth's Collections, the Lords' Journal, Quincy, Massachusetts Reports, 1761–1772 580–84 (1865).

Of the fifty-five members of the Federal Convention, "Four had studied in the Inner Temple, five in the Middle Temple. . . ." Hughes, *supra* note 18, at 11. And it is not to be presumed that they were ignorant of the famous State Trials. *See also* note 170 *infra*. Ross justly remarks, "The history of Seventeenth Century England—the Long Parliament, the Puritan Revolution, the 'Glorious Revolution', all that was no closed book to Eighteenth century Americans . . . ." Ros, *"Good Behavior" of Federal Judges*, 12 U. Kan. City L. Rev. 118, 122 (1944). *See also* Bailyn, *supra* note 2, note 170 *infra*.

[162] As Story stated, "The doctrine, indeed would be truly alarming that the common law did not regulate, interpret, and control the powers and duties of the court of impeachment. . . . If the common law has no existence as to the Union as a rule or guide, the whole proceedings are completely at the arbitrary pleasure of the government and its functionaries. . . ." Story, *supra* note 12, at § 798. Since, he said, "high crimes and misdemeanors" are not defined by any statute of the United States (nor, it may be added, by any English statute), "Resort then, must be had either to parliamentary practice, and the common law, in order to ascertain what are high crimes and misdemeanors, as the whole subject must be left to the arbitrary discretion of the Senate. . . ." *Id.* §§ 796, 798. Cf. Marshall, C.J. in United States v. Wilson, 32 U.S. (7 Pet. 150, 159 (1833).

a limited power is confirmed by their rejection of removal by Address which knew no limits.[163]

Even so, some uneasiness apparently was excited by the breadth of the power, for there were repeated assurances that impeachment was meant only for "great offenses," "great misdemeanors." James Iredell, later to be a Supreme Court Justice, told the North Carolina Convention that the "occasion for its exercise [impeachment] will arise from acts of great injury to the community. . . ." [164] Impeachment, said Governor Johnston in that Convention, "is a mode of trial pointed out for great misdemeanors against the public." [165] From James Wilson's expression of hope in the Pennsylvania Convention that impeachments "will seldom happen," [166] it is inferable that he too was concerned only with serious misconduct. In this the Founders were but reflecting English sentiment, as was well put by Solicitor General, later Lord Chancellor, Somers, who stated in Parliament in 1691, "The power of Impeachment ought to be, like Goliath's sword, kept in the temple, and not used but on great occassions." [167]

The peaks of the English practice were evidently familiar to the Founders. In the Federal Convention George Mason said "corruption" would be impeachable; Governeur Morris agreed that "corruption and some few other offenses" ought to be impeachable. Madison added that protection against the "negligence or perfidy of the Chief Magistrate" were "indispensable." The President, said Madison, "might pervert his administration into a scheme of peculation or oppression. He might betray his trust to a foreign power." Morris added that he "may be bribed . . . to betray his trust," and recalled that "Charles II was bribed by Louis XIV." [168]

In the Virginia Ratification Convention Madison stated that "if the President be connected, in any suspicious manner with any person, and there be grounds to believe that he will shelter him" he may be impeached. He also stated that, "Were the President to commit anything so atrocious as to summon only a few States [*i.e.* Senators to consider a treaty]" he would be impeached for a "misdemeanor." [169] Corbin and Pendleton considered the giving of "bad advice" impeachable.[170] In North Carolina Iredell said, "I suppose the only instances,

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[163] 2 Farrand *supra* note 108, at 428. Speaking of the Act of Settlement (1700), Todd properly remarks that the removal by Address "is, in fact, a qualification or exception from the words creating a tenure during good behavior and not an incident or legal consequence thereof." The power "may be invoked upon occasions when the misbehavior complained of would not constitute a legal breach of the conditions on which the office is held," i.e. when they would not amount to "misbehavior" in law. A. Todd, Parliamentary Government 193 (Walpole ed. 1892). The terms of the Act confirm his construction: "Judges' Commissions [to] be made *Quamdiu se bene gesserint* . . . but upon the Address of both House of Parliament it may be lawful to remove them." 12 & 13 Wm. III, c. 2, § 3 (emphasis supplied). For further discussion, see Berger, *Impeachment of Judges and "Good Behavior" Tenure*, 79 Yale L.J. 1475, 1500–01 (1970).

[164] 4 Elliot, *supra* note 3, at 113.

[165] *Id.* at 48. In the Federal Convention Mason said impeachment was to be *for* "great crimes." 2 Farrand, *supra* note 108, at 65.

[166] 2 Elliot, *supra* note 6, at 513.

[167] 5 New Parl'ty. Hist. 678 (1691). His view was immediately paraphrased by Attorney General Treby, later Chief Justice of Common Pleas: "Impeachments are seldom used, as not fit on common occasions. . . ." *Id.* So too, when the impeachment of the Earl of Orrery was proposed, Sir Thomas Clifford said he "would not have the sword of this House of Impeachments be blunted upon offenses of this nature . . . Would have Impeachments of this nature upon great and considerable occasions." The Commons noted that the accusation "the left to be prosecuted at law." 6 Howell, *supra* note 7, at 913, 919, 920 (1680). In this country Story said that impeachments is "intended for occasional and extraordinary cases, where a superior power, acting for the whole people is put into operation, to protect their rights and to rescue their liberties from violation." 1 Story, *supra* note 12, at § 751.

[168] 2 Farrand, *supra* note 108, at 68–69. For the bribes Louis paid to Charles, which came out in the impeachment of Danby, see Chafee, *supra* note 6, at 120.

[169] 3 Elliot, *supra* note 5, at 498, 500.

[170] Corbin noted in Virginia that a British minister who advises an "abuse of this royal prerogative" is impeachable. 3 Elliot, *supra* note 5, at 516. In South Carolina, Pendleton

in which the President would be liable to impeachment, would be where he had received a bribe, or had acted from some corrupt motive or other." [171] General C. C. Pinckney said in South Carolina that those are impeachable "who behave amiss, or betray their public trust." An abuse of trust by the President, there said Edward Rutledge, was impeachable.[172] The net effect of these remarks, it seems to me, is to preclude resort to impeachment for petty misconduct. Such is also the implication of Hamilton's reference to "[T]he awful discretion which a court of impeachment must necessarily have, to doom to honor or to infamy the most confidential and the most distinguished character of the community. . . ." [173] He was not thinking of a sledgehammer to crush a fly. Senate power, then, was not designed to be unlimited; rather as Story said, "what are and what are not high crimes and misdemeanors is to be ascertained by a recurrence to English law." [174]

One case of impeachable conduct in England mentioned by Story, the rendering of unconstitutional opinions,[175] merits special notice. The subservient judges of Charles I had held that the "Ship-Money Tax" was constitutional,[176] a judgment rejected by an outraged Commons, which later impeached the judges.[177] Under our Constitution, however, the determination whether a measure is constitutional was left to the final determination of the judiciary. James Wilson flatly rejected the suggestion, made in the Pennsylvania Ratification Convention in order to cast doubt on the security which he had stressed was provided by an independent judiciary, that

> judges are to be impeached because they decide an act null and void, that was made in defiance of the Constitution? What House of Representatives would dare to impeach, or Senate to commit, judges for the performance of their duty.[178]

A similar statement was made by Gerry;[179] and that conclusion is inherent in the very nature of judicial review. Once it is granted that

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noted that "in England . . . ministers that advised illegal measures were liable to impeachment, for advising the king." 4 *id.*, at 208; *see also* statement of Iredell, note 91 *supra*.

[171] 4 *id.*, Elliot, *supra* note 5, at 120; *see also* text accompanying note 183 *supra*.

[172] 4 Elliot, *supra* note 5, at 276, 281.

[173] The Federalist, *supra* note 2, No. 65 (A. Hamilton), at 426.

Apparently Story, *supra* note 12, at § 786, conceived of removal by impeachment "upon the mere ground of political usurpation or malversation in office, admitting of endless varieties, from the slightest guilt up to the most flagrant corruption." But he did not explain his "slightest guilt" nor take note of the assurances in the several conventions, including the history of the adoption of "high crimes and misdemeanors." Nor did he seek to reconcile it with his statement in § 751, quoted note 167 *supra*.

[174] Story, *supra* note 12, at § 795.

[175] *See* text accompanying note 76 *supra*.

[176] The Ship-Money Tax originally levied on the great seaport towns to provide ships, was extended by Charles I to inland towns as a means of raising money without resort to Parliament. Chief Justice Finch, by one form of pressure or another, had made certain of the opinions of the judges before the king had formally put his case." 6 Holdsworth, *supra* note 23, 52n (1924); T. Taswell-Langmaid, English Constitutional History 517 (9th ed. 1929); R. Haynes, Selection and Tenure of Judges 50 (1944). The Ship Money Case, the King v. John Hampden, is reported in 3 Howell, *supra* note 7, at 825 (1637). *See* Clarendon's comment on Finch, *id.* 835n; *see also* Hatsell, *supra* note 24, at 127.

[177] The Commons called the judges to account for their opinions. 3 Howell *supra* note 7, at 1260. Finch's solicitation was stressed *id.* at 1264; the legality of the opinion was challenged, *id.* at 1282, 1286, 1368; the judgment was declared void by the Lords, *id.* at 1300, and the judges were impeached, Id. at 1337, 1301. The core of Justice Berkley's impeachment, *see* text accompanying note 63 *supra*, was his participation in the Ship-Money matters. *See* Articles 5–7, and 8, Howell, *supra* note 7, at 1285–87. He was fined 20,000 pounds and made incapable of any place in the judicature. 4 Hatsell, *supra* note 24, at 173n.

[178] 2 Elliot, *supra* note 5, at 478.

[179] *Gerry*, 1 Ann. Cong. *supra* note 130, at 537. In New Hampshire the Court had declared the "Ten Pound Act" unconstitutional, and although the Representatives by a 41 to 14 vote then declared the Act constitutional, they approved by a vote of 56 to 21 a Committee report that the judges were "not Impeachable for Maladministration as their conduct [was] justified by the constitutional" of New Hampshire. 2 W. Crosskey, Politics and the Constitution In the History of the United States 970 (1953).

judges were empowered to declare an Act void that is not "in pursuance" of the Constitution, it defeats the Framers' purpose to conclude that they authorized Congress to impeach judges for rendering such decisions.[180]

Mention only can be made of several associated problems: does out-of-court conduct which damages confidence in the administration of justice constitute a "great offense?" Are the examples of official misconduct, i.e. misconduct in office, cited by the Founders merely illustrative or preclusive and intended to repudiate the branch of English practice which dealt with out-of-court misconduct? Must we view rejection of removal "at the pleasure of Congress" as a bar to removal for just cause? For example, did Judge Ritter's acceptance of substantial gifts from wealthy residents of his district [181] constitute a "great offense?" Had litigation of the donors been pending before him, acceptance of the gifts would have amounted to bribery. Substantial gifts in the absence of pending cases are a step removed, but they raise the question: why did divers donors shower the judge with gifts. It was not sheer coincidence which caused them to break out in a rash of generosity and to select this precise individual as the object of their benefactions. Is it unreasonable to infer that they expected to influence his judgment in future cases in which men of property may expect to be involved? Judge Ritter received these gifts by reason of his office, and the Senate could fairly infer, in the words of a charge against Lord Treasurer Middlesex that this was "Corruption shadowed under pretext of a New Year's Gift. . . ." [182] If, unlike Middlesex, Ritter did not use "the power of his place . . . to wrest" these gifts from the donors, it is justly inferable that "the power of his place" was the sole inducement thereto.[183] And as in the case of Lord Halifax, his acceptance of those gifts "open[ed] a way to all manner of corrupt practices." [184]

Instead of engaging in such refinements the Senate convicted Ritter on the charge that his offense was "to bring his court into scandal and disrepute, to the prejudice of said court and public confidence in the administration of justice therein, and to the prejudice of public respect and confidence in the Federal judiciary. . . ." [185] For this there was a precedent in the charge that Chief Justice Scroggs, by his "notorious excess and debaucheries" brought "the highest scandal on the public justice of the kingdom." [186] Vast powers, greater than those entrusted to English judges, were granted to our courts. Unlike English judges, it is given to them to set aside legislation enacted by the representatives of the people. Their judgments, going from time to time to issues that divide the nation, depend on acceptance by the people, acceptance which in large part derives from the respect the judiciary, and in particular the Supreme Court, has enjoyed. Judicial

[180] *Cf.* Congress v. Court, *supra* note 2, at 289–90.
[181] *See* text accompanying ante 16 *supra*.
[182] Hark to Middlesex' own explanation: one Jacobs told him "That the Farmers of the Petty Farms [of wine, who sought governmental relief from Middlesex, 3 Howell, *supra* note 7, 1197] . . . did intend, to present him with a tun of wine, for a new year's gift. The Lord Treasurer then answered him merrily, That other Lord Treasurers had been better respected by those farmers, and that he would have none of their wines and shortly after, Bernard Hyde brought him 100 [pounds] for a new year's gift only, and for no other cause." *Id.* at 1206.
[183] *See* text accompanying note 88 *supra*.
[184] *See* text accompanying note 88 *supra*.
[185] 80 Cong. Rec. 5606 (1936); *see also* text accompanying note 16 *supra*.
[186] Article 8, 8 Howell, *supra* note 7, at 163, 200 (1680).

misconduct which vitiates that respect saps an important foundation of our government.[187] Although Ritter's misconduct did not constitute the "high treason" with which Scroggs was charged, it may well be regarded as a "great offense" within the compass of "high crimes and misdemeanors."[188] But this is a matter that requires more extensive investigation than is possible within the scope of this article.

II. THE ROLE OF POLITICS—MOTIVATION OF THE FRAMERS

In a comment on the Resolution for the impeachment of Justice Douglas introduced in the House on April 16, 1970, by Representative Gerald R. Ford, Milton Viorst states,

> 110 sponsors of the anti-Douglas resolution are all conservative Republicans and Dixiecrats. This seems persuasive evidence in support of the hypothesis which virtually everyone in Washington accepts: that the undertaking seeks not simply to impeach William Orville Douglas but to discredit the liberalism inherent in the domestic programs of Democratic Administrations since the New Deal . . .[189]

Representative Ford all but conceded that his Resolution was in retaliation for the Senate's rejection of two of President Nixon's nominees to the Supreme Court.[190] 'Twas ever thus; impeachment was "essentially a political weapon" from its inception in 1388;[191] and so it continued to be when it was revived in the reign of James I in order to bring his corrupt and oppressive ministers to heel.[192] But where the object of Jacobean impeachments had been the "reformation of abuses and not the venting of private spleen or party hatreds";[193] where the impeachment of the Earl of Strafford had been designed to break the back of Charles I's absolutist pretensions,[194] the moving force after the Restoration came to be party intrigue in a factional struggle for

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[187] *Compare* this *with* the words of Lord Chancellor Erskine in the proceedings respecting Justice Lake Fox (wherein article of impeachment had been filed by the House of Commons with the House of Lords, and where the possibility of removal by Address to the King was under discussion): "The true question . . . had Mr. Justice Fox, by his misconduct, conducted to the degradation of our free government and constitution." 7 Parl'y. Debates 768 (1806).

In one of the earliest American impeachments, that of Judge Francis Hopkinson in 1780, the Supreme Executive Council of Pennsylvania stated "we conceive it to be indelicate for a Judge to accept presents from persons who frequently have business before him tho' no cause be then depending. . . . And it stated that it was of "highest importance . . . that the people should have a confidence in the integrity of the Judges." Hogan, Pennsylvania State Trials 58–59 (1795). Hopkinson was acquitted on factual grounds, and the tribunal resolved doubts in his favor, as is fitting in such case.

[188] 8 Howell, *supra* note 7, at 197.

Chief Justice Taft, commenting on the impeachment of Judge Archbald, who had entered into advantageous deals with persons who had cases pending before him, stated in an address before the American Bar Association in 1912 that the conviction was

> must useful to demonstrating to all incumbents of the federal bench that they must be careful in their conduct outside of court as well as in the court itself, and that they must not use the prestige of their official position, directly or indirectly, to secure personal benefit.

ABA 36th Annual Report 423, quoted in Simpson, *supra* note 15, at 59–60.

[189] Viorst, *Bill Douglas Has Never Stopped Fighting the Bullies of Yakima*, N.Y. Times Magazine, June 14, 1970 at 8, 32.

[190] Facing up to the view of his Resolution as "retaliation for the rejection by the other body of two nominees for the Supreme Court, Judge Haynsworth and Judge Carswell," Ford said, "In a narrow sense, no. . . . But in a larger sense, I do not think there can be two standards for membership on the Supreme Court, one for Mr. Justice Fortas [who, Ford implies, resigned under pressure], another for Mr. Justice Douglas." 116 Cong. Rec. H. 3118–19 (daily ed. Apr. 15, 1970).

[191] Clarke, *supra* note 22, at 154.

[192] Roberts, *supra* note 24, at 23–28. *See* Jefferson's comments, *supra* note 131.

[193] Roberts, *supra* note 24, at 32.

[194] Trevelyan, *supra* note 95 at 403–04.

power.[195] From an "appeal to the nation against wicked ministers,"[196] impeachment was transformed into a clumsy means of striking at unpopular policies,[197] manifestly "political," and it was then supplanted by an Address of the Parliament to the King, which came to be regarded as a vote of censure and no confidence;[198] and thus by degrees ministerial accountability of the ministers to the Parliament was achieved.[199] While the Convention was sitting in Philadelphia the spectacular trial of Warren Hastings, spear-headed by Edmund Burke, the paladin of American liberty, was underway. Hear Macaulay on the Hastings impeachment:

> Whatever confidence may be placed in the decision of the Peers on an appeal arising out of ordinary litigation, it is certain that no man has the least confidence in their impartiality, when a great public functionary, charged with a great state crime, is brought to their bar. They are all politicians. There is hardly one among them whose vote on an impeachment may not be confidently predicted before a witness has been examined.[200]

Impeachment did not change color in this country. When John Adams proposed in 1774 to impeach, and the Massachusetts Assembly filed charges against, the Justices because they had declined to renounce royal salaries in place of those theretofore paid by the Assembly's appropriation, what was this but political?[201] In the Convention Charles Pinckney warned that Congress, "under the influence of heat and faction," would "throw [the President] out of office,"[202] a prophecy which barely fell short of realization 80 years later when the conviction of Andrew Johnson was narrowly defeated.[203] Explaining impeachment to the People who were being asked to adopt the Constitution, Hamilton stated that the prosecution of impeachments "will seldom fail to agitate the passions of the whole community, and to divide it into parties, more or less friendly or inimical, to the accused. In many cases, it will connect itself with the pre-existing factions . . . and in such cases there will always be the greatest danger, that the decision will be regulated more by the comparative strength of the parties, than by the real demonstrations of innocence or guilt."[204]

From the outset, the impeachment of the insane Judge Pickering in 1804 became a political football.[205] The Federalists were entrenched

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[195] Roberts, *supra* note 24, at 182.
[196] *Id.* at 220.
[197] *Id.* at 218, 380.
[198] *Id.* at 244, 267, 360.
[199] The story is fully recounted by Roberts, *supra* note 24; the point had earlier been made by Holdsworth, as noted by Chafee, *supra* note 6, at 111; Dougherty, *Inherent Limitations Upon Impeachment*, 23 Yale L.J. 60, 69 (1913).
[200] Quoted in Dougherty, *supra* note 199, at 69. In the Impeachment of President Johnson, "Prejudgment on the part of most Senators . . . was brazenly announced." J. Kennedy, Profiles In Courage 133 (1961).
[201] Johnson, *William Cushing*, in 1 The Justices of the United States Supreme Court 57–58 (L. Friedman & F. Israel ed. 1969); 2 Adams, *supra* note 26, at 320–31.
[202] 2 Farrand, *supra* note 108, at 551.
[203] Senators who sought to vote according to the dictates of conscience rather than of politics were subjected to intolerable pressure, and some were later hounded out of office. J. Marke, Vignettes of Legal History 131–68 (1965); J. Kennedy, *supra* note 200, at 126, 133, 135–42.
[204] The Federalist, *supra* note 2, No. 65 (A. Hamilton), at 424.
[205] A. Beveridge, The Life of John Marshall 164–67 (1919). Pickering was convicted "by a strictly partisan vote." *Id.* at 167. Dumas Malone states that "Members of the Judge's own party strongly opposed his resignation for purely political reasons." 4 D. Malone, Jefferson and His Time 463 (1970) (hereinafter cited as Malone).

in the Judiciary which was practically an arm of the party;[206] judges, as in the case of Justice Samuel Chase, were making intemperate attacks on the Jefferson administration in harangues to the Grand Jury;[207] and it is little wonder that the infuriated Jeffersonians launched an impeachment of Chase. The Federalists "supported Chase completely in every test," and with the help of a group of Jeffersonians whom John Randolph, leader of the impeachment, had alienated by his opposition to a judicious compromise of the Yazoo claims,[208] saved Chase from richly deserved retribution. In a study of the role of partisan politics in the impeachment of judges since 1903, ten Broek found a correlation between votes and party affiliations; at times the voting split along party lines.[209] The impeachment of Judge Ritter in 1936 is thus described by Gerald Ford: "Judge Ritter was a transplanted conservative Colorado Republican appointed to the Federal bench in solidly Democratic Florida by President Coolidge. He was convicted by a coalition of liberal Republicans, New Deal Democrats, and Farmer-Labor and Progressive Party Senators in what might be called the northwestern strategy of that era."[210] Notwithstanding, it may be added, Representative Ford unhesitatingly borrowed the explanatory utterances of several Senators in that proceeding for his own proposal to impeach Justice Douglas.

In evaluating the uses of impeachment, therefore, we should not close our eyes to its political inception and continued political coloration, even in the cases of the English Justices who had offended the Parliament by assisting the king to carry out detested policies.[211] The drawing of political lines goes to the *motivation* behind the given impeachment; and here we need to recall that in the great English impeachments the charges were often the sheerest facade for a politically motivated proceeding. But be the motivation what it may, in this country impeachment must proceed within the confines of "high crimes and misdemeanors" as they had taken form in 1787. The fact that the Founders further emphasized that impeachment was framed for "great offenses," "great misdemeanors," may well be attributable to their desire to reduce the impact of factionalism. The critical focus should therefore be not on political animus, for that is the nature of the beast, but on whether Congress is proceeding within the limits of "high crimes and misdemeanors."

Congressman Ford, to be sure, maintains that the impeachment process was meant to enforce the tenure for "good behavior," a more elastic phrase which permits removal for misbehavior; and in addition to the several quotations from the Ritter case he could have quoted still other and earlier remarks to the same effect. But my own study has convinced me that "good behavior" was a doctrine entirely separate from "high crimes and misdemeanors"; that it had its own enforcement machinery, in no wise allied to impeachment; that in

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[206] The "national judiciary, [a little earlier] one hundred per cent Federalist, amounted to an arm of that party." 4 Malone, *supra* note 205, at 453.

[207] 1 Warren, *supra* note 15, at 274–76. For example, "Chief Justice Dana of Massachusetts in a charge to the Grand Jury denounced the Vice-President [Jefferson] and the minority in Congress as 'apostles of atheism and anarchy, bloodshed and plunder'." *Id.* at 275.

[208] 4 Malone, *supra* note 205, at 479–80. A chapter of my forthcoming book will be devoted to the Chase trial.

[209] *See* ten Broek, *supra* note 15, at 193–94. *See also* Potts, *supra* note 15, at 35–36.

[210] 116 Cong. Rec. H. 3114 (daily ed. Apr. 15, 1970).

[211] *See* notes 176, 177 *supra*.

England impeachment proceeded solely for "high crimes and misdemeanors," not for a breach of "good behavior"; that almost all of the evidence in the Convention excludes an intention to wed the two. For this I have elsewhere set forth the extensive proof.[212] Here it must suffice to say only that a Convention which rejected Mason's "maladministration" as "so vague" and replaced it with the "limited," "technical" "high crimes and misdemeanors" hardly intended to pump into "high crimes and misdemeanors" all that is included in the equally "vague" "misbehavior."

Why, one asks, did the Framers take up this faction-ridden mechanism which, long before the Hastings trial, had seen its best days. For with the achievement of ministerial accountability to Parliament early in the 18th Century, the prime purpose of impeachment had been accomplished and thenceforth it found but infrequent use.[213] Then too, the successful struggle for ministerial accountability to Parliament was not really relevant to a system which set up three separate, independent departments, and made Cabinet members responsible to the President, not to Congress.[214] Professor Chafee considered that

> The British situation is obvious to us, but it was not obvious to the men who framed our Constitution. . . . They thought of the King as the Chief Executive and replaced him by the President. . . . You cannot get rid of a King by a hostile vote in the legislature, and perhaps their minds stopped there. The importance of a majority vote in Parliament for getting rid of the King's main advisers was overlooked.[215]

There was no confusion on this score. Governor Morris reminded the Convention that the President "is not the King, but the prime Minister," [216] and that in England the prime Minister was "the real King."[217] Iredell adverted to the maxim that the King can do no wrong and exulted in the "happier" American provision which made the President himself triable.[218] Thus they made sure to reach the topmost executive by impeachment. Nor did the Framers overlook "the importance of a majority vote in the Parliament for getting rid of the King's main advisers." In setting up an independent President who was to serve for a term, and in making cabinet officers a part of the Executive branch, the Framers surely were aware that a mere vote of no confidence could not, as in England, topple a Secretary.[219]

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[212] Berger, *Impeachment of Judges and "Good Behavior" Tenure*, 79 YALE L.J. 1475 (1970).

[213] Holdsworth remarks that between 1621 "and 1715 there were fifty cases of impeachments brought to trial. Since that date there have been only four." 1 Holdsworth, *supra* note 23, at 382. *See also* Roberts, *supra* note 24, at 113. For 18th century impeachments, see *id.* 380 n.1.

[214] For example, U.S. Const. art. II, § 2 provides that the President "may require the Opinion, in writing, of the principal Officer in each of the Executive Departments, upon any Subject relating to the Duties of their respective Offices."

[215] Chafee, *supra* note 6, at 141.

[216] 2 Farrand, *supra* note 108, at 60.

[217] *Id.* at 104.

[218] 4 Elliot, *supra* note 5, at 109. *See also* Nicholas and Corbin the Virginia Convention, 3 *id.* at 17, 516.

[219] Consider Butler's remark in the Convention on May 30th, when Randolph proposed three separate departments, that he had "opposed the grant of powers to Congs. [under the Articles of Confederation], heretofore, because the whole power was vested in one body. The proposed distribution of the powers into different bodies changes the case. . . ." 1 Farrand, *supra* note 108, at 34. That Congress, Butler surely knew, appointed the Secretary of Foreign Affairs. And the suggestion, rejected by the Convention, that the national legislature appoint the President, 2 *id.* 56–58, again indicates some awareness that the Prime Minister owed his office to Parliament. The Framers knew the English practice and consciously diverged from it. *Cf.* Madison, 2 *id.* at 56.

Indeed they rejected legislative removal by Address of judges, members of another independent branch.[220] It was because the separation of powers left no room for removal by a vote of no confidence that impeachment was adopted as a safety-valve, a security against an oppressive or corrupt President and his sheltered ministers.

Like the Colonists before them, the Founders were haunted by the threat to liberty of illimitable greed for power.[221] Before them marched the shade of despotic Kings;[222] they were familiar with absolutists Stuart claims; and many dreaded that a single Executive might tend to monarchy.[223] Franklin asked, "What was the practice before this where the Chief Magistrate rendered himself obnoxious? Why recourse was had to assissination. . . ."[224] Impeachment was preferable. Fear of Presidential abuses prevailed over frequent objections that impeachment threatened his independence.[225] "No point," said Mason, "is of more importance than that the right of impeachment should be continued."[226]

This may seem strange in light of Madison's warning that all power tended to be drawn into the "Legislative vortex."[227] It is true that the Framers had come to fear legislative excesses as a result of the State post-1776 experience;[228] and they fenced the Congress about with a number of restraints, *e.g.*, a Presidential veto and judicial review. But the Colonial Assemblies had been the darling of the Colonists, elected by themselves, not thrust upon them by a distant King as were judges and Governors.[229] At the end of the Colonial period

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[220] 2 *id.* 428–29.

[221] *See* Ballyn, *supra* note 2; *cf.* Congress v. Court, *supra* note 2, at 8–14. Speaking of the earlier State constitution, Professor Gordon Wood stated, "Nothing indicates better how thoroughly Americans were imbued with Whig apprehensions of misapplied ruling power than their rather unthinking adoption of this ancient English procedure enabling 'the grand inquest of the Colony', the representatives of the people, to pull 'overgrown criminals who are above the reach of ordinary justice' to the ground." G. Wood, *supra* note 107, at 141.

The records of the Federal and Ratification Conventions indicate that the adoption of impeachment was anything but "unthinking." The objective of the Founders, I suggest, was that outlined by an English barrister in 1791, who, writing a century after achievement of ministerial accountability, adverted to the "obvious" and "great" "advantage, which Impeachments afford, as a check and terror to bad Ministers," and cited as "an additional reason why it ought to be cherished by Englishmen . . . that it furnishes the most effectual preservative against the corrupt administration of justice. . . . That Ministers are not now violating the principles of the Constitution, or that the administration of justice is now free from the slightest stain or suspicion of corruption, furnishes no reason for abolishing this mode of trial, for it is impossible to know, how much the security, with which we now enjoy our Constitution and Liberties, and how much of the satisfaction, with which we now confide in these unsuspected characters, that now grace the seats of justice, may be derived from the existence of this very institution. . . ." Quoted 4 Hatsell, *supra* note 24, at 69–70n, 253n. The Founders were very much aware of the lessons of the past. See text accompanying notes 4–9 *supra*, 222–32, 236–37 *infra*; and note 170 *infra*.

[222] *Compare* this *with* John Dickinson's review of Charles I's reign, quoted in Ballyn, *supra* note 2, at 145; James Alexander's criticism of the despotic Charles I in Alexander, A Brief Narrative of the Case and Trial of John Peter Zenger 28 (S. Katz ed. 1963); a reference to James I's claim to make judges who were subservient to his will, Pennsylvania Gazette, Nov. 10–17, 1737, quoted in *id.* at 181, 184; and a recital that Charles II "had entered into a secret league with France to render himself absolute, and enslave his subjects." *Id.* at 188.

[223] 1 Farrand, *supra* note 108, at 66, 83, 90, 96, 101, 113, 119, 152, 425; 2 *id.* 35–36, 101, 278, 613, 632, 640. In the North Carolina convention, which rejected the Constitution, Hawlin Lewndes said, "as to our changing from a republic to a monarchy, it was what everybody must naturally expect. How easy the transition! No difficulty in finding a king; the President was the man proper for the appointment." 4 Elliot *supra* note 5, at 311.

[224] 2 Farrand, *supra* note 108, at 65.

[225] *Id.* at 64–69.

[226] *Id.* at 65.

[227] *Id.* at 85; *see also* The Federalist *supra* note 2, No. 48 (J. Madison), at 322.

[228] Congress v. Court, *supra* note 2, at 10–12, 82, 182.

[229] Thus it was that James Wilson explained the predilection for the legislature. 1 Wilson, *supra* note 5, at 292–93. The persistence of this feeling may be gathered from his admonition in 1791 that it was time to regard Executive and judges equally with the legislature as representatives of the people. Id. at 293. Warning against the danger of legislative tyranny, Madison remarked that the "founders of our republics . . . seem never

the prevalent belief, said Corwin, was that "'the executive magistracy' was the natural enemy, the legislative assembly the natural friend of liberty. . . ." [230] To the radical Whig mind, a potent influence on Colonial thinking, "the most insidious and powerful weapon of eighteenth century despotism" was the "power of appointment to offices." The Executive, it was feared, could fasten his grip on the community by placemen scattered strategically over the nation.[231] Such suspicions died hard, and when a choice had to be made the Framers preferred the Congress to the President, for as Madison explained in the Federalist, "In republican government, the legislative authority necessarily predominates." [232]

One thing is clear: in the impeachment debate the Convention was almost exclusively concerned with the President.[233] The extent to which the President occupied the center of the stage may be gathered from the fact that the addition to the impeachment clause of "the Vice President and all Civil officers" only took place on September 8th, shortly before the Convention adjourned.[234] But the Founders were also fearful of the ministers and favorites whom Kings had refused to remove,[235] and they dwelt repeatedly on the need of power to oust corrupt or oppressive ministers whom the President might seek to shelter. "Few ministers," said Nicholas in the Virginia Convention, "will ever run the risk of being impeached, when they know the King cannot protect them by a pardon," [236] and how much less against impeachment itself. No friend of the Constitution, Patrick Henry deplored the absence of "blocks and gibbets . . . those necessary instruments of justice." But he too looked to impeachment; Blackstone, he said, "tells you that the minister who will sacrifice the interest of the nation is subject to parliamentary impeachment. This has been ever found to be effectual." [237]

In our time impeachment of judges has become the predominant preoccupation, but we shall misconceive impeachment if we fail to grasp that to the Framers impeachment of judges was decidedly peripheral. It was only caught up in a last-minute interpolation in arti-

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for a moment to have turned their eyes from the danger to liberty, from the evergrown and all-grasping prerogative of an hereditary magistrate. . . ." The Federalist, *supra* note 2, No. 48 (J. Madison), at 322.

[230] E. Corwin, The President, Office and Powers 5–6 (4th rev. ed. 1957).

[231] Wood, *supra* note 106, at 143; *see also* Bailyn, *supra* note 2, at 102–03.

[232] The Federalist, *supra* note 2, No. 51 (J. Madison), at 338. In the preceding sentence Madison stated, "It is not possible to give to each department an equal power of self-defense." Justice Brandeis referred to the deep-seated conviction of the English and American people that they "must look to representatives assemblies for protection of their liberties." Myers v. United States, 272 U.S. 52, 177, 294–95 (1926) (dissenting opinion; J. Holmes concurring). But I would not intimate that Congress was given unlimited power over the President. To the contrary, the power was carefully hedged about. *See* text accompanying notes 278–80 *infra*.

[233] 2 Farrand, *supra* note 108, at 64–69; *see also* text accompanying notes 167–71 *supra*.

[234] 2 Farrand, *supra* note 108, at 552.

[235] The Founders' concern with removal of "favorites" emerges most clearly in the First Congress. Madison stated, "It is very possible that an officer who may not incur the displeasure of the President may be guilty of actions that ought to forfeit his place. The power of this House may reach him by means of an impeachment, and he may be removed even against the will of the President."

1 Ann. Cong., *supra* note 130, at 372. He made the point again *id.* at 498. *See also* text accompanying note 168 *supra*. Baldwin, also a Framer, put the matter more sharply: a from his place . . . ." 1 Ann. Cong., *supra* note 130, at 558. "It is this clause," said Elias Boudinot, "which guards the rights of the House, and enables them to pull down an improper officer, although he should be supported by all the power of the Executive." *Id.* at 468. Similar remarks were made by Benson, *id.* at 382; Livermore, *id.* at 478; Lawrence, *id.* at 377, 482 and Goodhue, *id.* at 534. This nagging fear of "favorites" illustrates that the Founders had studied the lessons of 17th century English experience. *See* note 95 *supra*.

[236] 3 Elliot, *supra* note 5, at 17.

[237] *Id.* at 512.

cle II, the executive article, when to the impeachment of the President was added without explanation "Vice President and all civil officers." That story, the effect of the judicial tenure for "good behavior," its relation, if any, to impeachment, the alleged exclusivity of the impeachment provisions for the removal of judges upon misconduct, is too lengthy for rehearsal here. One may doubt whether the considerations which fed apprehensiveness of the President and his favorites had any play with respect to judges who, because of their life-time tenure, conferred in order to insure judicial independence,[238] would now have no inducement to become tools of unpopular Presidential policy.[239] And one may wonder whether the persistence of partisan influence on judicial impeachments would have disappointed the hopes of the Founders who sought to set them apart from "every successive tide of party."[240]

III. JUDICIAL REVIEW

"The Constitution," said Charles Evans Hughes, "is what the judges say it is."[241] If "treason, bribery, and other high crimes and misdemeanors" likewise are what the Senate says they are, Congressman Gerald Ford did not err in asserting that "impeachable offenses" are what House and Senate jointly "consider [them] to be."[242] From Story onwards it has been thought that in the domain of impeachment the Senate has the last word;[243] that even the issue whether the charged misconduct constituted an impeachable offense is unreviewable because the trial of impeachments is confided to the Senate alone.[244] This view has the weighty approval of Professor Wechsler:

> Who . . . would contend that civil courts may properly review a judgment of impeachment when article I, section 3 declares that the 'sole Power to try' is in the Senate? That any proper trial of an impeachment may present issues of the most important constitutional dimension . . . is simply immaterial in this connection.

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[238] *Cf.* Congress v. Court, *supra* note 2, at 117–19. St. George Tucker referred in 1803 to that "preeminent integrity which amidst surrounding corruption, beams with genuine lustre from the English courts of judicature." 1 Tucker, *supra* note 126, at App. 356, a result of secure tenure.

[239] Madison said in the Virginia Convention, "Were I to select a power which might be given with confidence, it would be the judicial power." 3 Elliot, *supra* note 5, at 535; Congress v. Court, *supra* note 2, at 185–86.

[240] 1 Wilson, *supra* note 5, at 297. Writing in England in 1791, a barrister noted that impeachment "has been employed with less mixture of vindictive, or unwarrantable motives, when directed to this object ["corrupt administration of justice"] than when its terrors have been levelled against Favourites and Ministers." Quoted 4 Hatsell, *supra* note 24, at 70n. 253n.

[241] 1 M. Pusey, Charles Evans Hughes 204 (1951). This was uttered in 1907 during an address made in Elmira, New York. Later Hughes explained, "The inference that I was picturing Constitutional interpretation by the courts as a matter of judicial caprice . . . was farthest from my thought."

[242] Note 1 *supra*.

[243] With respect to impeachment, said Story, "the true exposition of the Constitution" is a matter, "the final decision of which may reasonably be left to the high tribunal constituting the court of impeachment when the occasion shall arise." 1 Story, *supra* note 12, §§ 802, 805. *See also* Rawle, *supra* note 13, at 219; Ross, *supra* note 161, at 125–28.

[244] In Ritter v. United States, 84 Ct. Cl. 293 (1936), *cert. denied* 300 U.S. 668 (1937), the court dismissed a suit wherein an impeached judge contended that the Senate had exceeded its jurisdiction in trying him on charges which did not constitute impeachable offenses under the Constitution, saying that the provision which conferred upon the Senate "the sole power to try all impeachments" (U.S. Const. art. I, § 3), meant that "no other tribunal should have any jurisdiction of the cases tried under the provisions with reference to impeachment." 84 Ct. Cl. at 296.

> What is explicit in the trial of an impeachment or, to take another case, the seating or expulsion of a Senator or Representative, may well be found in others.[245]

On one branch of his assertion, the "seating" of a Representative, Professor Wechsler has since been repudiated by the Supreme Court in *Powell v. McCormack*,[246] which reviewed and set aside the exclusion of Congressman Adam Clayton Powell from the House for serious misconduct. That decision calls for reconsideration of the scope of the Senate's "sole power to try" impeachments.

At issue in *Powell* were article I, § 2(2) which describes three qualifications which a Representative must meet, and Article I, § 5(1) which provides that "Each House shall be the judge of the . . . qualifications of its own members." In a suit against the Speaker of the House, Powell maintained that the exclusion was unconstitutional because exclusion was limited to the requirements of age, citizenship and residence contained in article I, § 2.[247] The House invoked the article I, § 5 provision empowering it to "judge the . . . qualifications of its own members," and went on to "note that under Art. I, § 3, the Senate has the 'sole power' to try all impeachments." And it argued that "these delegations (to 'judge,' to 'punish' and to 'try') to the Legislative Branch are explicit grants of 'judicial power' to the Congress and constitute specific exceptions to the general mandate of Art. III that the 'judicial power' shall be vested in the federal courts." In consequence, the House maintained, the Court could do no "more than to declare its lack of jurisdiction, to proceed."[248] The Court rejected the contention [249] and found the "political question" turned on an inquiry whether the claimed power had been committed to the House by the Constitution.[250]

The Court began with the established proposition that "it is the province and duty of the judicial department to determine . . . whether the powers of any branch of the government . . . have been exercised in conformity to the Constitution; and if they have not to treat their acts as null and void."[251] And it concluded that "in judging the qualifications of its members Congress is limited to the standing qualifications prescribed in the Constitution." Consequently "the House was without power to exclude [Powell] from its membership" on grounds of misconduct.[252] In other words, the power to "judge" does not permit the Senate to add to the Constitutional "qualifications." The point was admirably made by Senator Murdock in the debate on the unsuccessful attempt to exclude Senator William Langer in 1941: "Whoever heard the word 'judge' used as meaning the power to add to what already is the law."[253] The Senate, he stated, has no right "to add to the qualifications" enumerated in the Constitution;

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[245] Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1, 8 (1959).

[246] 395 U.S. 486 (1969). The Committee reported that Powell "had wrongfully diverted House funds for the use of others and himself; and that he had made false reports on expenditures of foreign currency to the Committee on Hous Administration." *Id.* at 492.

For further discussion of this case, see, *Symposium: Comments on Powell v. McCormack*, 17 U.C.L.A. L. Rev. 1 et seq. (1969).

[247] 395 U.S. at 489.

[248] *Id.* at 513–14.

[249] *Id.* at 514.

[250] *Id.* at 519–21.

[251] *Id.* at 506.

[252] *Id.* at 550.

[253] *Id.* at 557. The Court was quoting from 88 Cong. Rec. 2474 (1942).

and, said Justice Douglas, concurring in *Powell v. McCormack*, "Senator Murdock stated the correct constitutional principle governing the present case." [254] Like the three qualifications of article I, § 2 (age, resident and citizenship) to which exclusion is limited, impeachment, by article II, § 4, is confined to three grounds, "treason, bribery, or other high crimes and misdemeanors," which circumscribe the Senate's "sole power to try impeachments." The "sole power to try impeachments" does not enlarge these three grounds. For the "power to try" is limited by the power to "convict," and by the express terms of article II, § 4, only "on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors" may the President "be removed."

A threshold question is whether a misconstruction of "treason," for example, is the equivalent of adding a fourth category, as was "misconduct" in *Powell*. Let us test the analogy. The Senate may convict for "treason"; by article III, § 3, "treason" is defined as levying war against the United States or giving aid and comfort to its enemies. Suppose that the Senate convicts the President of treason on the ground that he attempted to subvert the Constitution, a favorite formula of Parliament.[255] Whether this be labelled as a "construction" or a "factual determination," it plainly amounts to an attempt to add an omitted category to the Constitutional definition.[256] When Mason suggested the addition to "Treason, bribery" of the word "maladministration," he explained to the Convention that "Treason . . . will not reach many great and dangerous offenses . . . Attempts to subvert the Constitution may not be treason as above defined." [257] And James Wilson stated in the Pennsylvania Ratification Convention, "it has not been left to the legislature to extend the crime and punishment of treason so far as they thought proper." [258] To impeach for "treason" on grounds that are outside the Constitutional definition, therefore, lies beyond the powers conferred. Nor does a free-wheeling Senatorial power to expand the common-law definition of "bribery" stand any better.[259]

The phrase "high crimes and misdemeanors" is not as sharply defined as "treason" or "bribery," but it did have an ascertainable content in the English practice.[260] If the phrase leaves more latitude for judgment to the Senate, this is still not equivalent to unbridled discretion. For the last thing intended by the Framers was to leave the Senate free to declare any conduct whatsoever a "high crime and misdemeanor." Madison rejected "maladministration" because "so vague a term will be equivalent to a tenure during the pleasure of the Senate"; [261] and "high crimes and misdemeanors" was adopted in its place

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[254] 395 U.S. at 559.

[255] *Cf.* Wilson's remarks, text accompanying note 5 *supra*. It "will not do to say that the argument is drawn from extremes. Constitutional provisions are based on the possibilities of extremes." General Oil Co. v. Crain, 209 U.S. 211, 226–27 (1908).

[256] Consequently the Court's reservation in *Powell* of the issue whether under the "political question" doctrine review would be barred of "the House's factual determination that a member did not meet one of the qualifications," 395 U.S. at 521 n.42, is not apposite.

[257] 2 Farrand, *supra* note 108, at 550.

[258] 2 Elliot, *supra* note 5, at 469.

[259] Compare this with note 161 and accompanying text *supra*.

[260] *See* text accompanying notes 81–97 *supra*. The alternative, as Story stressed, was to leave "the whole proceeding . . . completely at the arbitrary pleasure" of the Congress. Note 162 *supra*. *See also* 1 Story, *supra* note 12, § 799.

[261] 2 Farrand, *supra* note 108, at 550.

with knowledge that it had a "technical," "limited meaning," a meaning to be sought by recurrence to English practice.[262]

It may be objected that this analysis is too pat, that the three categories of *Powell*, "age, citizenship and residence," are quite clear, whereas "high crimes and misdemeanors" lack definite contours, that the Court would have no standards, no criteria whereby to settle the boundaries of the power thus conferred. The problem of "standards" was vastly greater in *Baker v. Carr*, the "reapportionment" case, where there were no precedents whatever to serve as guidelines, yet despite the "enormously difficult problem of working out standards for utilizing the equal protection provision in the apportionment cases" the Supreme Court entered the field.[263] The "standards" problem posed by "high crimes and misdemeanors" is very considerably less; the English practice if imprecise may yet be reduced to recognizable categories that serve as an outline such as was altogether lacking in "reapportionment."

When the constitutional boundaries of a power are in issue, the problem of "criteria," I suggest, is not really apposite. The "lack of criteria" test derives from *Luther v. Borden*, which arose out of the Dorr Rebellion in Rhode Island. In the aftermath "two groups laid competing claims to recognition as the lawful government," invoking the guarantee of a republican form of government.[264] The Court dwelt on the practical and evidentiary difficulties of determining whether the Rhode Island government sponsored by the Dorr faction was adopted by the "authorized" voters.[265] In substance, the Court refused to become involved in factual findings in a "political" struggle for power between competing State factions. Even so, it took care to differentiate and reserve

> the high power . . . of passing judgment upon the acts . . . of the legislative and executive branches of federal government, and of determining *whether they are beyond the limits of power* marked out for them respectively by the Constitution.[266]

In the performance of this function the Court has undertaken massive tasks of interpretation without any standards to guide it, as *Baker v. Carr* illustrates, and as the related path of case law pricking out the boundaries between State and federal powers under the "commerce clause,' for example, again demonstrates.[267]

Another criterion of "political question," in the words of Justice Frankfurter, is the difficulty of "finding appropriate modes of relief." [268] A Court which did not boggle at the refractory remedial dif-

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[262] *See* text accompanying notes 158–166 *supra*.
[263] 369 U.S. 186 (1962). The quotation is from Emerson. *Malapportionment and Judicial Review*, 72 Yale L.J. 64, 65 (1962).
[264] 48 U.S. (7 How.) 1 (1849). The Court explained this at 369 U.S. 218.
[265] 48 U.S. (7 How.) at 41–42 *Cf.* Coleman v. Miller, 307 U.S. 433, 453–54 (1939).
[266] 48 U.S. (7 How.) at 47 (emphasis added).
[267] Justice Douglas remarked, "Adjudication is often perplexing and complicated. An example of the extreme complexity of the task can be seen in a decree apportioning water among several states. . . . The constitutional guide is often vague, as the decisions under the Due Process and Commerce Clauses show." 369 U.S. at 245.
[268] 369 U.S. at 278 (dissenting opinion).

ficulties [269] posed by reapportionment [270] should not shy from entering a decree, in a suit to recover salary or in a quo warranto, ordering payment of the salary or restoration of the suitor to office.

The "political question" doctrine, in my judgment, has been seriously undermined by *Baker v. Carr* and *Powell v. McCormack*. That doctrine is a self-denying judicial construct without roots in constitutional history. No mention is made in the debates of the Framers and the Ratifiers that "political questions" should be excluded from the ambit of judicial review. Constitutional questions are inescapably "political." [271] In at least one pre-1787 case, *Commonwealth v. Caton*, [272] Judge George Wythe took for granted the justiciability of a dispute between the Virginia Senate and the House of Delegates. That dispute lay at the bottom of an appeal from a conviction for treason; and Wythe unhesitatingly assimilated the duty "to protect one branch of the legislature, and, consequently, the whole community, against the usurpations of the other." to the judicial duty to protect "a solitary individual against the rapacity of the sovereign." It speaks volumes on whether a dispute between difference branches of government was deemed justiciable in 1782 that so eminent a scholar and jurist should not have experienced the slightest qualm on that score.

No case thus far has held that a legislative-executive conflict is non-justiciable. On the contrary, the Supreme Court has already acted "as umpire between Congress and the president" [273] in *Myers v. United States*, [274] and *United States v. Lovett*. [275] In *Myers* the Court permitted the Attorney General to attack a Congressionally enacted statute that limited the President's removal power; and as Justice Frankfurter remarked, "on the Court's special invitation Senator George Wharton Pepper, of Pennsylvania, presented the position of Congress [in opposition to the Attorney General] at the bar of this Court." [276] In *United States v. Lovett*, which involved a statute designed to force certain agencies to discharge respondents, the argument of counsel for Congress [277] was rejected that

> since Congress under the Constitution has complete control over appropriations a challenge to the measure's constitution-

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[269] Professor Bickel points out that "the decisive factor in *Colgrove* could not well have been the difficulty or uncertainty that might attend enforcement of a judicial decree. A judicial system that swallowed *Brown v. Board of Education* and *Cooper v. Aaron* could hardly strain at *Colegrove v. Green* or *Baker v. Carr*." Bickel, *The Durability of Colegrove v. Green*, 72 Yale L.J. 39, 40 (1962). The Court itself acknowledged in *Brown v. Board of Education*, 347 U.S. 483, 495 (1954), that "the formulation of decrees in these cases presents problems of considerable complexity."

[270] Emerson, *supra* note 263, at 75–78. *Cf.* Sindler, *Baker v. Carr: How to "Spar the Conscience of Legislators*, 72 Yale L.J. 23, 32–38 (1962).

[271] "From the beginning the Court had to resolve what were essentially political issues—the accommodation between the states and the central government." F. Frankfurter & J. Landis, The Business of the Supreme Court 318 (1928). It needs to be borne in mind that a "Constitution is a political instrument. It deals with government and governmental powers . . . . It is not a question whether the considerations are political, for nearly every consideration arising from the Constitution can be so described . . . ." Melbourne v. Commonwealth of Australia, 74 Commw. L. Rep. 31, 82 (1947) (per Dixon, J.). This had been anticipated by de Tocqueville: "The American judge is brought into the political arena independently of his own will . . . . The political question which he is called upon to resolve is connected with the interest of the suitors and he cannot refuse to decide it without abdicating the duties of his post." 1 A. De Tocqueville, Democracy in America 191 (1890).

[272] 4 Call. 5, 8 (Va. 1782).

[273] Nathanson, The Supreme Court as a Unit of National Government: Herein of Separation of Powers and Political Questions, 6 J. Pub. L. 331, 332 (1957). In the Congressional debate on the President's "removal" power, Elbridge Gerry, one of the Framers, said that "Judges are the Constitutional umpires on such questions." 1 Ann. Cong., *supra* note 130, at 473.

[274] 272 U.S. 52 (1926).

[275] 328 U.S. 303, 312 (1946).

[276] Wiener v. United States, 357 U.S. 349, 353 (1958).

[277] 328 U.S. at 304.

ality does not present a justiciable question in the courts, but is merely a political issue over which Congress has final say.[278]

In form, to be sure, both *Myers* and *Lovett* were private suits for recovery of salary, but in fact these were vigorous contests between Congress and the President. And in the teeth of a Congressional attempt to deprive the Supreme Court of jurisdiction to review a provision curtailing the effect of a Presidential pardon, the Court held in *United States v. Klein* that the provision "impairs the executive authority," [279] thus jumping into a political thicket with both feet. If the central "power" issue was "political," the curse was not removed because it was presented in a "private" litigation. "Some arbiter," said Justice Jackson, "is almost indispensable when power is . . . balanced between different branches, as the legislative and executive . . . . Each unit cannot be left to judge the limits of its own power." [280] The courts, said *Baker v. Carr*, "cannot reject as 'no law suit' a bona fide controversy as to whether some action denominated 'political' exceeds constitutional authority." [281] For, said Chief Justice White in another "political question" case, it is the "ever present duty" of the courts "to enforce and uphold the applicable provisions of the Constitution as to each and every exercise of governmental power." [282]

Another argument against judicial review of impeachment is that the power to "try" and to issue a "judgment," article I, § 3(7), is itself "judicial" and, in consequence the Court may not substitute its "judicial power" for that of the Senate. On this view, there is an exception from article III, § 2, which provides that "The judicial power shall extend to *all* cases . . . arising under this Constitution." Rather than carve out an exception from this all-encompassing grant, I would suggest an accommodation, to read the "sole power to *try* all impeachments" as a grant of trial jurisdiction, for there is good reason to conclude that in 1787 the word "try" connoted a trial rather than an appeal.[283] Thereby effect would be given both to the Senate's

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[278] *Id.* at 313, 314. Nathanson, *supra* note 278, at 337, says that *United States v. Lovett* "in one sense . . . was a protection of the executive power over personnel against unwarranted intrusions by Congress." *See also* 328 U.S. at 312. The Court found no "need" to decide whether the statute was an "unconstitutional encroachment on executive power. . . ." *Id.* at 307.

In Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952), the President had directed the Secretary of Commerce to seize and operate most of the nation's steel mills on the ground that a strike called by the steel union would jeopardize the continued production of steel, which was indispensable to the national defense. The seizure was held invalid because Congress had "refused to adopt that method of settling labor disputes." *Id.* at 586, 602, 603, 657, and because, in the words of Justice Jackson (concurring), the President "invaded the jurisdiction of Congress." *Id.* at 660.

[279] 80 U.S. (13 Wall) 128, 145, 148 (1871).

[280] R. Jackson, The Struggle for Judicial Supremacy (1941). Justice Frankfurter said that "The judiciary may, as this case proves, have to intervene in determining where the authority lies as between the democratic forces in our scheme of government," i.e. between Congress and the President. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 597 (1952) (concurring).

[281] 369 U.S. at 217, 230. *Compare* with text accompanying note 278 *supra*.

[282] Pacific States Tel. & Tel. Co. v. Oregon, 223 U.S. 118, 150 (1912).

[283] The related word "trial" was defined by Blackstone as "the examination of matters of fact in issue," 3 Blackstone, *supra* note 11, at 330. Probably this was too narrow, for it had earlier been deemed to include the trial of issues of law. J. Rastall, *Trial* in Les Termes de la Ley (London, ed 1742). But that it was thought of as the initial determination appears from Dr. Johnson's Dictionary of the English Language: "*Trial* is used in law for the examination of all causes. . . . the trial is the issue, which is tried upon the indictment. . . ." The affinity between "tried (try) and "trial" is woven through the old examples cited under "trial" and "try" in the Oxford English Dictionary.

True, Gouverneur Morris stated that the Supreme Court "was to try the President after the trial of the impeachment. 2 Farrand, *supra* note 108, at 500, but this was an uninformed layman's loose use of legal terms, for the Court would not try the criminal charges but only hear an appeal therefrom. Hamilton, explaining the choice of the Senate as tribunal, also said "Would it be proper that the person who disposed of his fame . . . in one [impeachment] trial, should, in another trial, for the same offense, be also the disposers of

power "to try" and to the Court's appellate jurisdiction under "all cases . . . arising under this Constitution," *i.e.* questions of law, of constitutionality, as distinguished from questions of fact settled by the trier of the facts.[284] Such an accommodation harmonizes with the *Powell* holding that the article I, § 5(1) provision "Each House shall be the *Judge* of the . . . Qualifications of its own Members" did not bar inquiry into action in excess of jurisdiction. Surely the power to "try" is not more comprehensive or final than the power to "judge";[285] nor is protection of the other branches from wrongful Congressional onslaughts more intrusive than review of the "qualifications of [the House's] own Members."

Perhaps the most formidable argument against judicial review may be based on the fact that the trial of impeachments was originally entrusted to the Supreme Court but was at length transferred to the Senate over the objectives of Charles Pinckney and Madison.[286] Gouverneur Morris explained that the reason for the change was that the Supreme Court "was to try the President after the trial of the impeachment."[287] At a later point, he added, "no other tribunal than the Senate could be trusted. The Supreme Court were too few in number and might be warped or corrupted. . . ."[288] So too, Roger Sherman "regarded the Supreme Court as improper to try the President because the judges would be appointed by him."[289] These views were expanded by Hamilton in No. 65 of The Federalist. He emphasized that whereas the Senate would be "unawed" by the fact that the House lodged charges, it was doubtful whether the Supreme Court would be "endowed with so evident a portion of fortitude" to execute "so difficult a task."[290] But he himself later explained in Federalist No. 78 that judicial tenure was made secure in order that the courts would have the "fortitude" to set aside unconstitutional statutes enacted by *both* Houses and endorsed by the President.[291] Such decisions would engender no little political excitement. It was the part of wisdom to shield the Court from the heat of a trial crackling with political lightning; but the trial by the Senate would draw much of the lightning; and as the lawyers among the Founders knew from their own law practice, appellate tribunals generally do not operate in a super-heated atmosphere.

This is not to say that the prospect of reviewing an impeachment as passion-laden as that of President Andrew Johnson might not

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his life and his fortune." The Federalist, *supra* note 2, No. 65, at 426. Hamilton was too practiced a lawyer to confuse a trial and an appeal, and one may deduce that he was employing short-hand for the quick grasp by laymen, rather than attempting to alter the accepted meaning of the term "try."

[284] As Elbridge Gerry said in the First Congress, "Why should we construe any part of the Constitution in such a manner as to destroy its essential principles when a more consonant construction can be obtained? 1 Ann. Cong., *supra* note 130, at 473.

[285] In Powell v. McCormack, the House analogized its exclusion power to the power "to try all impeachments," and characterized both as "explicit grants of 'judicial power' to the Congress [which] constitute specific exceptions" to the article III grant of "judicial power" to the courts. 395 U.S. at 513.

[286] 1 Farrand, *supra* note 108, at 22; 2 *id.* at 186, 493, 547. For the Madison objection, see *id.* at 551, 612. Edmund Randolph also objected. *Id.* at 563.

Charles Pinckney warned the Convention that the two Houses would combine against the president "under the influence of heat and faction," 2 *id.* at 551, a prophecy later realized in the impeachment of Andrew Johnson.

[287] *Id.* at 500.

[288] *Id.* at 551. But compare Morris' remarks note 308 *infra*.

[289] 2 Farrand, *supra* note 108, 551.

[290] The Federalist, *supra* note 2, No. 65, at 425.

[291] *Id.* No. 78, at 507–09. This was a main objective of judicial independence, for there had been pre-1787 threats of impeachment against state judges who had declared statutes unconstitutional. See Congress v. Court, *supra* note 2, at 42–43, 117–19.

give the Court pause. At that point the prestige of the Court, badly tarnished by the *Dred Scott* decision, was at its nadir,[292] and any attempt at judicial intervention might well have invited harsh reprisals by the inflamed Reconstruction Congress. But in the intervening century the Court has been restored to its high position in the regard and loyalty of the American people—witness the reaction to President Franklin Roosevelt's "Court-Packing Plan" notwithstanding popular discontent with the Court's anti-New Deal decisions[293]—and vindictive reprisals by the Congress would be almost unthinkable. If there be indeed power to review impeachments in excess of jurisdiction, we may expect of the Court the fortitude exhibited by the aged Chief Justice Taney when Lincoln's suspension of habeas corpus was brought before him at the outbreak of the Civil War.[294] Then too, the far more frequent impeachments of lesser figures, e.g. district judges, would be unlikely to whip up a storm of such dimensions as might a direct confrontation between President and Congress. If we are to test judicial review by practical considerations, let the focus be not on the solitary Johnson impeachment but on the humdrum impeachments of small-fry district judges, the usual fare. At best such considerations are prudential, a counsel of judicial self-restraint rather than a denial of jurisdiction to declare that Constitutional bounds have been transgressed.

Another Hamilton argument drawn from Morris was that it would be improper for one and the same tribunal to hear both the impeachment and the criminal prosecution.[295] Historically, however, the House of Lords tried both issues, i.e. removal and criminal punishment, in the same proceeding, whereas the Supreme Court would hear appeals on two different records of trials by two different triers of fact, the Senate and a jury, attended by all the limitations that surround such review. For me, the Hamilton arguments have an air of *post hoc* rationalization. A preference for the Senate based upon the Sherman-Morris fear of judicial corruptibility or Hamilton's fear that the Court would lack fortitude is hardly reconcilable with representations made to secure judicial tenure or the wide-spread confidence in the judiciary as contrasted with pervasive distrust of Congress.

Whatever the effect of the Morris-Sherman-Hamilton remarks, their force seems to me counteracted by relevant representations made in the Ratification Conventions; and as Jefferson and Madison emphasized, the meaning of the Constitution is to be sought in the explanations made to those who adopted it.[296] There the fear of

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[292] The "grave injury that the Court sustained through its decision has been universally recognized. Its action was a public calamity. . . ." The "widespread and bitter attacks upon the judges who joined in the decision undermined confidence in the Court." C. Hughes, The Supreme Court of the United States 50 (1928).

[293] See Congress v. Court, *supra* note 2, at 291–92.

[294] A military officer seized a citizen upon "vague charges" and conveyed his prisoner to Fort McHenry. The commanding officer rejected service of a writ of habeas corpus and stated that the President had authorized him to suspend the writ at his discretion. Taney held that only Congress could suspend the writ, and stated, "my duty was too plain to be mistaken. I have exercised all the power which the constitution and laws confer upon me, but that power has been resisted by a force too strong for me to overcome." Ex parte Merryman, 17 F. Cas. 151, 153 (No. 9,487) (C. Ct. Md. 1861).

[295] The Federalist, *supra* note 2, No. 65, at 426.

[296] For Madison, the meaning of the Constitution was to be looked for "in the State Conventions which accepted and ratified the Constitution," quoted in C. Warren, Congress, the Constitution and the Supreme Court 67 n. (1925). As President, Jefferson declared that he read the Constitution in accordance with the "meaning contemplated *by the plain understanding of the people at the time of its adoption*—a meaning to be found in the explanation of those who advocated it." Quoted in 4 Elliot, supra note 5.

Congressional excesses found its sharpest expression, and proponents of adoption repeatedly assured the Ratifiers that Congress was "fenced" about with "limits," that judicial review would confine Congress within bounds.[297] To be sure, no express mention of judicial review was made with respect to impeachment, but the same may be said of other equally important functions. "To what quarter," asked John Marshall in the Virginia Convention, "will you look for protection from infringement on the constitution, if . . . not . . . to the judiciary? There is no other body that can afford such protection." [298] Such remarks were made by others in the Virginia and other Conventions.[299] It was never intended that Congress should be the final judge of the boundaries of its own powers.[300] Not an inkling is to be found in the Records of the Ratification Conventions that the area of impeachment was to constitute an exception, that in this area Congress was left free to roam at will. To the contrary, when Archibald Maclaine sought in the North Carolina Convention, by construction of the impeachment power, to allay certain fears expressed by Timothy Bloodworth, Bloodworth commented, "I do not distrust him, but I distrust them [Congress]. I wish to leave no latitude of construction." And Joseph Taylor, speaking to Congress' power to impeach, stated that the Senators are "one of the branches of power [i.e., Congress] which we dread under this Constitution." [301] So intense was such distrust that North Carolina rejected the Constitution notwithstanding it had been ratified by ten States.[302] In no Convention was a claim of illimitable power made with respect to any function of Congress. Astonishment would have greeted a claim that the structure so carefully reared upon the separation of powers could be shaken to bits whenever Congress chose to resort to an unlimited power of impeachment. To the contrary, there was a constant drumfire of warnings against Congressional oppression.[303] Bearing in mind that ratification was touch and go,[304] I daresay that had such claims been made ratification would have foundered.[305]

Although impeachment was chiefly designed to check Executive abuses and oppressions [306] there was no thought of delivering either the President or the judiciary to the unbounded discretion of Con-

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at 446. For Madison, *see also* 9 Writings of James Madison 191, 372 (G. Hunt ed. 1900–10), and 3 Farrand, *supra* note 108, at 518, letter of December, 1831. For Jefferson, *see also* 4 *id.* at 534.

[297] The citations are collected in Congress v. Court, *supra* note 2, at 12–16, 124–29, 131–34, 136–40.

[298] 3 Elliot, *supra* note 5, at 555–54.

[299] *See* note 297 *supra*.

[300] After his remarks in Federalist, *supra* note 2, No. 65, Hamilton himself stated in No. 78, at 506, that it

> cannot be the natural presumption" that the "legislative body are themselves the constitutional judges of their own powers. . . . It is far more rational to suppose that the courts were designed . . . to keep the [legislature] within the limits assigned to their authority.

See also Congress v. Court, *supra* note 2, at 136–37.

[301] 4 Elliot, *supra* note 5, at 50, 83.

[302] Congress v. Court, *supra* note 2, at 131–32.

[303] *See* note 297 *supra*.

[304] There were narrow majorities in Virginia, Massachusetts, New Hampshire and New York. Congress v. Court, *supra* note 2, at 17–18.

[305] As Alexander White of Virginia stated in the First Congress during the course of the "removal" debate, insisting that the federal government must adhere to the limits described in the Constitution:

> This was the ground on which the friends of the Government supported the Constitution . . . it could not have been supported on any other. If this principle had not been successfully maintained by its advocates in the convention of the State from which I came, the Constitution could never have been ratified.

1 Ann. Cong., *supra* note 130, at 515.

[306] *Cf.* text accompanying notes 167–71 *supra*; *see also* 2 Farrand, *supra* note 108, at 64–69; *cf.* 1 *id.* at 78, 85, 91, 230, 247; 2 *id.* at 61, 110, 172, 185–86, 495, 499.

gress. This is attested by the Framers' rejection of the unfettered removal by Address,[307] by their rejection of "maladministration" because that was "so vague" as to leave tenure "at the pleasure" of the Senate,[308] and by substitution of "high crimes and misdemeanors: with knowledge that it had a "technical," "limited meaning." Nothing less than a limited power of impeachment would have satisfied the opposition who regarded impeachment as a threat to Presidential independence.[309] Impeachment, be it remembered, was a carefully limited exception to the separation of powers,[310] tolerable only if exercised strictly within bounds. "Limits" on Congress determined by Congress itself would be no limits at all.[311]

To this it may be answered that just as the ultimate guarantee that the judiciary will not step out of bounds is the self-restraint of the Court, so the Senate too must be trusted to exercise self-restraint. It is one thing, however, to expect self-restraint of judges schooled to disciplined, dispassionate judgment, and not subject to the gusts of faction, and something else again to expect self-restraint of a body predominantly political in character and which both in England and in the United States has been unable to shake off political considerations when sitting in judgment.[312] Self-restraint could be relied upon with respect to the judiciary because, in the words of Hamilton, they "have neither FORCE nor WILL, but merely judgment," and were "therefore the least dangerous to the political rights of the Constitution."[313] But the vast power to prescribe the rules under which we live, to initiate action, as is the case even in impeachment, cast Congress in a very different role, one of which there was pervasive distrust. The fact is that the Ratifiers feared Congress and trusted judges. Said Madison in the Virginia Convention, "Were I to select a power which might be given with confidence it would be the judicial power,"[314] a sentiment echoed by others in the several conventions.[315] The courts, said Hamilton in the Federalist, were "the bulwarks of a limited constitution against legislative encroachments,"[316] a statement anticipated

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[307] 2 Farrand, *supra* note 103 at 428, 429; *see also* Berger, *Impeachment of Judges and "Good Behavior" Tenure*, 79 Yale L.J. 1475, 1500–02 (1970).

[308] *See* text accompanying note 158 *supra*. In a discussion of the "removal" power in the First Congress, William Smith emphasized that "It would be improper that [judges] should depend on this House for the degree of permanency which is essential to secure the integrity of judges." 1 Ann. Cong., *supra* note 130, at 508. *See also* John Lawrence, *id.* at 377. Judge, said James Wilson, could not be "made to depend on every gust of fashion which might prevail in the two branches of our Government." 2 Farrand 429. *Cf.* The Federalist, *supra* note 2, at 509; Congress v. Court, *supra* note 2, at 117–119. George Mason "opposed decidedly making the Executive the mere creatures of the Legislature as a violation of the fundamental principle of good government." 1 Farrand 86. In the Convention, Gouverneur Morris at first feared that impeachment "will render the Executive dependent on those who are to impeach." 2 Farrand 65; and when he was at last convinced of the necessity of impeachment, he stated that in making the President amenable to justice, "we should take care to provide some mode that will not make him dependent on the legislature." *Id.* at 68. *See also* Charles Pinckney, *id.* at 66; Rufus King, *id.* at 67; Edmund Randolph, *id.*; Madison, *id.* at 551.

[309] *See* note 308 *supra*.

[310] In the First Congress Elias Boudinot stated that impeachment was one of the "exceptions to a principle," *i.e.* to the separation of powers. 1 Ann. Cong., *supra* note 130, at 527. *Compare* this *with* George Mason, note 308 *supra*; *see also* Michael Stone, 1 Ann. Cong., *supra* note 130, at 564–65.

[311] *See* note 300 *supra*.

[312] *See* text accompanying notes 189–211 *supra*.

[313] The Federalist, *supra* note 2, No. 78, at 505.

[314] 3 Elliot, *supra* note 5, 535.

[315] Patrick Henry, who wished to "see Congressional oppression crushed in embryo," declared it "the highest encomium of this country, that the acts of the legislature, if unconstitutional are liable to be opposed by the judiciary." 4 *id.* at 546, 325. *See also* the remarks of John Marshall, text accompanying note 298 *supra*; note 297 *supra*; and Congress v. Court, *supra* note 2, at 186–88.

[316] The Federalist, *supra* note 2, No. 78, at 508.

by Jefferson.[317] In recommending adoption of the Bill of Rights, Madison stated in the First Congress that the courts would be "an impenetrable bulwark against every assumption of power in the Legislative and Executive."[318]

Constitutional limits, as *Powell v. McCormack* again reminds us, are subject to judicial enforcement; and I would urge that judicial review of impeachments is required to protect the other branches from Congress' arbitrary will. It is hardly likely that the Framers, so devoted to "checks and balances," who so painstakingly piled one check of Congress on another,[319] would reject a crucial check at the nerve center of the separation of powers. They scarcely contemplated that their wise precautions must crumble when Congress dons its "judicial" hat, that then Congress would be free to shake the other branches to their very foundations. Before we swallow such consequences, the intention of the Framers to insulate Congressional transgressions of the "limits" they imposed upon impeachment should be proved, not casually assumed. The Constitution, said the Supreme Court, condemns "all arbitrary exercise of power"; [320] "there is no place in our constitutional system for the exercise of arbitrary power." [321] The "sole power to try" affords no more exemption from that doctrine than does the sole power to legislate which, it needs no citation, does not extend to arbitrary acts.

Finally, assume that the "sole power to try" conferred insulation from review, it must yield to the subsequent Fifth Amendment provision that "No person" shall "be deprived of life, liberty, or property without due process of law. . . ." If the Constitution does in fact place limits upon the power of impeachment, action beyond those limits is without "due process of law" in its primal sense:

> when the great barons of England wrung from King John . . . the concession that neither their lives nor their property should be disposed of by the crown, except as provided by the law of the land, they meant by "law of the land" the ancient and customary laws of the English people. . . .[322]

In our system the place of the "ancient and customary laws" was taken by the Constitution; and injurious action not authorized by the Constitution is therefore contrary to the "law of the land" and is forbidden by the due process clause. "Due process" has been epitomized by the Court as the "protection of the individual against arbitrary action." [323] One who enters government service does not cease to be a "person" within the fifth amendment; and an impeachment for offenses outside the Constitutional authorization would deny him the protection afforded by "due process." It would be passing strange to conclude that a citizen may invoke the judicial "bulwark" against a $20 fine,[324] but not against an unconstitutional impeachment, re-

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[317] In 1787, when Jefferson welcomed the "check" which a Bill of Rights "puts in the hands of the judiciary," he added, "This is a body, which if rendered independent . . . merits confidence for their learning and integrity." 5 The Writings of Thomas Jefferson 81 (P. Ford ed. 1892–1899).

[318] 1 Ann. Cong., *supra* note 130, at 439.

[319] *See* Congress v. Court, *supra* note 2, at 20–21.

[320] ICC v. Louisville & N.R.R., 227 U.S. 88, 91 (1913).

[321] Garfield v. United States *ex rel* Goldsby, 211 U.S. 249, 262, *supra* note 2, (1908); Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886); and *see* Berger, *Administrative Arbitrariness: A Synthesis*, 78 Yale L.J. 965, 980–81 (1969).

[322] Davidson v. New Orleans, 96 U.S. 97, 102 (1877).

[323] Ohio Bell Tel. Co. v. Public Serv. Comm'n., 301 U.S. 292, 302 (1937).

[324] Frank v. Maryland, 359 U.S. 360 (1959).

moval from and perpetual disqualification to hold federal office. Here protection of the individual coincides with preservation of the separation of powers, and the interests of the assaulted branch, as Judge George Wythe perceived, are one with the interest of "the whole community." Those interests counsel us to give full scope to the "strong American bias in favor of a judicial determination of constitutional and legal issues,"[325] and to deny insulation from review of impeachments in defiance of Constitutional bounds.

IV. CONCLUSION

In England impeachment for "high crimes and misdemeanors" did not require proof of an indictable crime, although the penalties of death or imprisonment made impeachments "criminal," but this was under the "course of Parliament" as distinguished from the ordinary statutory or common law crimes. The Framers, however, completely separated the impeachment-removal proceedings from a subsequent indictment and criminal trial. Thereby they indicated that impeachment was not to be a criminal proceeding, a view that the double jeopardy amendment and the sixth amendment provision for trial by jury "in all criminal prosecutions" caution us to adopt. History, in short, does not require indictability as the basis for impeachment.

The Framers were almost exclusively concerned with fashioning "a bridle" upon the Executive; and fear of "encroachments of the executive"[326] led the Framers to swallow the possibility that factional strife would continue to color impeachment.[327] But the Framers had no intention of delivering the President to the untrammeled will of Congress; they confined impeachment within the technical, "limited" terms of the common law—"treason, bribery, or other high crimes and misdemeanors." Although the removal of judges was decidedly peripheral to concern with executive encroachments, being governed by the same language it is subject to the same limits. Finally, Constitutional limits, as *Powell v. McCormack* reminds us, are subject to judicial enforcement, the more so in the case of impeachment, because the other branches can not be left to the arbitrary will of the Congress.

Whether or not judicial review is available for a conviction on impeachment, Congress should avoid possible Constitutional confrontations. And a decent regard for the design of the Founders should constrain the Senate to disclaim unlimited power,[328] and to act within the confines contemplated by the Founders. When Congress impeaches and convicts in disregard of those bounds, it is guilty of an abuse of its power which posterity, if not the Court, will condemn. No member of Congress should lightly invite a judgment such as branded the impeachment of President Andrew Johnson as "one of the most disgraceful episodes in our history."[329] Congress should have before it the admonition of Edmund Burke with respect to a mooted impeachment: "We stand in a position very honorable to ourselves

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[325] Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 Harv. L. Rev. 1265, 1302 (1961).

[326] The Federalist, *supra* note 2, at 425, 430.

[327] Charles Pinckney reminded the Convention that the two Houses would combine against the President "under the influence of heat and faction." 2 Farrand, *supra* note 108, at 551, as the impeachment of President Andrew Johnson later demonstrated.

[328] *See* note 2 *supra*.

[329] S. Morrison, The Oxford History of the American People 721 (1965).

and very useful to our country, if we do not abuse the trust that is placed in us." [330] Let impeachment be, not a mere means of venting party spleen, but rather, as it was for Burke, "that great guardian of the purity of the Constitution." [331]

APPENDIX

Indictability of Judges

In order to sustain his argument in the Chase impeachment proceedings that impeachment demanded an indictable crime, Luther Martin, leading counsel for Chase, maintained that judges were indictable for violation of their official duties. He dismissed Floyd v. Barker, text accompanying note 46 *supra*, out of hand because "the reasons there assigned, however correct they might be as to the judges in England, can have no possible application to the judges of the United States." 14 Ann. Cong. 434. Nevertheless, American law accepted Coke; in 1810, five years after Martin spoke, Chancellor Kent held that the Coke doctrine "has a deep root in the common law"; and took note of Coke's statement that no judge may be questioned for a judgment given, "either at the suit of a party, or of the king." Yates v. Lansing, 5 Johns. 282, 291, 293. In 1867, Lawrence, who sought to lay a predicate for the impending Andrew Johnson impeachment, wrote, "It is a rule of the common law that judges of record are freed from all presentations whatever except in Parliament, where they may be punished for anything done by them in such courts as judges." Lawrence, *supra* note 15, at 664. Bradley v. Fisher, 12 Wall. (80 U.S.) 335, 350 (1871). It became accepted doctrine that judges enjoyed immunity from *private* suits for actions in their judicial capacity.

But Martin leaned more heavily on Viner's statement that "A justice cannot rase a record, nor imbecile [embezzle?] it." 14 Ann. Conn. 435. Viner cited Brooke's Coronę, which in turn cited 2 Rich. III, 9, 10. No such statute appears in the Statutes of the Realm or Statutes at Large; but a cognate statute is 8 Rich. II, cap. 4: if any judge is convicted "of the false entering of pleas, rasing [erasure] of Rolls and changing of verdicts . . . before the King and his Council . . . he shall be punished by Fine and Ransom [a treble fine, Jenkins 162, 145 E.R. 104 (undated)]." This was a statute of 1385, at a time when great ministers and the Justices were tried before the "King and his Council," so that one may question whether the statute contemplated an indictment. *See* text accompanying notes 22–26 *supra*.

In Martin's quotation, Viner made two further points. First, a judge cannot "file an indictment which is not found." Apparently this refers to Rex v. March, 3 Mod. 66, 87 E 79, Rep. 42 (1603), wherein a Mayor who was also coroner and seemingly acted in a quasi-judicial capacity, had inserted additional names in an indictment after it had been found, and was therefore himself held guilty upon a subsequent information. This was punishment of a lesser judge, who was treated differently from a Justice of the higher courts. *See* text accompanying notes 55–59 *supra*. Second, Martin quoted Viner's statement that a judge cannot "give judgment of death where the law does not give it." Jenkins relates that this happened in a manor court, again a lesser court, and that the Star Chamber decided that the judge should "be fined and imprisoned and lose his office." Jenkins 162, 145 E.R. 104 (undated). Indictments were not employed by the Star Chamber, *see* E. Jenks, A Short History of English Law 147 (2d ed. 1920).

Martin (14 Ann. Cong. 435) also quoted 1 Hawkins, ch. 69 [actually ch. 67] § 6, to the effect that bribery in a judge is "punishable, not only with forfeiture of the offender's office of justice, but also with fine and imprisonment." Hawkins' marginal citation to 1 Rushworth's Collections at 131, deals with the impeachment of Lord Bacon. Indeed, Hawkins himself stated that the law "free the Judges of all Courts of Record from all Prosecutions whatsoever, except in the Parliament, for anything done by them openly in such Court as Judges." Id. ch. 72, § 6.

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[330] Quoted in Topp, *supra* note 160, at 194.

[331] 1 E. Burke, The Works of Edmund Burke 397 (Boston ed. 1839) (emphasis in original).

"The Scope of the Impeachment Power", Paul S. Fenton

The Scope of the Impeachment Power*

Paul S. Fenton**

INTRODUCTION

Article II, section 4 of the Federal Constitution provides that "[t]he 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." Since the adoption of the Constitution, congressional investigation of possible impeachable misconduct has been ordered in sixty-five cases, of which fifty-three involved federal judges.[1] As a result of twelve of these investigations—nine concerning federal judges—articles of impeachment were voted by the House.[2] Seven of the twelve respondents in these proceedings were acquitted,[3] one resigned just before the commencement of his trial by the Senate,[4] and four—all of whom were federal judges—were convicted by the Senate.[5]

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**Minority Counsel, Committee on the Judiciary, United States House of Representatives; Member, New York and District of Columbia Bars. The views expressed in this article are those of the author and do not purport to represent those of the Committee on the Judiciary or any of its members.

[1] J. Borkin, The Corrupt Judge 219–58 (1962); 3 Hinds, Precedents of the House of Representatives of the United States 644–1034 (1907) [hereinafter cited as Hinds]; 6 Cannon's Precedents of the House of Representatives of the United States 684–795 [hereinafter cited as Cannon's]; sources cited in the Appendix. One case not mentioned in any of these sources is that of Associate Justice William O. Douglas, who was attacked in 1953 for issuing a stay of execution in connection with the Rosenberg espionage trial; the proceedings never developed beyond a day of hearings held by the House Judiciary Committee.

[2] The twelve are William Blount, John Pickering, Samuel Chase, James Peck, West Humphreys, Andrew Johnson, William Belknap, Charles Swayne, Robert Archbald, George English, Harold Louderback and Halsted Ritter. All but Blount, Johnson and Belknap were federal judges. The charges involved in these twelve cases and their disposition are set out in the Appendix.

A thirteenth official, Judge Mark Delahay, was impeached in 1873 by the House, but the case was discontinued before articles of impeachment could be drawn. Hinds, supra note 1, at 1008–11.

Those cases not resulting in impeachment being voted by the House were disposed of in a variety of ways. In a substantial number of cases, the subject of the inquiry resigned, which invariably caused the proceedings to be discontinued. In the majority of the remaining cases the investigatory committee (which, with a single exception since it was established in 1813, has been the House Judiciary Committee or a subcommittee thereof in the case of charges against a federal judge) dropped the investigation without filing a report or filed a report recommending against impeachment. There have also been at least seven cases where the majority report stated that the facts did not warrant impeachment but censured the individual concerned or condemned his conduct; in three of these seven cases the minority report recommended impeachment. The investigatory committee recommended impeachment on twenty occasions. There was one occasion where the House voted not to impeach notwithstanding a recommendation to do so by the committee, and only one instance—that of Judge Louderback in 1933 (who was ultimately acquitted by the Senate)—where the House voted an impeachment in the face of a contrary recommendation by the majority report of the investigatory committee. *See* sources cited in note 1 *supra*.

[3] Blount, Chase, Peck, Johnson, Belknap, Swayne and Louderback.

[4] Judge English.

[5] Pickering, Humphreys, Archbald and Ritter.

Of central concern in each of these controversies has been the issue of what constitutes an impeachable offense. Since the high court of impeachment—the Senate—issues no written opinions to accompany its decisions,[6] the standard of impeachable conduct has never been definitively resolved. This article will focus on the standards of impeachable conduct as reflected in the phrase "high crimes and misdemeanors," with attention to the historical background of the law of impeachment, in order to construe the sweep of this controversial clause in our Constitution.

THE HISTORICAL STANDARD

Analysis of the scope of the impeachment power has often begun with the theory that since the framers of the Constitution adopted the phrase "high crimes and misdemeanors" from the English practice, its definition was intended to be taken from the law of England at the time of adoption of the Constitution.[7] By this reasoning, no conduct would be impeachable under the Constitution unless it was impeachable in England in 1787.

Although the English practice is undoubtedly of substantial value in construing the impeachment clause, to accept this precedent as an inflexible and unchanging standard would be a grave error. Contemporary constitutional analysis correctly calls for a flexible approach to interpretation. A constitution "is necessarily adopted for the future, perhaps a remote future. . . . and those who adopt it cannot be presumed to have thought it was to be applied only to the then existing conditions, rather than to similar conditions certain to rise . . ."[8] Just as "the things for which people could be impeached in Great Britain shifted and changed with the shifting and changing judgment and legislation of the times,"[9] so the definition of an impeachable offense has not remained constant in this country. We turn, then, to the various factors that have dominated the discussion of impeachment standards.

UNDESIRABLE POLITICAL VIEWS

The impeachment by the House and subsequent acquittal by the Senate of Justice Samuel Chase in 1804–05 has been widely construed as a restraint on the use of the impeachment process to oust a judge or justice whose political views or judicial opinions are not to the liking of the political party in power.

The prosecution was based on the theory that "impeachment is nothing more than an inquiry by the two Houses of Congress whether the office of a public man might not be better filled by another" and that

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[6] On occasion, individual senators will file opinions in the Congressional Record after a conviction, as was done by several senators in the Ritter case. These opinions are unofficial, however; there is never a formal opinion which speaks for the court of impeachment itself.

[7] "Whatever crimes and misdemeanors were the subjects of impeachment in England prior to the adoption of our Constitution, and as understood by its framers, are, therefore, subjects of impeachment before the Senate of the United States . . ." Brief filed by Mr. Manager Henry W. Palmer on February 23, 1905, in the Swayne impeachment, 3 Hinds, supra note 1, at 340; accord, Brief for respondent in the Swayne impeachment, filed February 22, 1905, cited in id. at 328–25. But cf. id. at 344–45.

[8] Simpson, Federal Impeachments, 64 U. Pa. L. Rev. 651, 677 (1916).

[9] Final argument on February 25, 1905, of Mr. Manager David A. De Armond in the Swayne impeachment, 3 Hinds, supra note 1, at 358.

removal by impeachment was nothing more than a declaration by Congress to this effect: You hold dangerous opinions, and if you are suffered to carry them into effect you will work the destruction of the nation. We want your offices, for the purpose of giving them to men who will fill them better.[10]

The defense, on the other hand, contended that "in order to sustain an impeachment, an offense must be proved upon the respondent which would support an indictment."[11]

The Senate's acquittal of Justice Chase in effect disavowed the prosecution's theory of impeachment, despite the ambiguous general verdict on both the facts and the law. The Republican partisans of Jefferson were forced to abandon their attempt at wholesale removal of Federalist judges through the impeachment process.

At the time of the Fortas crisis in 1969, Senator Sam Ervin, commenting on the Chase impeachment, noted that

> [t]he precedent established was that judges could be impeached only for violations of law, and not for their political views or for decisions they handed down while on the bench. This precedent is a foundation stone of the independence of the Supreme Court. While the Court is not and never should be immune from criticism for its decisions, it should remain safe from retribution based upon partisan politics.[12]

MISBEHAVIOR

Since federal judges hold office "during good behavior,"[13] it has been suggested that "misbehavior" properly defines the bounds of "high crimes and misdemeanors," or even that lack of good behavior constitutes an independent standard for impeachment, apart from whatever standard may be dictated by the impeachment clause.[14] This position is bottomed, to some extent, on the much disputed premise that impeachment is the sole method of removing federal judges from office.[15] Were this the case, then the only way to give

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[10] Senator Giles, as recorded in the diary of John Quincy Adams, 1 Memoirs of John Quincy Adams 321–22 (1874).

[11] Joseph Hopkinson, speaking in oral argument before the Senate, 11 American State Trials 306 (J. Lawson ed. 1919). See Lillich, The Chase Impeachment, 4 Am. J. Legal Hist. 49 (1960).

[12] 115 Cong. Rec. 12,208 (1969). Partisanship has, nonetheless, played a considerable role in many subsequent impeachment proceedings. For a discussion of partisanship in the more recent impeachments see Ten Broek, *Partisan Politics and Federal Judgeship Impeachment since 1903*, 23 Minn. L. Rev. 185 (1939).

[13] U.S. Const. art. III, § 1.

[14] *See, e.g.*, final argument of Mr. Manager George W. Norris on January 9, 1913, in the Archbald impeachment, 6 Cannon's *supra* note 1, at 649–50; Memorandum Opinions of Senators Borah, LaFollette, Frazier, Shipstead, Thomas and McAdoo in the Ritter impeachment, Proceedings of the United States Senate in the Trial of Impeachment of Halsted L. Ritter, S. Doc. No. 200, 74th Cong., 2d Sess. 644–47, 658 (1936) [hereinafter cited as Ritter Proceedings].

In its report recommending the impeachment of Judge English in 1926, the House Committee on the Judiciary concluded that the good behavior clause was to be accorded considerable weight:

> A civil officer may have behaved in public so as to bring disgrace upon himself and shame upon the country and he would continue to do this until his name became a public stench and yet might not be subject to indictment under any law of the United States, but he certainly could be impeached. Otherwise the public would in this and kindred cases be beyond the protection intended by the Constitution. When the Constitution says a judge shall hold office during good behavior it means that he shall not hold it when his behavior ceases to be good behavior.
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> H.R. Rep. No. 653, 69th Cong., 1st Sess. 10 (1926).

[15] The problems surrounding proposals for mandatory retirement of judges and justices, including the question of whether article III federal judges can constitutionally be involuntarily removed from office by means other than impeachment, will not be discussed here. There is, however, considerable literature on this subject. See *e.g.*, Chandler v. Judicial Council of the Tenth Circuit of the United States, 398 U.S.

meaning to the good behavior clause would be either to incorporate it into the impeachment clause or to elevate it to the status of a second means of impeachment.[16] It is argued, however, that the "good behavior" clause is more aptly described by its other appellation—the "judicial tenure" cause—on the theory that it does not constitute a standard for impeachability, but merely states that federal judges hold office for life unless removed under some other provision of the Constitution.

For a number of reasons the impeachment clause, rather than the good behavior clause, should control.[17] If lack of good behavior were the standard for impeachability of federal judges, presumably a different standard would have to apply to civil officers other than judges, since the good behavior clause applies only to article III judges. Secondly, under the English practice at the time the Constitution was adopted, "good behavior" referred not to grounds for removal, but rather to the concept of lifetime tenure. Finally, it can be argued that if the word "misdemeanor" includes misbehavior, there is no reason for the drafters to have constructed the "good behavior" clause, unless it be for a purpose other than setting an impeachment standard.

It is interesting to note that the articles in each of the eight impeachments through 1905 were styled Articles of Impeachment for "high crimes and misdemeanors."[18] During this period, it was apparently the feeling of the House of Representatives that the impeachment power lay solely within the impeachment clause. Subsequent to 1905, however, the House departed from this strict construction. In all of the four later impeachments the phrase "high crimes and misdemeanors" was removed from the introductory clause. Except for four articles in the Ritter case,[19] the word "misbehavior" was used in all of the individual articles of impeachment, sometimes with the phrase "high crimes and misdemeanors" or simply "misdemeanors." Presumably, the use of the term "misbehavior" indicates a reliance on the judicial tenure clause as an impeachment standard.

The phraseology of articles of impeachment, however, should be accorded little weight if the intent of the framers of the Constitution is clear. The proceedings of the Constitutional Convention do indicate an intention to limit the grounds for impeachment to those con-

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74 (1970); *Constitutionality of a Statutory Alternative to Impeachment*, 115 Cong. Rec. 14,912 (1969); Davis, *The Chandler Incident and Problems of Judicial Removal*, 19 Stan. L. Rev. 488 (1967); Kurland, *The Constitution and the Tenure of Federal Judges: Some Notes from History*, 36 U. Chi. L. Rev. 665 (1969); Shartel, *Federal Judges—Appointment, Supervision and Removal—Some Possibilities under the Constitution*, 28 Mich. L. Rev. 870 (1930); Stolz, *Disciplining Federal Judges: Is Impeachment Hopeless?*, 57 Calif. L. Rev. 659 (1969); Legislation, 20 Vand. L. Rev. 723 (1967).

[16] To say that the judicial tenure shall be limited to good behavior in one section of the Federal Constitution and then contend that the section of the Constitution immediately preceding that has destroyed its force and effect and has left the Federal Government without any machinery to . . . take jurisdiction of acts which constitute misbehavior but are not criminal, is to treat the words "during good behavior" as surplusage. Such an interpretation violates all rules of construction.

Final argument of Mr. Manager Paul Howland, January 9, 1913, in the Archbald impeachment, 6 Cannon's, *supra* note 1, at 642.

[17] *See* Simpson, *supra* note 8, at 806–08.

[18] *See* sources cited in the Appendix *infra*. In the case of Judge Peck, the term used was "high misdemeanors."

[19] Articles 3, 4, 5 & 6, *See* Appendix *infra*. Article 7, on which Judge Ritter was convicted, charged "misbehavior . . . and high crimes and misdemeanors in office." The articles on which Judge Archbald, the only other person impeached and convicted in the 20th century, was convicted—articles 1, 3, 4, 5 & 13—all charged "misbehavior in office" or "misbehavior as . . . judge," as well as either "high crimes and misdemeanors in office," or simply "misdemeanors in office." *See* Appendix *infra*.

tained in article II, section 4. On August 27, 1787, an amendment was offered to the "good behavior" clause[20] which sought to insert the proviso "that they [federal judges] may be removed by the Executive on the application [of] the Senate and House of Representatives."[21] Mr. Randolph opposed the motion "as weakening too much the independence of the Judges." Mr. Wilson commented that "[t]he Judges would be in a bad situation if made to depend on every gust of faction which might prevail in the two branches of our Government." By a vote of 7 to 1 (with 3 absent) the states voted to reject the amendment.[22] The delegates did, however, subsequently attach such a judicial removal provision to the impeachment clause, which had originally been drafted so as to apply only to the President. On September 8, 1787, the following was added to the impeachment clause: "The Vice-President and other Civil officers of the United States shall be removed from office on impeachment and conviction *as aforesaid*."[23]

The likelihood that the words "as aforesaid" indicate an intent to adopt for federal judges the same standard of impeachable offense as applies to the President is underscored by the fact that immediately prior to the adoption of this provision the Convention had debated the appropriate standard to be used in the impeachment clause and expressly rejected the vaguer term "maladministration" in favor of "high crimes and misdemeanors."[24] The standards of article II, section 4 were thus carried over from the original presidential impeachment provision, which had been extended to apply to all "other civil officers,"—clearly including judges. The Constitutional Convention, therefore, quite clearly rejected the dual standard of "misbehavior" for judges and "high crimes and misdemeanors" for other federal officials.

In short, both logic and history indicate that the judicial tenure clause relates only to the tenure of federal judges, negating the proposition that their term of office is limited to a term of years. The power of removal, together with the appropriate standard, are therefore contained solely in the impeachment clause.[25]

INDICTABLE OFFENSES

In the almost 200-year history of impeachments under the Constitution, the most closely debated legal issue has consistently been whether impeachment is limited to offenses indictable under the criminal law—or at least to offenses which constitute crimes—or whether the word "misdemeanors" in the impeachment clause extends

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[20] "The Judges of the Supreme Court, and of the Inferior Courts, shall hold their offices during good behavior." Art. XI, § 2, as reported by the Committee on Detail on August 6, 1787. 2 The Records of the Federal Convention of 1787, 186 (M. Farrand ed. 1911) [hereinafter cited as Farrand]. This clause was carried over unchanged into the final draft of the Constitution and now appears in article III, § 1.

[21] 2 Farrand, *supra* note 20, at 428.

[22] *Id.* at 429.

[23] *Id.* at 552 (emphasis added).

[24] *Id.* at 550.

[25] This is not to say that the proper standard is not lack of good behavior or misbehavior, or something on that order, but merely that if this is the standard it must be arrived at by construing the impeachment clause. If the result of such a construction turned out to be lack of good behavior, the similarity of such standard to the phraseology of the good behavior clause would be coincidental rather than causative. For a view directly to the contrary—that the relationship is causative rather than coincidental—see the statement of Mr. Manager George W. Norris in final argument on January 9, 1913, in the Archbald impeachment, 6 Cannon's, *supra* note 1, at 649–50.

to noncriminal misconduct as well. While the authorities are divided on this question, the majority clearly favors the broader definition.[26] That this conclusion is the better view follows from a logical analysis of the impeachment clause, the English precedents, the debates in the Constitutional Convention and the history of impeachments under the Constitution.

ANALYSIS OF THE IMPEACHMENT CLAUSE

If the phrase "high crimes and misdemeanors" is considered by itself, dissociated from any historical background and from all other clauses of the Constitution, the word "misdemeanors" cannot logically be limited to its meaning in the criminal law—that is, all crimes which do not amount to felonies.

Following the doctrine that each word in the Constitution must be given meaning and none can be discarded as superfluous,[27] a separate and independent meaning must be found for the term "misdemeanors," as distinguished from the term "crimes." Since "crimes" encompasses misdemeanors in the sense of non-felony criminal offenses,[28] the term "misdemeanors" must be construed to include noncriminal misconduct

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[26] That the Managers on the part of the House in the American impeachments have consistently urged the broad view and that counsel for respondents have argued that impeachable offenses be limited to crimes is not surprising. For example, the House Committee on the Judiciary, in its report recommending the impeachment of Judge English in 1926 concluded:

Although frequently debated, and the negative advocated by some high authorities, it is now, we believe, considered that impeachment is not confined alone to acts which are forbidden by the Constitution or Federal statutes. The better sustained and modern view is that the provision for impeachment in the Constitution applies not only to high crimes and misdemeanors as those words were understood at common law but also acts which are not defined as criminal and made subject to indictment, and also to those which affect the public welfare.

H.R. Rep. No. 653, 69th Cong., 1st Sess. 9–10 (1926).

With respect to more neutral observers, however, the list of authorities favoring the broad view is not unimpressive. One such authority states:

The cases . . . seem to establish that impeachment is not a mere mode of procedure for the punishment of indictable crimes; that the phrase "high crimes and misdemeanors" . . . includes not only crimes for which an indictment may be brought, but grave political offenses, corruptions, maladministration, or neglect of duty involving moral turpitude, arbitrary and oppressive conduct, and even gross improprieties, by judges and high officers of state, although such offenses be not of a character to render the offender liable to indictment either at common law or under any statute.

15 American and English Encyclopedia of Law 1067–68 (2d ed. 1900).

It is interesting to note that this authority defines impeachment to extend to "maladministration," which was expressly rejected by the Constitutional Convention.

2 Farrand, *supra* note 20, at 550.

[27] In expounding the Constitution of the United States, every word must have its due force, and appropriate meaning; for it is evident from the whole instrument, that no word was unnecessarily used or needlessly added . . . . No word in the instrument, therefore, can be rejected as superfluous and unmeaning.

Holmes v. Jennison, 39 U.S. (14 Pet.) 540, 570–71 (1840).

[28] That the word "crimes" includes misdemeanors in the criminal law sense is clear. Black's Law Dictionary 444 (4th ed. 1951) defines "crime" as a "positive or negative act in violation of penal law . . . . 'Crime' and 'misdemeanor,' properly speaking, are synonymous terms; though in common usage 'crime' is made to denote such offenses as are of a deeper and more atrocious dye."

To illustrate the intention of the Constitutional Convention with regard to the definition of "crime," one might examine article IV, § 2, of the Constitution, which provides: "A person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall on demand of the executive authority of the State from which he fled, be delivered up to be removed to the State having jurisdiction of the crime." The Supreme Court, construing this clause in Kentucky v. Dennison, 65 U.S. (24 How.) 66, 99 (1860), held that "[t]he word 'crime' of itself includes every offense, from the highest to the lowest in the grade of offenses, and includes what are called 'misdemeanors,' as well as treason and felony." *Accord, Ex parte* Reggel, 114 U.S. 642, 649–50 (1885).

It is interesting to note that an earlier version in the Constitutional Convention of the phrase "treason, felony or other crime" in article IV, § 2, took the form of "treason, felony or high misdemeanor." Art XV, Report of the Committee of Detail, Aug. 6, 1787, 2 Farrand, *supra* note 20, at 187–88. This supports the proposition that "crime" includes "misdemeanor." Yet it might also be cited to demonstrate, contrary to the argument made in the text, that since "high misdemeanor" in this early draft of article IV, § 2, refers to criminal conduct, it also denotes criminal conduct when it appears in the impeachment clause, article II, § 4.

if it is to have any independent meaning. As one commentator has put it, "the word 'crimes' was used to negative the thought that the only criminal offenses for which an impeachment would lie were 'treason' and 'bribery'; and the word 'misdemeanors' was used to negate the thought that only 'crimes' were impeachable." [29]

It is interesting to note that Congress did not make bribery a federal crime until three years after the Constitution was drafted in 1787.[30] If bribery was not a federal crime at the time of the drafting of the Constitution, then presumably "*other* high crimes and misdemeanors" would include offenses which are not federal crimes.

Bribery was, however, a crime in the various states, either by statute or common law. It might therefore be argued that "other high crimes and misdemeanors" refers to offenses against the criminal law of either the federal government or the states. On the other hand, it could be argued that it is not in keeping with the structure of our federal system, as embodied in the supremacy clause and in the Constitution generally, to allow the scope of the impeachment power to be delineated by the enactments of the various state legislatures.

ENGLISH PRECEDENTS

The phrase "high crimes and misdemeanors" was taken directly from the English parliamentary common law, where it had become surrounded by a substantial body of interpretive case law. Since this clause is a term of art, the normal canons of construction require that we look to its source in England for guidance as to its application under our Constitution.[31]

An examination of the history of impeachment in England reveals that a significant number of impeachments were based on noncriminal misconduct, and that in some cases the charges were essentially political in nature:

> Thus, persons have been impeached for giving bad counsel to the king, advising a prejudicial peace, enticing the king to act against the advice of Parliament, purchasing offices, giving medicine to the king without the advice of physicians, preventing other persons from giving counsel to the king except in their presence . . . Thus, lord chancellors and judges and other magistrates have not only been impeached for bribery, and acting grossly contrary to the duties of their office, but for misleading their sovereign by unconstitutional opinions, and for attempts to subvert the fundamental laws and introduce arbitrary power.[32]

One commentator cites ten impeachments in which "high crimes and misdemeanors" were charged but in which the offenses were not in-

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[29] Simpson, *supra* note 8, at 679.

[30] Act of Apr. 30, 1790, ch. 9, § 21, 1 Stat. 117.

[31] The debates of the Constitutional Convention indicate that the delegates were aware of the development of the law of impeachment in England. *See, e.g.*, comments of Dr. Franklin and Mr. Gouverneur Morris, 2 Farrand, *supra* note 20, at 67–69.

[32] 1 J. Story, Commentaries on the Constitution of the United States 385 (5th ed. 1891). For a discussion of the English impeachment cases see 4 J. Hatsell, Precedents of Proceedings in the House of Commons 56 *et seq.* (1818) (hereinafter cited as Hatsell); Hinds, *supra*, note 1, at 331–34; 2 R. Wooddesson, A Systematical View of the Laws of England 596 (Lecture XL 1792); Yankwich, *Impeachment of Civil Officers Under the Federal Constitution*, 26 Geo. L.J. 849, 853–56 (1938).

dictable.[33] Another cites several cases in which English judges were impeached for giving "extrajudicial opinions and misinterpreting the law." [34] While there is some authority to the contrary,[35] the predominant view, therefore, is that under the English practice impeachment will lie for noncriminal, as well as criminal, misconduct.

DELIBERATION OF THE CONSTITUTIONAL CONVENTION

That the debates and actions of the Constitutional Convention surrounding the adoption of article II, section 4, should be considered in attempting to fathom the meaning of the impeachment clause is clear. What is less certain is how these deliberations should be interpreted.

Shortly after the Convention convened on May 29, 1787, the Committee of the Whole agreed that the President should be "removable on impeachment and conviction of malpractice or neglect of duty." [36] The Convention agreed on July 20 that the Executive should be impeachable [37] and approved the language of this provision on July 26.[38] The Committee of Detail [39] reported a draft constitution on August 6, which provided that the President might be "removed from his office on impeachment by the House of Representatives, and conviction in the Supreme Court, of treason, bribery or corruption." [40] On September 4, the Committee of Eleven [41] reported an impeachment provision limited to "treason or bribery." [42]

On September 8, Colonel Mason commented that "[t]reason as defined in the Constitution will not reach many great and dangerous

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[33] Simpson, *supra* note 8, at 682. The author concludes that "there is nothing . . . in the English practice which otherwise limits that construction [of the phrase "high crimes and misdemeanors"] and hence it must be held to mean other than criminal misdemeanors." *Id.* at 686. It is interesting to note that this same commentator, in oral argument before the Senate as counsel for the respondent in the Archbald impeachment three years earlier, took a rather different view:

"[T]he question arises which of the English precedents are you going to accept, in view of the fact that some hold that an impeachable offense need not be an indictable one, and others hold a precisely antagonistic view. Are you going back to the days when a man was impeached simply because he happened to have been put in office by those who have themselves just been turned out? If that is the view you are going to accept then perhaps every four years in this country there will be a wholesale slaughter. But if you are going to accept the best precedents which appear upon the English reports, and especially those down near to the time when the Constitution of the United States was adopted, then those best precedents show that, except for an indictable offense, no impeachment would lie under the laws of England. 6 Cannon's, *supra* note 1, at 646."

[34] 4 Hatsell, *supra* note 32, at 76.

[35] One such authority is quite direct:

"It is asserted, without fear of successful contradiction, both upon authority and principle, notwithstanding a few isolated instances apparently to the contrary, that no impeachment can be had where the King's Bench would not have held that a crime had been committed, had the case been properly before it.

"Dwight, *Trial by Impeachment*, 15 Am. L. Reg. 257, 264 (1867). This statement was intended by its author to be applicable to American, as well as English, impeachments. Dwight cites the case of Lord Melville, who was charged with wrongfully (but not corruptly) spending public funds without proper authority as Treasurer of the Navy, as an example of an acquittal due to the lack of an indictable crime. *Id.* at 267. *See also* Simpson, *supra* note 8, at 684–86. Of course, an acquittal cannot be determinative of any legal principle in any definitive sense since there is no separate ruling on the facts and the law."

[36] 1 Farrand, *supra* note 20, at 78.

[37] 2 Farrand, *supra* note 20, at 69.

[38] *Id.* at 116.

[39] On July 23, 1787, "the proceedings of the Convention for the establishment of a national government, except what respects the Supreme Executive" were referred to a 5-man body, known as the "Committee of Detail," "for the purpose of reporting a Constitution conformably to the proceedings aforesaid." *Id.* at 85, 97.

[40] *Id.* at 185–86.

[41] The Convention on August 31 referred "such parts of the Constitution as have been postponed, and such parts of reports as have not been acted on to a Committee of a Member from each State," known as the "Committee of Eleven." *Id.* at 473.

[42] "He [the President] shall be removed from his office on impeachment by the House of Representatives, and the conviction by the Senate, for treason or bribery . . ." *Id.* at 495.

offenses" and moved to add "or maladministration" after "bribery." Upon the objection of Madison that "[s]o vague a term would be equivalent to a tenure during the pleasure of the Senate," Mason withdrew "maladministration" and substituted "or other high crimes and misdemeanors against the State," and the Convention voted 8 to 3 to adopt this phrase.[43] The words "United States" were then substituted for "State."[44] The Convention also voted to extend the impeachment sanction to the Vice President and other civil officers.[45]

In its report of September 12, the Committee of Style and Arrangement deleted the words "against the United States,"[46] and the Convention accepted this change when it agreed to the Constitution as amended on September 15.[47] No further changes were made in the impeachment clause, which now covered "treason, bribery or other high crimes and misdemeanors," prior to the adoption of the Constitution in final form on September 17, 1787.

From this recounting it appears that, prior to the adoption of the phrase "high crimes and misdemeanors," each time the Convention spoke as a whole it opted for a broad definition of impeachable offenses covering noncriminal as well as criminal misconduct. While the standard chosen by the Committee of Eleven—"treason or bribery"—and, most probably, that reported by the Committee of Detail—"treason, bribery or corruption"—are limited to criminal conduct, it should be emphasized that in these instances it was not the Convention as a whole which was speaking, but merely a committee thereof. From the post-Convention comments by its participants, as well as those by other authorities, it appears that these prior versions of the impeachment clause, together with the accompanying debates, indicate an intent on the part of the framers to include noncriminal misconduct within the catalog of impeachable offenses.[48] Even though "high crimes and misdemeanors" is construed to include some noncriminal misconduct, the fact that "maladministration" was deemed too vague and "high crimes and misdemeanors" was substituted in its place indicates, of course, that the latter clause must be construed more narrowly than the former.

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[43] *Id.* at 545, 550.
[44] *Id.* at 551–52.
[45] *Id.* at 552.
[46] *Id.* at 600.
[47] *Id.* at 633.
[48] [I]n the many excellent and exhaustive briefs prepared by counsel for respondents in our impeachment proceedings, some of which were tried while members of the convention which framed the Constitution still lived, there is no assertion that any member of that convention had expressed the opinion that impeachment was only intended to cover indictable offenses. A somewhat careful independent examination fails to disclose any such statement . . . .
Simpson, *supra* note 8, at 690–91. Simpson cites Luther Martin, who was a member of the Convention but later argued against its adoption, as the sole exception. As counsel for the respondent in the Chase impeachment, Martin contended that impeachment would lie only for indictable offenses. 3 Hinds, *supra* note 1, at 762–63. There are several instances of post-Convention statements by the participants, however, which define the scope of an impeachable offense more broadly than that of an indictable crime. For example, Hamilton was of the view that impeachment will lie for "those offenses which proceed from the misconduct of public men, or in other words, from the abuse or violation of some public trust." The Federalist No. 65, at 490 (J. Hamilton ed. 1866) (A. Hamilton). During a speech in Congress on June 16, 1789, on the bill to establish a Department of Foreign Affairs, Madison said that the President would be impeachable for "an act of maladministration" such as the "wanton removal of meritorious officers." 4 Elliot's Debates 380 (2d ed. 1937). Parenthetically, it should be noted that the phrase "high crimes and misdemeanors" was adopted after Madison had objected, successfully, to "maladministration" as being too vague.

An examination of the impeachment proceedings brought under the Federal Constitution indicates that impeachment may be invoked for serious noncriminal misconduct, as well as for criminal offenses.[49] Generalizations are difficult to draw, however, since few cases are available for analysis. The impeachments which failed of conviction are of relatively little value as precedent for purposes of this analysis. The close intermixture of fact and law makes it difficult to determine whether the Senate voted to acquit because the evidence was insufficient to support the allegations in the articles, or because the acts alleged in the articles, even if true, did not constitute impeachable offenses as a matter of law. Thus, if the articles of impeachment against a respondent who is acquitted contain elements of noncriminal misconduct, this would not establish that such activities do not fall within the impeachment power.

Even the four impeachments resulting in conviction[50] are less helpful than might appear at first glance. The impeachments of Judge Pickering and Judge Humphreys were not defended. Of the two contested cases, convictions were obtained on only five of thirteen articles in the case of Judge Archbald and on only one of seven articles in the case of Judge Ritter. Moreover, the value of the Ritter case as precedent is seriously diminished by the ambiguity created by his conviction on an article which essentially incorporated by reference the six articles on which he had been acquitted.

The result, then, is that the hard core of case law on federal impeachments consists of the five articles on which Archbald was convicted, surrounded by a penumbra consisting of the Pickering, Humphreys and Ritter cases. Accordingly, we must examine these four impeachments, placing emphasis on Judge Archbald's case.

The impeachment of Judge Pickering in 1803–04, was the first such proceeding to succeed and was quite clearly based, at least in part, on noncriminal misconduct. The first three articles involved a series of flagrant errors on the part of the judge in his conduct of a case. Articles 1 and 3 constituted violations of federal statutory law, but none of the first three articles constituted a criminal offense.[51]

It would be difficult to establish that any of the articles on which Judge Humphreys was impeached and convicted in 1862 are noncriminal, since all seven articles contain at least a flavor of treason, which the Consitution defines as follows: "Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort." [52] Articles 3 and 4 alleged that the respondent aided the war effort of the Confederacy. Article 1, making a speech declaring the right of secession and inciting

[49] While the impeachment provisions of the various states are not directly in point they are instructive. For example, article V, § 5, of the Nebraska Constitution provides that all civil officers of the state may be impeached for "any misdemeanor in office." In State v. Hastings, 37 Neb. 96, 114, 55 N.W. 774, 780 (1893), the court rejected "the doctrine that an impeachable offense is necessarily an indictable offense" as "too narrow."

[50] *See* text accompanying notes 3–5 *supra*.

[51] Article 4, however, charged open and notorious drunkenness and public blasphemy on the bench, which were probably punishable as misdemeanors at common law. Presumably, such conduct would violate the applicable state and local ordinances on disturbing the peace.

[52] U.S. Const. art. III, § 3. *See* Act of Apr. 30, 1790, 1 Stat. 112, which tracks the constitutional definition of treason and provides the death penalty therefor.

rebellion, and article 2, advocating secession, go well beyond the limits of protected free speech. Articles 5, 6 and 7 alleged in effect that Humphreys turned his court into a Confederate court which enforced the laws of the Confederacy and required allegiance to it. This allegation may or may not be sufficient to support a charge of treason, depending on whether it constitutes conduct "adhering to their [the United States'] enemies."

The question of treason aside, the conduct alleged in articles 2 through 4 appears also to constitute violations of a criminal statute dealing with various forms of seditious conspiracy.[53] Acts specifically proscribed by this statute are charged in article 3—levying war against the United States—and article 4—opposing by force the authority of the United States government. Article 2—advocating secession with intent to subvert the authority of the United States—appears to fall, though less directly, within the provisions of the statute applicable to articles 3 and 4. Article 2 also comes within the proscription against preventing the execution of the laws of the United States by force, which would, of course, inevitably result from secession.

At least some of the first six articles in the Ritter impeachment in 1933–36 alleged criminal offenses.[54] However, Judge Ritter was convicted only on article 7 which alleged that he had brought his court into disrepute and rendered himself unfit to serve as a federal judge by the conduct alleged in the first six articles.[55]

There are basically two theories by which this seemingly strange result can be rationalized. The first theory is that although none of the specific acts of misconduct, standing alone, warranted impeachment, all of the offenses taken in the aggregate were sufficient.[56] Under this theory, the substance of articles 1 through 6 is incorporated into article 7, which then includes criminal offenses. The weakness of this line of

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[53] Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That if two or more persons within any State or Territory of the United States shall conspire together to overthrow, or to put down, or to destroy by force, the Government of the United States, or to levy war against the United States, or to oppose by force the authority of the Government of the United States; or by force to prevent, hinder, or delay the execution of any law of the United States; or by force to seize, take, or possess any property of the United States against the will or contrary to the authority of the United States; or by force, or intimidation, or threat to prevent any person from accepting or holding any office, or trust, or place of confidence, under the United States; each and every person so offending shall be guilty of a high crime. . . .

Act of July 31, 1861, ch. 33, 12 Stat. 284.

Articles 2, 3 & 4 refer to the respondent's activities in 1861 & 1862; this statute was adopted July 31, 1861. Since one element of proof for a conviction is the presence of a conspiracy, it should be noted that each of the three articles alleges that the respondent acted in concert with others, and in fact article 4 specifically alleges a conspiracy. It also is of interest that a violation is labeled a "high crime," perhaps for the specific purpose of making clear that the crime involved was of a serious enough nature to be impeachable.

[54] Articles 5 & 6 alleged tax evasion and articles 3 & 4 alleged that the respondent practiced law while on the bench, a "high misdemeanor." Act of Mar. 3, 1911, ch. 231, § 258, 36 Stat. 1161, *as amended* 28 U.S.C. § 454 (1964). Article 1 alleged the receiving of a kickback out of the fee paid to his former law partner whom the judge had appointed as a receiver, and article 2 charged participating in a champertous proceeding intended in part to create the fees described in article 1. These might also be criminal violations if all the elements contained in the federal bribery statute (cited in note 64 *infra*). Act of Mar. 3, 1909, ch. 321, § 133, 35 Stat. 1112, such as the requisite intent, could be shown.

[55] After the vote was announced, a point of order was made that respondent was not guilty under article 7 because he had been acquitted of all the charges to which it referred by the action of the Senate with respect to articles 1–6. The point of order was overruled, the chair holding that article 7 contained the "separate charge" of "general misbehavior." 80 Cong. Rec. 5606 (1936).

The contention that his acquittal on articles 1–6 precluded his conviction on article 7 was advanced by Judge Ritter in a suit to recover his salary, but the Court of Claims rejected the suit for lack of jurisdiction in the courts to review the actions of the Senate in impeachment proceedings. Ritter v. United States, 84 Ct. Cl. 293, 300 (1936), *cert. denied*, 300 U.S. 668 (1937).

[56] Ten Broek, *supra* note 12, at 208.

reasoning is that article 7 does not specifically allege again the charges contained in the first six articles, but alleges only that the respondent brought his court into disrepute. The conduct detailed in articles 1 through 6 is cited only as the cause of such disrepute, not as an allegation proper.

The second theory is based on the effect of the conduct, rather than on the acts themselves:

> This ruling definitely lays down the principle that even though upon specific charges amounting to legal violations the impeaching body finds the accused not guilty, it may, nevertheless, find that his conduct in these very matters was such as to bring his office into disrepute and order his removal upon that ground.[57]

This result is analogous to the procedure generally followed with respect to the professions. Thus a lawyer may be disbarred, even after being acquitted of a criminal charge involving the conduct in question, on the theory that the purpose of the disbarment is to protect the public and the profession.[58] Presumably, a different result in the two proceedings can be reached because the burden of proof is higher for the criminal proceeding.[59]

In any event, under the second theory, which is probably the more plausible of the two,[60] article 7 would be construed not to contain any allegations of criminal misconduct.

In the Archbald impeachment of 1912-13, the thirteen articles essentially charged influence peddling—the use of the respondent's position as judge to influence litigants before his court to make deals favorable to friends. In return, the judge would typically be given a share of the profits without having to invest any money. Judge Archbald was convicted on articles 1, 3, 4, 5 and 13. In articles 1 and 3 the deals involved litigants before his court, while article 5 dealt only with a potential litigant. Article 4 alleged improper conduct by the respondent as a judge in having ex parte communications with one party in a suit without the knowledge of the other party or the other judges sitting on the case. This article did not, however, allege any personal gain for the respondent. Article 13 was an omnibus summary of Archbald's influence peddling, resulting in personal monetary gain from deals involving both actual and potential litigants before his court and from fees given for compromising litigation before the Interstate Commerce Commission.[61]

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[57] Yankwich, *supra* note 32, at 858; *accord*, Memorandum Opinion of Senator Austin in the Ritter Proceedings, *supra* note 14, at 650.

[58] Yankwich, *supra* note 32, at 858–59.

[59] The effort to analogize impeachment with disbarment, however, runs afoul of the oft-expressed theory that impeachment is in the nature of a criminal proceeding. Thus, article II, § 2, of the Constitution gives the President power to grant pardons "for offenses against the United States, except in cases of impeachment." Article III, § 2, grants a right to a jury trial for "all *crimes*, except cases of impeachment" (emphasis added).

[60] In the view of one commentator, political factors, rather than the merits of the case, were determinative of the outcome. Although the respondent was a district court judge, dissatisfaction of liberal New Deal Democrats with a conservative Supreme Court was not unrelated to the proceedings. Ten Broek, *supra* note 12, at 198–204.

[61] Article 13 differs from article 7 in the Ritter impeachment in that the substance of the allegations in article 13 is specific misbehavior, rather than bringing of disgrace on the respondent's court. In the opinion of one commentator,

> [I]t seems fair to conclude from the vote on the thirteenth article that judges are impeachable for a general course of misbehavior embracing a series of acts that are subversive of judicial probity or propriety chiefly because of the persistency with which they are committed. This is not to be understood as a holding that many legal naughts may,

The authorities consistently conclude that none of the five articles on which Archbald was convicted constitutes an indictable offense.[62] This assessment is probably correct with respect to article 4, which alleged misconduct in the course of judicial proceedings that is essentially in the same category with respect to criminality as the charges in the first three articles in the Pickering impeachment. As to articles 1, 3, 5 and 13, however, one must consider the relevant criminal statutes in force when the actions complained of took place.[63] For example, section 132 of the Criminal Code of 1909 makes it a crime for a federal judge to accept anything of value "with the intent to be influenced thereby" in any matter pending before him.[64] This section would appear to apply to articles 1, 3 and 13,[65] except that these articles nowhere allege an intent on Archbald's part to allow his judicial opinions to be influenced in return for the transactions he arranged. While the requisite intent might be inferred from the facts alleged, it can also be argued that Archbald merely held himself out as subject to being influenced but in fact never intended to be so influenced.

Perhaps the question of an intent to be influenced could be avoided under section 85 of the Criminal Code, an extortion statute extending to "[e]very officer . . . of the United States." [66] Even if the respondent never intended to be influenced, this statute might apply to articles 1, 3, 5 and 13 to the extent that he held himself out as being prepared to visit adverse consequences upon those who did not cooperate.

Finally, Judge Archbald's activities in compromising litigation before the Interstate Commerce Commission, as alleged in article 13,

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collectively, become a legal unit, but rather that a continuation of transactions which are not seriously irregular when standing alone may become component elements of a system of misconduct sufficient to support an impeachment.

Brown, *The Impeachment of the Federal Judiciary*, 26 Harv. L. Rev. 684, 703–04 (1913).

[62] W. Carpenter, Judicial Tenure in the United States 147 (1918); Simpson, *supra* note 8, at 687; Yankwich, *supra* note 32, at 856. One writer has commented that it was "doubtful" that any of the five articles charged an indictable offense. Ten Broek, *supra* note 12, at 198.

[63] Following the usual practice, none of the articles in the Archbald impeachment specifically charged respondent with a crime. This is not determinative, however, of whether the facts alleged in the articles would be sufficient as a matter of law to constitute a criminal offense.

[64] Whoever, being a judge of the United States, shall in anyway accept or receive any sum of money, or other bribe, present, or reward, or any promise, contract, obligation, gift, or security for the payment of money, or for the delivery or conveyance of anything of value, with the intent to be influenced thereby in any opinion, judgment, or decree in any suit, controversy, matter, or cause pending before him, or because of any such opinion, ruling, decision, judgment, or decree, shall be fined not more than twenty thousand dollars, or imprisoned not more than fifteen years, or both; and shall be forever disqualified to hold any office of honor, trust, or profit under the United States.

Act of March 4, 1909, ch. 321, § 132, 35 Stat. 1112.

It might be noted, parenthetically, that since a federal judge convicted under § 132 would be "forever disqualified to hold any office of honor . . . under the United States." Congress, on at least this one occasion, has taken the position that federal judges can be removed by means other than impeachment. This is, of course, softened somewhat by the fact that bribery is explicitly mentioned as a basis for impeachment in the impeachment clause.

[65] Article 5 would not be covered since it involved only *potential* litigants in the respondent's court, whereas § 132 requires intent by the judge to be influenced in a matter "pending before him." However, § 117 of the Criminal Code, Act of Mar. 4, 1909, ch. 321, 35 Stat. 1109–10, a bribery statute similar to § 132, extends to intent to be influenced as to matters "which may by law be brought before him" in the future. Section 117 applies to an "officer of the United States" and there is some authority that this includes federal judges. United States v. Germaine, 99 U.S. 508, 509–10 (1878).

[66] Every officer, clerk, agent, or employee of the United States, and every person representing himself to be or assuming to act as such officer, clerk, agent or employee, who, under color of his office, clerkship, agency, or employment, or under color of his pretended or assumed office, clerkship, agency, or employment, is guilty of extortion, and every person who shall attempt any act which if performed would make him guilty of extortion, shall be fined not more than five hundred dollars, or imprisoned not more than one year, or both.

Act of Mar. 4, 1909, ch. 321, § 85, 35 Stat. 1104.

might constitute the practice of law by a federal judge, which was proscribed in 1812 and is arguably a crime.[67]

The foregoing discussion shows that at least some of the activities for which American federal judges have been impeached and convicted are not criminal offenses. This fact, in conjunction with the internal logic of the language of the impeachment clause, the English precedents and the debates in the Constitutional Convention, indicates that the impeachment remedy is not limited to criminal offenses.

OFFICIAL MISCONDUCT

It has often been suggested that the impeachment power does not extend to misconduct by a public official outside of his official position. The defense in the Swayne impeachment, for example, argued that, with respect to judges, impeachment should be limited to misconduct committed on the bench:

> In English and American parliamentary and constitutional law the judicial misconduct which rises to the dignity of a high crime and misdemeanor must consist of judicial acts performed with an evil or wicked intent, by a judge while administering justice in a court, either between private persons or between a private person and the government of the State. All personal misconduct of a judge occurring during his tenure of office and not coming within that category must be classed among the offenses for which a judge may be removed by address, a method of removal which the framers of our Federal Constitution refused to embody therein.[68]

The strongest argument against this position is that criminal conduct, no matter how serious, would not be grounds for impeachment if

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[67] 28 U.S.C. §454 (1964) (based on Act of December 18, 1812, ch. 5, 2 Stat. 788). It can be argued most persuasively, however, that this is not a criminal statute since no penalty is prescribed for violations. This argument is strengthened by the fact that the only apparent reason for denominating the offense a "high misdemeanor" was to make it subject to the impeachment power. Yet the phrase "misdemeanor," as used in the impeachment clause, is not limited to criminal misconduct.

[68] Brief for the respondent, submitted February 22, 1905, 5 Hinds, *supra* note 1, at 836. One commentator, writing eight years later, took a contrary position, but only to the extent that respondent's conduct brought his office into disrepute:

> To determine whether or not an act or a course of conduct is sufficient in law to support an impeachment, resort must be had to the eternal principles of right, applied to public propriety and civic morality. The offense must be prejudicial to the public interest and it must flow from a willful intent, or a reckless disregard of duty, to justify the invocation of the remedy. It must act directly or by reflected influence react upon the welfare of the state. It may constitute an intentional violation of positive law, or it may be an official dereliction of commission or omission, a serious breach of moral obligation, or other gross impropriety of personal conduct which, in its natural consequences, tends to bring an office into contempt and disrepute.
>
> While the offense must be committed during incumbency in office, it need not necessarily be committed under color of office. An act or a course of misbehavior which renders scandalous the personal life of a public officer shakes the confidence of the people in his administration of the public affairs, and thus impairs his official usefulness, although it may not directly affect his official integrity or otherwise incapacitate him properly to perform his ascribed functions.

Brown, *supra* note 61, at 691–92.

Mr. Brown, as Special Investigator and Assistant to the Attorney General of the United States, prepared for the Attorney General a report on Judge Archbald's activities, which was later transmitted to the House, that in effect recommended impeachment.

The prosecution in the Archbald case made the flat statement that "[i]t is not essential that an offense should be committed in an official capacity in order that it may come within the purview of the constitutional provisions relating to impeachments," and went on to denote as impeachable "[a]ny conduct on the part of a judge which reflects on his integrity as a man or his fitness to perform the judicial functions." Brief submitted by Mr. Manager Henry D. Clayton in the Archbald impeachment, 1 Proceedings of the Senate and the House of Representatives in the Trial of Impeachment of Robert W. Archbald, S. Doc. No. 1140, 62d Cong., 2d Sess. 1061–62 (1913) [hereinafter cited as Archbald Proceedings]; *accord*, Simpson, *supra* note 8, at 805. (Mr. Simpson, as indicated previously, was later transmitted to the House, that in effect recommended impeachment.)

committed outside the scope of the respondent's official duties.[69] This argument is neutralized if one accepts Congressman McCloskey's recent assertion that acceptable judicial conduct is "conduct which complies with judicial ethics while on the bench and with the criminal and civil laws while off the bench."[70]

The idea is not a new one. Counsel for respondent in the Swayne impeachment proceedings argued that "personal misconduct of an English judge off the bench has never furnished the ground for impeachment."[71] An examination of the English impeachment cases lends suport to this statement.[72]

The proceedings of the Constitutional Convention have some bearing on the question. On September 8, 1787, the Convention substituted for "maladministration" the phrase "high crimes and misdemeanors against the State."[73] The words "United States" were then substituted for "State," "in order to remove ambiguity."[74] The Committee on Style and Arrangement deleted "against the United States" in its report of September 12, 1787,[75] and the Convention adopted this change without debate on September 15, 1787.[76]

Had the phrase "against the United States" not been deleted, the impeachment clause would clearly be limited to violations of federal criminal or civil laws and official misconduct. The change, however, was most probably a technical one, designed to remove surplusage. The framers having adopted the phrase "high crimes and misdemeanors" from the English practice, which appears to have limited impeachment to official misconduct, the addition of "against the State" or "against the United States" was unnecessary.[77] This explanation is further supported by the nature of the committee that made the change, and by the lack of debate with which the Convention accepted it.

Greater insight can be gained by an examination of the twelve American impeachments, with emphasis on the four convictions, to determine what part, if any, noncriminal, unofficial conduct has played.[78]

The first impeachment, that of Senator William Blount in 1797–99, involved the alleged incitement of two Indian tribes to mount a military expedition against neighboring Spanish territory and cap-

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[69] *See, e.g.*, concluding argument of Mr. Manager James B. Perkins in the Swayne impeachment proceedings, Feb. 24, 1905, 3 Hinds, *supra* note 1, at 328.

[70] 116 Cong. Rec. H. 3326, H. 3328 (daily ed. April 21, 1970) (Statement by Honorable Paul N. McCloskey, Jr.).

[71] Final argument of Mr. John M. Thurston, Feb. 25, 1905, 3 Hinds, *supra* note 1, at 327.

Excepting bribery there is no case in the parliamentary law of England which gives color to the idea that the personal misconduct of a judge, in matters outside of his administration of the law in a court of justice, was ever considered or charged to constitute a high crime and misdemeanor.

Brief for respondent in Swayne impeachment, filed February 22, 1905, *id.* at 334.

[72] *See* 4 Hatsell, *supra* note 32, at 56 *et seq.*; 3 Hinds, *supra* note 1, at 331–34; Yankwich, *supra* note 32, at 853–56.

[73] 2 Farrand, *supra* note 20, at 550.

[74] *Id.* at 551. Counsel for respondent in the Swayne impeachment argued that if a federal judge could be impeached for "a crime committed as an individual against a State law," he would be left "at the mercy of a local condition, inimical as it might be to the Federal Constitution." 3 Hinds, *supra* note 1, at 327. Counsel did not cite the substitution of "United States" for "State" by the Convention as a basis for his position.

[75] 2 Farrand, *supra* note 20, at 600.

[76] *See id.* at 604–23.

[77] "In the final draft the words 'against the State' were omitted, doubtless as surplusage . . . ." Van Nest, *Impeachable Offences under the Constitution of the United States*, 16 Am. L. Rev. 798, 804 (1882).

[78] *See generally* 6 Cannon's *supra* note 1; 3 Hinds, *supra* note 1; Archbald Proceedings, *supra* note 68; Ritter Proceedings, *supra* note 14. The charges are outlined in greater detail in the Appendix *infra*.

ture it for Great Britain. Four of the five articles, which dealt separately with the various means used by the respondent to further his scheme, alleged violations of the "laws" of the United States.[78] This is, at the very least, a reference to violations of civil law, such as the treaty between the United States and Spain referred to in article 2, and may involve criminal violations as well.

The charges on which Judge Pickering was impeached and convicted in 1803–04 all clearly involved official misconduct. The first three articles alleged grossly erroneous rulings on questions of law, while article 4 involved the respondent's personal decorum (drunkenness and profanity) while performing his official duties in court.[79]

Justice Chase (1804–05) was charged solely with misconduct while acting in his official capacity. The first six articles involved improper rulings in two criminal trials, while the last two articles dealt with abuses in connection with the respondent's statements to grand juries.[81]

The single article of impeachment exhibited against Judge Peck (1826–31), dealing with the respondent's abuse of the contempt power in connection with an attorney who had argued a case before him, similarly involved misconduct on the bench.[82]

Judge Humphreys was impeached and convicted in 1862 on charges each of which encompassed either criminal violations or official misconduct, or both. Articles 1 and 2 (urging secession from the Union) and articles 3 and 4 (assisting the Confederate war effort) appear to fall within the constitutional definition of treason.[83] Articles 2 through 4 most probably come within the conspiracy statute passed by Congress in 1861.[84] Article 1 alleged that the respondent violated his oath of office, apparently a form of official misconduct. Articles 5 through 7 alleged that the respondent used his official position and his court to support the Confederacy.[85]

In the impeachment of President Johnson (1866–68), the charges revolved around the respondent's attempts to remove his Secretary of War from office (articles 1 through 9, 11) and certain of the respondent's speeches in which he was highly critical of Congress (articles 10 and 11). Each of the articles dealing with the effort to oust the War Secretary cited at least one federal statute alleged to have been violated by the respondent. In addition, all of the actions in question were taken by the respondent in his official capacity as President. The charges involving the respondent's speeches alleged not only that such language was inflammatory and reflected badly on the Congress, but that the thrust of at least one speech was to attack the validity of congressional legislation and deny that it was binding

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[78] S. Jour. No. 2, 435–37 (1798); 3 Hinds, *supra* note 1, at 644–80. Article 5 alleged only that the respondent's actions were against the "peace and interests" of the United States. The activity recited in article 5, however, was stated to be committed in furtherance of respondent's overall "criminal designs" to incite the Indian tribes to war. If this language is to be taken as characterizing the overall scheme as criminal, then certainly this article, being a component part thereof, must be characterized as criminal in nature. In any event, since the conduct enumerated in article 5 is an integral part of respondent's overall scheme, such conduct must represent a violation of at least those civil laws alleged to have been violated by such scheme.

[79] 3 Hinds, *supra* note 1, at 690–92. The conduct alleged in article 4 was probably also punishable under state or local law as a misdemeanor under disturbing the peace statutes.

[81] 3 Hinds, *supra* note 1, at 722–24.

[82] *Id.* at 786–88.

[83] *Id.* at 810–11. "Treason" is defined in the text accompanying note 52 *supra*.

[84] Act of July 31, 1861, ch. 33, 12 Stat. 284. *See* note 53 *supra* and accompanying text.

[85] *See* text following note 52 *supra*.

on the respondent.[86] The latter accusation, tied in with the charges that the respondent ignored several congressional statutes in attempting to remove his Secretary of War, implied a flouting of the principle of separation of powers and a refusal to be bound by the Constitution. This would constitute a violation of civil law and misconduct in the official capacity with which the respondent, as President, deals with the executive and legislative branches.[87]

William Belknap was impeached in 1876 for abusing his position as Secretary of War by accepting money in return for an appointment to an Army post tradership.[88] This was official misconduct, as well as bribery.

Most of the charges against Judge Swayne (1903–05) rather clearly involved either official misconduct or violation of civil or criminal law. Articles 1 through 3 alleged that excessive government monies were paid out to reimburse the respondent while he was on official business. Articles 6 and 7 (failure to reside in the respondent's judicial district) are sufficient grounds for impeachment, since they alleged a "high misdemeanor."[89] This charge, in addition, involved official misconduct, since residence in the respondent's district was required by statute for a person occupying the respondent's official position. The conduct complained of in articles 8 through 12 (abuse of the contempt power against three attorneys) took place on the bench, and therefore constituted official misconduct.

Articles 4 and 5 also involved official misconduct, but for more subtle reasons. These articles alleged that the respondent appropriated for his personal use a railroad car held by a receiver appointed by him. While the respondent took this action in his private capacity, he was able to do so only because of the leverage inherent in his official position.

All thirteen of the articles in the case of Judge Archbald, who was impeached and convicted in 1912–13,[90] alleged official misconduct. Respondent committed the offense specified in article 4 (improper ex parte communications with one party to a suit before his court) while on the bench. The offense complained of in article 12 (appointing the attorney for a railroad as jury commissioner)[91] was committed in an equally official capacity. While the other articles[92] involved conduct committed by the respondent in his private capacity, all of

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[86] 3 Hinds, *supra* note 1, at 863–69. Article 11 refers specifically to respondent's speech of August 18, 1866, quoted in article 10. Ironically, this charge does not seem to be supported by the quoted portion of the text.

[87] Since there was no question of respondent's "guilt" of the offense charged—making specified speeches—it is realistic to conclude that his acquittal indicated that the offense charged was not an impeachable one. Thus construed, the Johnson case—as does the unsuccessful Chase impeachment over half a century before—stands for the proposition that impeachment should not be used as a tool to remove from office officials with whom those in power disagree politically.

[88] 3 Hinds, *supra* note 1, at 910–14.

[89] 3 Hinds, *supra* note 1, at 960–63. 2 Stat. 788 (1812) declared it "incumbent" upon federal judges to reside within the district for which they were appointed. The statute also stated that it shall "not be lawful" for a judge to practice law. Any person offending the injunctions or prohibitions of the act was guilty of a "high misdemeanor." This definition, arguably, may have included residency violations as a high misdemeanor.

[90] 48 Cong. Rec. 8705–08 (1912); 6 Cannon's, *supra* note 1, at 684–708. The Senate voted to convict on articles 1, 2, 4, 5 & 13 only.

[91] 48 Cong. Rec. 8707 (1912). The conduct alleged in article 12 (on which article respondent was acquitted) does not on its face appear improper. If it were, however (perhaps because the railroad in question was the subject of attempted influence peddling on respondent's part, alleged in article 6), it would be official misconduct since respondent made the appointment in question in his capacity as judge.

[92] *Id.* at 8706–08 (articles 1–3, 6–11 & 13).

the allegations contained therein involve the abuse of his official position as judge for personal gain.[93] In some cases the respondent used his influence to persuade a litigant [94] or a potential litigant [95] to enter into a particular business transaction with a third party, in return for which the respondent would usually be given a financial interest. In other instances, the respondent used his position as judge to secure more direct economic benefits, either from litigants [96] or potential litigants [97] in his court.[98] Judge Archbald also was alleged to have used his influence as judge to settle a case before the Interstate Commerce Commission for a fee, where the opposing party was also a litigant in a case before his court.[99]

All of the charges against Judge English (1925–26) involved either misconduct in his official capacity on the bench or abuse of his position for personal gain, or both. Article 1 involved misconduct during disbarment proceedings, summoning state officials to appear for an imaginary case, and coercion of a jury and of the press. Articles 2 and 3 alleged that the judge operated his bankruptcy court for his personal profit and for that of a particular referee toward whom he showed undue favoritism. Article 4 outlined the respondent's use of his power to choose depository banks for bankruptcy funds to his personal financial benefit. Article 5 alleged denials of the right to counsel and to a jury trial and general mistreatment of litigants. This article also charged that the respondent attempted to use his power to appoint receivers and other officers of the court to secure the appointment of his son to like positions.[100]

One charge against Judge Louderback (1932–33) involved a violation of civil law, while all the remaining allegations were of official misconduct on the bench, designed, in some cases, to personally enrich the respondent. Article 1 outlined an elaborate scheme by which the judge established a fictitious legal residence, in violation of state law, in order to shift the venue of anticipated lawsuit and then rewarded his secret assistant in this endeavor by attempting to coerce a receiver, appointed by the respondent, to choose as his attorney a friend of said assistant. Articles 2 through 4 (appointing incompetents and personal friends as receivers and granting excessive fees) similarly involved misconduct by the respondent in his official capacity and an abuse of his position for personal benefit. Article 5 realleged the substance of the other articles and also charged unfair and arbitrary conduct by the respondent while on the bench.[101]

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[93] *Id.* at 8707. One charge in article 11, accepting money solicited by court officials appointed by the respondent, was not only an abuse of the respondent's official position for personal gain, but involved his official duties of office in that he appointed the court officials in question.

[94] *Id.* at 8706–08 (articles 1, 3 & 13). Article 13 also refers to certain persons interested in the results of litigation pending before respondent.

[95] *Id.* at 8706 (articles 7 & 8).

[96] *Id.* at 8707–08 (articles 7, 8, 9 & 13).

[97] *Id.* at 8707 (articles 10 & 11). Article 10 refers to officials who were liable to be interested in litigation coming before the respondent.

[98] For a discussion of whether some of these charges might constitute bribery or extortion, see text accompanying notes 64–66 *supra*.

[99] 48 Cong. Rec. 8706–08 (1912) (article 2). *See* text accompanying note 61 *supra*. *See also* article 13, Appendix *infra*. Respondent's activities in this regard probably amounted to the "high misdemeanor" of the practice of law by a federal judge. 28 U.S.C. § 454 (1948) (based on Act of December 18, 1812, ch. 5, 2 Stat. 788). *See* note 67 *supra* and accompanying text.

[100] 67 Cong Rec. 6283–87 (1926).

[101] 6 Cannon's *supra* note 1, at 713–16. Article 5, like article 7 in the Ritter impeachment, realleges the content of the preceding articles. While these "omnibus" articles might appear similar at first glance, the thrust of the two is quite different. Article 7 in the

The first six articles in the Ritter impeachment (1933–36) similarly charged offenses that are either official misconduct or violations of criminal or civil law. Article 1 (receiving a kickback from the fee paid to a receiver appointed by the respondent) and article 2 (participating as a judge in a champertous proceeding designed in part to create the above mentioned fee) alleged, at the very least, misconduct in the respondent's official capacity for personal profit.[102] Articles 3 and 4 alleged the "high misdemeanor" of engaging in the practice of law while on the bench,[103] which is possibly criminal and in any event impeachable.[104] The tax evasion alleged in articles 5 and 6 is, of course, a criminal violation.

While Judge Ritter was acquitted on these six articles, he was convicted on the charge of bringing his court into disrepute, through the conduct alleged in these six articles, which is neither a violation of civil nor criminal law,[105] nor is it official misconduct per se. The underlying conduct by which this was accomplished was, however, either official misconduct or violation of criminal or civil law. Article 7 must be construed accordingly.[106]

As can be seen from this recital of the charges in the twelve American impeachments, every charge in each article in all twelve cases—acquittals and convictions alike—charges either official misconduct or violation of criminal or civil law. Such a well-established and long-standing precedent, though not determinative, provides at least a strong indication of the scope of impeachable offenses. Thus, the impeachment power should exclude misconduct by the respondent in his private capacity which involves neither the conduct of his official duties, an abuse of his official position, nor a violation of criminal or civil law.

CONCLUSION

It can therefore be concluded that impeachment is not a political tool for arbitrary removal of officials; that the standard for what constitutes an impeachable offense is not based on an inflexible historical precedent or on the judicial tenure clause; that impeachment is not limited to crimes, whether indictable or otherwise;[107] and that the sanction of impeachment does not extend to noncriminal misconduct unless it involves violation of statutory law, the conduct of the respondent's official duties or an abuse of his official position.

Within these limitations, it is extremely difficult to define the proper standard for an impeachable offense in affirmative terms since the

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Ritter case cites the conduct charged in the first six articles only as the basis for a charge of bringing respondent's court into disrepute. Article 5 in the Louderback case, on the other hand, realleges the substance of the first four articles.

[102] 80 Cong. Rec. 5602–06 (1936). The conduct alleged, especially that in article 1 might also constitute bribery. *See* note 54 *supra*.

[103] 28 U.S.C. § 454 (1964) (based on Act of December 18, 1812, ch. 5, 2 Stat. 783).

[104] *See* note 67 *supra*.

[105] For the argument that article 7 incorporates the substantive allegations of articles 1–6, and therefore would allege crimes and official misconduct directly see text accompanying notes 54–56 *supra*.

[106] Thus, if the respondent brings his court into disrepute by conduct which itself could be the subject of an impeachment, this degradation of his court is an impeachable offense under the Ritter precedent. However, otherwise nonimpeachable conduct cannot be bootstrapped into an impeachable offense under the rubric of alleging that such conduct brought the respondent or his court into disrepute.

[107] One commentator is of the opinion that noncriminal misconduct is impeachable only to the extent that such conduct is of a nature that it could be made a criminal offense. Simpson, *supra* note 8, at 805, 811–12; *accord*, Brief for the Respondent in Archbald Impeachment, 1 Archbald Proceedings, *supra* note 68, at 1092–1101 (argued in the alternative to the proposition that only indictable crimes are impeachable).

number of impeachments, not to mention convictions, has been far too small to form the basis of a comprehensive catalog of specific impeachable offenses.

The only generalization which can safely be made is that an impeachable offense must be serious in nature. This requirement flows from the language of the impeachment clause itself—"*high* crimes and misdemeanors," and is mandated by common sense if nothing else. While there is perhaps some authority to the contrary, it is generally accepted that the adjective "high" modifies "misdemeanors" as well as "crimes".[108] The nature of those articles of impeachment which resulted in conviction also indicates quite clearly that misconduct by a public official, be it criminal or noncriminal, must be of a serious nature to be impeachable.

While there are no clear rules as to what constitutes a serious offense, there are a number of factors which are relevant. Thus, an offense is more serious if it is a criminal violation or if it involves moral turpitude. In the words of one court,

> It may be safely asserted that where the act of official delinquency consists in the violation of some provision of the constitution or statute which is denounced as a crime or misdemeanor, or where it is a mere neglect of duty willfully done, with a corrupt intention, or where the negligence is so gross and the disregard of duty so flagrant as to warrant the inference that it was willful and corrupt, it is within the definition of a misdemeanor in office. But where it consists of a mere error of judgment or omission of duty without the element of fraud, and where the negligence is attributable to a misconception of duty rather than a willful disregard thereof, it is not impeachable, although it may be highly prejudicial to the interests of the State.[109]

Thus a minor or technical violation of the judicial canons of ethics, of the civil law or even of the criminal law would not be impeachable. The violation must be serious, as in the cases of the four American judges convicted. To conclude otherwise would be not only to fly in the face of the precedents set by the 200-year history of American impeachments, but also to undermine the efforts of the framers of the Constitution to create an independent judiciary.

Appendix: The 12 American Impeachments

1. William Blount

Position: United States Senator from Tennessee
Date: 1797–99
Charges: *Article I*, Conspiring to carry on a military expedition against Spanish territory "in the Floridas and Louisiana . . . for the purpose of . . . conquering the same for the King of Great Britain," in violation of the laws and the obligations of neutrality of the United States.

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[108] In fact, the language of 28 U.S.C. § 454 (1964) making the practice of law by federal judges a "high misdemeanor"—a phrase otherwise foreign to the criminal law—would indicate that Congress as far back as 1812 assumed that "high" modifies "misdemeanors" and that this conduct should be denominated a "high misdemeanor" to make clear that it could form the basis of an impeachment. *See* note 67 *supra*.

[109] State v. Hastings, 37 Neb. 96, 116–17, 55 N.W. 774, 780 (1893), interpreting article V, § 5, of the Nebraska Constitution, which provides that all civil officers of the state shall be "liable to impeachment for any misdemeanor in office."

Article 2. Conspiring to incite the Creek and Cherokee Indians to warfare in furtherance of the above mentioned scheme and in violation of the laws of the United States and of a treaty between the United States and Spain.

Article 3. Attempting to diminish and destroy the influence with the Creek and Cherokee Indian tribes of the principal Federal temporary agent in the area in furtherance of respondent's above mentioned scheme and against the laws of the United States.

Article 4. Attempting to "seduce" a Federal agent stationed at a trading post in the Cherokee Indian territories into assisting respondent in his "criminal intentions and conspiracies" above mentioned, against the laws and treaties of the United States.

Article 5. Attempting to impair the confidence of the Cherokee Indians in the United States and to "create and foment discontents and disaffection among said Indians" toward the United States in relation to the process provided by treaty for determining the boundary line between the Cherokee Nation and the United States, in furtherance of respondent's above mentioned "criminal designs" to incite the Cherokees and "against the peace and interests" of the United States.

Disposition: Acquitted of all charges on the ground that a United States Senator is not a civil officer of the United States as that term is used in the impeachment clause.

Sources: S. Jour. No. 2, 435–37 (1798); 3 Hinds, *supra* note 1, at 644–80.

2. JOHN PICKERING

Position: District Judge in the District Court for the District of New Hampshire

Date: 1803–04

Charges: *Article 1.* In the course of proceedings by the United States to condemn a ship and its cargo for violation of the customs laws, delivering the ship to the claimant after its attachment by the marshal without requiring a bond, as required by federal law.

Article 2. In the same case, refusal to hear certain testimony offered by the United States.

Article 3. In the same case, refusal to grant an appeal by the United States which was permitted by federal statute as a matter of right.

Article 4. "[B]eing a man of loose morals and intemperate habits," appearing on the bench on November 11 and 12, 1802, "in a state of intoxication . . . and there frequently, in a most profane and indecent manner, [invoking] the name of the Supreme Being."

Disposition: Respondent did not appear to defend himself, but his son appeared, alleging the insanity of his father. Respondent was convicted on each of the articles and removed from office.

Source: 3 Hinds, *supra* note 1, at 681–710.

3. SAMUEL CHASE

Position: Associate Justice, United States Supreme Court

Date: 1804–05

Charges: *Article 1.* "Highly arbitrary, oppressive, and unjust" conduct in respondent's judicial capacity at the trial of John Fries for treason, to wit: delivering an opinion on a question of law before defendant's counsel had been heard, restricting defense counsel from citing English authorities and certain statutes of the United States, and denying defendant's constitutional right to argue (through counsel) questions of law to the jury.

Article 2. "With intent to oppress and secure the conviction" of James Thompson Callender for a libel on President John Adams in a prosecution under the sedition laws, refusing to excuse a juror who wished to be excused because he had already made up his mind on the publication in question.

Article 3. In the Callendar trial, refusal to allow a certain defense witness to testify.

Article 4. "Manifest injustice, partiality, and intemperature" in the Callender trial by compelling defense counsel to submit in writing to the court questions to be asked of a certain defense witness for respondent's admission or rejection of said questions, refusal to postpone the trial until certain material witnesses could be procured, "rude and contemptuous expressions" toward defense counsel, "repeated and vexatious interruptions" of said counsel, and "an indecent solici-

tude . . . for the conviction of the accused . . . highly disgraceful to the character of a judge."

Article 5. Denial of bail to defendant in the Callender case, in violation of state law, which is made applicable by a federal statute.

Article 6. In the Callender case, violation of a provision of applicable state law which required that in non-capital cases a defendant might not be tried during the same term of court in which the grand jury returned its indictment, also made applicable by federal statute.

Article 7. Improperly attempting to induce a grand jury to indict a newspaper editor for violation of the sedition laws and refusing to discharge said grand jury when they refused to do so.

Article 8. Delivering to a grand jury "an intemperate and inflammatory political harrangue, with intent to excite the fears and resentment of said grand jury and of the good people of Maryland against their State government and constitution."

Disposition: Acquitted.

Source: 3 HINDS, *supra* note 1, at 711–71.

4. JAMES H. PECK

Position: District Judge in the District Court of Missouri

Date: 1826–31

Charges: Gross abuse of respondent's power as a judge in sentencing an attorney to 24 hours imprisonment and suspension from the bar of respondent's court for 18 months for writing and publishing a letter criticizing respondent's decision in a case in which the attorney had appeared.

Disposition: Acquitted.

Source: 3 HINDS, *supra* note 1, at 772–804.

5. WEST H. HUMPHREYS

Position: District Judge in the District Court for the District of Tennessee

Date: 1862

Charges: *Article 1.* Giving a public speech on December 29, 1860, declaring the right of secession and inciting revolt and rebellion against the United States in violation of respondent's oath of office requiring him to "discharge all the duties incumbent upon him as judge . . . agreeable to the Constitution and laws of the United States."

Article 2. Unlawfully supporting and advocating the secession of the State of Tennessee from the Union in 1861 "together with other evil-minded persons" and "with intent . . . to subvert the lawful authority and Government of the United States."

Article 3. Unlawfully, and in conjunction with other persons, aiding in the organization of an armed rebellion and the levying of war against the United States in 1861 and 1862.

Article 4. On August 1, 1861, and "divers other days" thereafter, conspiring to oppose the authority of the government of the United States by force contrary to the laws of the United States and respondent's duty as judge.

Article 5. Refusing to hold court in respondent's district as required by law.

Article 6. Specification (1): Unlawfully acting as judge of a Confederate district court and, as judge of such court, requiring a man to swear allegiance to the Confederacy.

Specification (2): As judge of such court, ordering confiscation of property belonging to United States citizens.

Specification (3): As judge of such court, causing citizens of the United States to be arrested and imprisoned because of their allegiance to the United States.

Article 7. As judge of such court, "without lawful authority and with intent to injure," causing a citizen of the United States to be arrested and imprisoned.

Disposition: Conviction on all articles, except Specification (1) of article 6. (The three specifications in article 6 were voted on separately.)

Source: 3 HINDS, *supra note* 1, *at* 805–20.

6. ANDREW JOHNSON

Position: President of the United States

Date: 1866–68

Charges: *Article 1.* Ordering the removal from office of Edwin M. Stanton, Secretary for the Department of War, in violation of the Tenure of Office Act.

Articles 2–5, 8, 11. Appointing one Lorenzo Thomas to act as Secretary of the Department of War ad interim when no vacancy in that office existed and conspiring with Thomas and other persons unknown to prevent Stanton from holding said office, without the advice and consent of the Senate and in violation of the Tenure of Office Act and other federal statutes, and with intent to unlawfully control the disbursement of moneys appropriated for the military service.

Articles 6–7. Conspiring with Thomas to seize, by force, the property of the Department of War, in violation of the Tenure of Office Act and other federal statutes.

Article 9. In furtherance of respondent's attempts to oust Secretary Stanton from office, ordering the military commander of the Department of Washington to take orders directly from respondent, in violation of an act of Congress providing that all orders relating to military operations issued by the President or Secretary of War shall be issued through the General of the Army.

Articles 10–11. Intending to set aside the rightful authority of Congress and attempting to bring the Congress into contempt and reproach by "intemperate, inflammatory, and scandalous harangues" which were highly critical of Congress and which, allegedly, denied that the legislation of Congress was valid or binding on respondent.

Disposition: Acquitted.

Source: 3 HINDS, *supra* note 1, at 821–901.

7. WILLIAM W. BELKNAP

Position: Secretary of War

Date: 1876

Charges: *Articles 1–5.* Accepting a portion of the profit of an Army post-tradership from one Caleb P. Marsh in consideration for appointing one John S. Evans, Marsh's designee, as post trader. The original arrangement was that Evans paid March $12,000 annually, out of which sum March paid $6,000 annually to respondent.

Disposition: Acquitted. (Respondent resigned just prior to the adoption of articles of impeachment by the House, but the Senate proceeded with the trial nonetheless.)

Source: 3 HINDS, *supra* note 1, at 902–47.

8. CHARLES SWAYNE

Position: District Judge in the District Court for the Northern District of Florida

Date: 1903–05

Charges: *Articles 1–3.* Rendering false claim against the government with respect to respondent's expense accounts.

Articles 4–5. Appropriating to respondent's own use, without compensating the owner, a railroad car belonging to a railroad company then in the hands of a receiver appointed by respondent.

Articles 6–7. Violating for six years the federal statute requiring a district judge to reside in his own district.

Articles 8–12. "[M]aliciously and unlawfully" adjudging three lawyers in contempt of court and imposing a fine of $10 and a prison sentence of 10 days for two of such attorneys and a prison sentence of 60 days for the third.

Disposition: Acquitted.

Source: 3 HINDS, *supra* note 1, at 948–80.

9. ROBERT W. ARCHBALD

Position: Circuit Judge in the United States Court of Appeals for the Third Circuit serving as Associate Judge of the United States Commerce Court for a four-year period by designation

Date: 1912–13

Charges: Articles 1–6 involve misconduct occurring while respondent was sitting on the Commerce Court. Articles 7–12 involve misconduct occurring previous thereto, while respondent was a judge in the District Court for the Middle District of Pennsylvania. Article 13 involves misconduct during respondent's tenure on both courts.

Article 1. In partnership with another, purchasing a culm dump, where respondent used his position as judge in a case in which the parent company of the seller was a litigant before him to induce the seller to agree to the sale.

Article 2. Using the influence of his office to effect a settlement in a case before the Interstate Commerce Commission, and being paid a fee therefor, where respondent acted on behalf of one party and the other party was a party litigant to another case before respondent in the Commerce Court.

Article 3. Securing, through use of respondent's official position, from a company, the parent company of which was involved in litigation pending before respondent's court, an agreement for respondent and his associates to lease a culm dump and ship the product exclusively over the lines of the lessor (a railroad).

Article 4. "Gross and improper conduct" in favoring an attorney for one party in a case before respondent's court by communicating secretly and exparte with said attorney to receive evidence and testimony after the completion of the trial.

Article 5. Attempting to obtain a lease agreement for a culm bank on behalf of the prospective lessee where the prospective lessor had previously declined to enter the agreement, notwithstanding that the lessor was owned by the same holding company which owned the Philadelphia and Reading Railroad Company a common carrier engaged in interstate commerce and thus potentially a future litigant before respondent's court; accepting $500 from said lessee for respondent's above described, but unsuccessful, efforts.

Article 6. Improper use of respondent's influence to induce a railroad company and a coal company to purchase certain land owned by a third party.

Article 7. Participating in an investment, in a manner particularly advantageous to respondent, with the owner of a company in litigation before respondent.

Article 8. Attempting to obtain favors—specifically the discounting of a $500 note—from the principal owner of a company engaged in litigation before respondent.

Article 9. Improperly influencing a party defendant in whose favor respondent had ruled to discount a $500 note.

Article 10. Accepting "a large sum of money" from an official of several corporations, any of which in the course of business was liable to be interested in litigation coming before respondent, and thereby bringing respondent's office into disrepute.

Article 11. Receiving in excess of $500 from various attorneys practicing in respondent's court and two court officials appointed by respondent.

Article 12. Appointing as jury commissioner the general attorney for a railroad.

Article 13. Obtaining credit from and through persons interested in litigation pending before respondent, while respondent was sitting on the District Court and also while respondent was sitting on the Commerce Court. While sitting on the Commerce Court: Carrying on a general business for speculation and profit in the purchase and sale of culm dumps and other coal property; compromising litigation before the Interstate Commerce Commission for a valuable consideration; corruptly using his influence as a judge on the Commerce Court in furtherance of the above mentioned schemes and to induce various railroads engaged in interstate commerce to enter into contracts in which respondent was financially interested. Respondent did not invest any money in consideration of any interest given him, but instead used his influence as judge with the contracting parties, many of whom were litigants in his court, and received an interest in such contracts in consideration of the use of his influence.

Disposition: Convicted on articles 1, 3, 4, 5 and 13; acquitted on other articles.

Sources: 6 CANNON'S, *supra* note 1, at 684–708; 48 CONG. REC. 8705–08 (1812).

10. GEORGE ENGLISH

Position: District Judge in the District Court for the Eastern District of Illinois

Date: 1925–26

Charges: *Article 1.* Suspending and disbarring several attorneys without charges being preferred against them, without prior notice and without permitting them to be heard; issuing and having served on the state sheriffs and state attorneys a summons to appear before respondent in an imaginary case and then denouncing such officials in abusive and profane language when they appeared; attempting to coerce the minds of jurymen by stating in open court that the defendant was guilty and threatening that if they did not so find

respondent would jail the jurymen; summoning certain members of the press to appear in court and threatening them with abusive language, including one threat of imprisonment, in order to suppress publication of certain facts concerning a disbarment proceeding.

Articles 2–3. Showing favoritism to a particular referee in bankruptcy, resulting in a combination to control and manage the court to the personal interest and profit of respondent and said referee; amending the rules of bankruptcy in respondent's judicial district for the sole purpose of furthering said combination.

Article 4. Directing that certain bankruptcy funds within the jurisdiction of respondent's court be deposited, in some instances interest free, in banks of which respondent was a depositor, stockholder and director; securing employment for respondent's son with certain banks by ordering certain bankruptcy funds deposited in such banks, in one instance on an interest free basis and in a second with the interest to be paid over to respondent's son; borrowing funds without giving security and at less than the customary rate of interest from a bank in which respondent had ordered bankruptcy funds deposited.

Article 5. Mistreating members of the bar appearing before respondent by arbitrary and tyrannical conduct; denying litigants the right to appear with counsel and defendants in criminal cases the right to trial by jury; favoritism toward a particular referee in bankruptcy; attempting to make a deal with a fellow judge whereby each would choose a particular relative of the other for certain receiverships and other appointments.

Disposition: Resigned prior to commencement of trial by Senate and proceedings discontinued at that point.

Sources: 6 CANNON'S *supra* note 1, at 778–86; 67 CONG. REC. 6283–87 (1926).

11. HAROLD LOUDERBACK

Position: District Judge in the District Court for the Northern District of California.

Date: 1932–33

Charges: *Article 1.* Discharging an equity receiver after attempting, unsuccessfully, to coerce him to appoint one Douglass Short as attorney for the receiver with promises of the allowance of large fees and threats of reduced fees; establishing a fictitious residence in violation of state law to shift the venue of a lawsuit which respondent anticipated to be filed against him; entering into a conspiracy with one Sam Leake to maintain, secretly, an actual residence in the county from which respondent was supposed to have moved in return for which respondent attempted to secure the appointment of Short, a friend of Leake, as attorney for a receiver as recited above.

Article 2. Granting "exorbitant" allowances to a receiver and an attorney, who were respondent's "personal and political friends and associates," and then refusing to order all of the assets involved in the case turned over to the state insurance commissioner, as ordered by the Circuit Court of Appeals, until all parties agreed not to contest said allowances.

Article 3. Appointing one Guy H. Gilbert as receiver knowing he was unqualified and incompetent, and refusing a hearing on the question to the parties in interest.

Article 4. Granting "on insufficient and improper application" and without proper notice to the parties the appointment as equity receiver of Guy H. Gilbert (referred to in article 3 *supra*) in a case where no receiver should have been appointed; failing to give impartial consideration to the motion to discharge such receiver; unlawfully taking jurisdiction over and approving a petition in bankruptcy of the company concerned, which petition was based solely on the improper appointment of an equity receiver by respondent, notwithstanding the pendancy of the motion to discharge said receiver; appointing as receiver in said bankruptcy proceeding the aforementioned Guy H. Gilbert.

Article 5. Conduct alleged in articles 1–4, appointment of personal and political associates of respondent (who were in some cases incompetent as well) as receivers and appraisers, and conduct on the bench "displaying a high degree of indifference" toward some parties appearing before respondent such as "to create a general condition of widespread fear and distrust and disbelief in the fairness and disinterestedness of the official actions" respondent, "to the scandal and disrepute of [respondent's] court and the administration of justice therein and

prejudicial generally to the public respect for and public confidence in the Federal judiciary."

Disposition: Acquitted.

Source: 6 CANNON'S *supra* note 1, at 709–42.

12. HALSTED L. RITTER

Position: District Judge in the District Court for the Southern District of Florida

Date: 1933–36

Charges: *Article 1.* Corruptly and unlawfully receiving $4,500 from a former law partner who paid the amount out of a $75,000 fee as a receiver, to which position he had been appointed by respondent. This fee was originally set at $15,000 by another judge, but respondent raised it to the "exorbitant" level of $75,000.

Article 2. Participating with respondent's former partner and others in a champertous undertaking designed, in part, to produce the fees described in article 1, notwithstanding the request of the plaintiff that the complaint be dismissed since it was not authorized when filed.

Article 3. Engaging in the practice of law while on the bench, in violation of federal statutory law. In this connection, respondent requested, and received, $2,000 from a client of his former law firm but without the knowledge of his former partner in said law firm.

Article 4. Practicing law while on the bench in that respondent received a fee of $7,500 for representing one J. R. Francis in several matters.

Article 5. Failure to pay income tax on $12,000 of income for 1929, including the fees referred to in articles 3 and 4.

Article 6. Failure to pay income tax on $5,300 of income for 1930, including $2,500 of the $4,500 received by respondent as described in article 1.

Article 7. "The reasonable and probable consequence of the actions or conduct of Halsted L. Ritter" enumerated in article 1–6 "since he became judge of said court, as an individual, or as such judge, is to bring his court into scandal and disrepute, to the prejudice of said court and public confidence in the administration of justice therein, and to the prejudice of public respect for and confidence in the Federal judiciary, and to render him unfit to continue to serve as such judge."

Disposition: Convicted on article 7; acquitted on all other articles.

Sources: RITTER PROCEEDINGS, *supra* note 14; 80 CONG. REC. 5602–06 (1936).

"Impeachment of Civil Officers Under the Federal Constitution", Leon R. Yankwich

Impeachment of Civil Officers Under the Federal Constitution*

Leon R. Yankwich**

I

The Nature of Impeachment

Impeachment is resorted to so little that when mention is made of courts, the court of impeachment is seldom adverted to. Yet in California law, the court of impeachment is given at the head of the list of courts.[1] Under the Federal Constitution, the judicial power of the United States is vested in the Supreme Court and in such inferior courts as the Congress may, from time to time "ordain and establish".[2]

The power of impeachment is, not strictly speaking, judicial power retained by the Congress. Nevertheless, the power is a most important one and when the Senate, under the mandate of the Constitution, sits in impeachment, it exercises a function of judicial character, whether we call it a court or not.

The word "impeachment", in its original sense—derived from the Latin *impedicare* (*pedica*, fetter, and *pes*, *pedem*, foot)—meant "to hinder" or "to prevent". In parliamentary usage, it acquired the meaning of accusation or charge. Late in the 16th century, the word began to acquire the meaning which it has now, to accuse a person of high crime and misdemeanor before a court of impeachment. The practice of impeachment developed with the rise of responsible government and parliamentary institutions. By some, its rise is attributed to the fact that it was thought that high officers of the Crown might avoid, through their influence, punishment unless Parliament itself was in a position to inflict punishment.

The practice, as we have it, comes from England. The earliest record of an impeachment trial in England dates back to 1376. During the reign of Edward III and some of his successors, Bills of Attainder and proceedings in the Court of the Star Chamber took the place of impeachment trials. In 1620, impeachment was revived and during

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**LL. B., Willamette University, Salem, Oregon (1909), J. D., Loyola University, Los Angeles, California (1926), LL. D., *Id.* (1929); Judge, Superior Court of Los Angeles County, 1927–1935; Judge, United States District Court, Southern District of California, since 1935. Author of: California Pleading and Procedure (1926), Essays in the Law of Libel (1929), Notes on Common Law Pleading (1925, 1930), and numerous articles in legal periodicals.

[1] Cal. Code Civ. Proc. (Deering 1933) § 37.

[2] U.S. Const. Art. III, § 1.

the next sixty-eight years, there was an impeachment on the average of every twenty months. There has been no resort to impeachment in England since the trial of Henry Lord Viscount Melville, Treasurer of His Majesty's Navy, for misappropriation of funds in 1806, in the reign of George III.[3] Under English parliamentary practice, any person, whether a peer or a commoner, may be impeached by the House of Commons for any crime or misdemeanor.[4] By specific constitutional provision, the right of impeachment under the Federal Constitution is very limited.

II

IMPEACHMENT UNDER THE CONSTITUTION OF THE UNITED STATES

Impeachment and the procedure under it are governed by a few apparently simple provisions in the Constitution of the United States. They are:

"The House of Represenatives . . . . shall have the sole power of impeachment."[5]

"The Senate shall have the sole power to try all impeachments. When sitting for that purpose, they shall be on oath or affirmation. When the President of the United States is tried, the chief justice shall preside; and no person shall be convicted without the concurrence of two-thirds of the members present."[6]

"Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust or profit under the United States; but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment, and punishment, according to law."[7]

"The President . . . . shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment."[8]

"The President, Vice-President, and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, reason, bribery, or other high crimes and misdemeanors."[9]

"The trial of all crimes, except in cases of impeachment, shall be by jury. . . ."[10]

One of the most significant differences between impeachement in England and in the United States appears in the designation of persons who may be impeached. First to be noted is the fact that the President is subject to impeachment. No such right existed in England as to the English sovereign. The fact has been adverted to repeatedly by our courts in discussing the nature of the presidential office. In *Langford* v. *United States*, Mr. Justice Miller wrote:

"The President, in the exercise of the executive functions, bears a nearer resemblance to the limited monarch of the English Government than any other branch of our Government, and is the only individual

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[3] Melville's case (1806), 29 Howell, State Trials (1821) 549.
[4] 22 Halsbury, Laws of England (1912) 650–651, Lord Halsbury calls impeachment "the most solemn form of trial known to English law."
[5] U.S. Const. Art. I, § 2, Cl. 5.
[6] U.S. Const. Art. I, § 3, Cl. 6.
[7] U.S. Const. Art. I, § 3, Cl. 7.
[8] U.S. Const. Art. II, § 2, Cl. 1.
[9] U.S. Const. Art. II, § 4.
[10] U.S. Const. Art. III, § 2, Cl. 3.

to whom it could possibly have any relation. It cannot apply to him, because the Constitution admits that he may do wrong, and has provided a means for his trial for wrong-doing, and his removal from office if found guilty by the proceeding of impeachment. None of the eminent counsel who defended President Johnson on his impeachment trial asserted that by law he was incapable of doing wrong, or that, if done, it could not, as in the case of the King, be imputed to him, but must be laid to the charge of the ministers who advised him." [11]

Another difference is noticeable in the fact that under English procedure, *any* person may be impeached. Under the provisions of the Constitution of the United States, only "civil officers" may be impeached. The provision is broad enough to include all officers of the United States, who hold their appointment from the national government, whether their duties be executive, administrative or judicial, or whether their position be high or low. Military or naval officers are not subject to impeachment. No attempt has ever been made to impeach one. The reason, of course, is obvious: Army and Navy officers are subject to trial and punishment according to the Military Codes. As Story once put it,

"The very nature and efficiency of military duties and discipline require this summary and exclusive jurisdiction." [12]

Judges of the courts of the United States may be impeached. Four such judges have actually been convicted after impeachment: John Pickering in 1803; W. H. Humphreys in 1862; R. W. Archbald in 1912, and Halsted L. Ritter in 1936. In 1917, articles of impeachment were voted against Judge George W. English of Illinois, but he resigned before trial. There are other instances of judges against whom impeachment proceedings were recommended by the House Committee, but were dropped when they resigned: P. K. Lawrence in 1839; J. C. Watrous in 1860; M. H. Delahy in 1872; E. Durrell in 1874, and R. Busted in 1874. In 1933, a Federal District Judge from California stood trial for impeachment. The two-thirds vote necessary to obtain conviction not having been secured on any of the five charges of misconduct directed against him and arising out of the manner of handling receiverships, he stood acquitted and retained office. On April 16, 1936, the Senate of the United States convicted Judge Halsted L. Ritter, District Judge of the Southern District of Florida, after impeachment under seven articles charging him with misbehavior in office.

So far as is known, impeachment proceedings have been begun but once in the United States against a member of the President's Cabinet. That happened in 1876 when impeachment charges for bribery were filed against William W. Belknap, Secretary of War, after he had resigned. Although his contention that he was not a "civil officer"

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[11] 101 U.S. 341, 343 (1879). Similar language was used by Chief Justice John Marshall in the trial of Burr, United States v. Burr, 25 Fed. Cas. No. 14,692d at 34 (C.C.D. Va. 1807):

"Of the many points of difference which exist between the first magistrate in England and the first magistrate of the United States in respect to the personal dignity conferred on them by the constitutions of their respective nations, the court will only select and mention two. It is a principle of the English constitution that the king can do no wrong, that no blame can be imputed to him, that he cannot be named in debate. By the constitution of the United States, the president, as well as any other officer of the government, may be impeached. . . ."

[12] Story, Manual of The Constitution (1886) 83. Modern writers agree with Story that Army and Navy Officers are not subject to impeachment. 3 Willoughby, The Constitution (1929) 1488, § 929; 9 Hughes, Federal Practice (1931) 621, § 7228.

and, therefore, not subject to impeachment, was overruled, he was later acquitted, presumably upon the same ground. All authorities agree that members of the Congress of the United States, not being commissioned by the President, are not "civil officers" of the United States. Only one attempt has ever been made to impeach a Senator of the United States. That was in 1797, when articles of impeachment were filed against Senator William Blount. The Senate sustained Senator Blount's objection to the jurisdiction upon the ground that he was not a "civil officer", subject to impeachment.[13]

Under the broad interpretation which has been placed upon the words "civil officer", it is quite evident that many of the civil officers who are subject to impeachment may also be removed by the President with or without the consent of the Senate.[14] Others, such as the President and Vice-President, cannot be removed otherwise. This is also true as to Judges. For, while the Constitution provides that they shall hold office during "their good behavior"[15] there is no provision in the Constitution for their removal for lack of "good behavior", except through impeachment.

III

GROUNDS FOR IMPEACHMENT

The grounds for impeachment are treason, bribery and "other high crimes and misdemeanors".[16] The words "high crimes and misdemeanors" are general. They are borrowed from English parliamentary practice. The phrases there used have been, at various times "treason, felonies and mischiefs done to our Lord, The King", "divers deceits", and, finally, in their latest form, "high crimes and misdemeanors". No definition of them has been attempted. The meaning of the two specific crimes, bribery and treason, is well established. Treason is defined in the Constitution itself as consisting "only in levying War against them, or in adhering to their enemies, giving them aid and comfort".[17] For a definition of bribery, resort is had to the common law definition which is usually given as "the voluntary giving or receiving of anything of value in corrupt payment for an official act done or to be done".[18] The Constitution gives us no clue as to what crime or misdemeanors are. However, a study of English and American precedents in impeachment cases leads to the conclusion that they cover general official misconduct. The variety of charges which have served as a basis for impeachment may be illustrated by reference to some well-known cases.

On May 20, 1620, in the reign of James I, Francis Bacon, Lord Verulam, Viscount St. Albans, Lord Chancellor of England, was impeached before the House of Lords for bribery and corruption in office. The charges against him, contained in a large number of articles consisted of receiving money and valuable objects as bribes from litigants in cases pending before him. In many instances, the

[13] 9 Hughes, Federal Practice (1931) 621, 622, § 7228.
[14] Myers v. United States, 272 U.S. 52 (1926); Humphry's Executor v. United States, 295 U.S. 602 (1935).
[15] U.S. Const. Art. III, § 1.
[16] U.S. Const. Art. II, § 4.
[17] U.S. Const. Art. III, § 3.
[18] 9 Corpus Juris 402.

charge was made that he received bribes from both sides of the controversy. A final charge was also made that "he had given way to great extractions by servants in respect of private seals, and sealing injunctions". On April 30, 1620, Bacon admitted his guilt. He was fined 40,000 pounds. He was stripped of his peerage and his honors and sentenced to imprisonment in the Tower, at the King's pleasure. The fine was later remitted. He actually served only a few days in the Tower and was pardoned in November, 1621. That English judges, at the time, were not above corruption is evidenced by the fact that Bacon, himself, in his address to Serjeant Hutton upon becoming a Judge of the Common Pleas, saw fit to warn him against corruption with these words:

"That your hands and the hands of your hands (I mean those about you) be clean and uncorrupt from gifts, from meddling in titles, and from serving of turns, be they great ones, or small ones." Bacon, in his famous essay on judicature, set the loftiest ideals for a judge. In it he speaks of "integrity" as the portion of judges and their proper virtue and warns against improper acts by subalterns.

"The place of justice," he says, "is a hallowed place; and therefore not only the bench, but the foot pace and precincts, and purprise (close) thereof, ought to be preserved without scandal and corruption." More is the pity that a man of this type—the man who through his most important work, *Novum Organum*, or *The Advancement of Learning*, laid the foundation for the inductive method of discerning truth, and who is considered by modern historians of science as "one of the great builders who constructed the mind of the modern world" [19]—should have brought corruption to the high office of Chancellor, thus demonstrating that to study truth may not always mean to live it.

On May 13, 1624, during the reign of the same King, Lionel Cranfield, Earl of Middlesex, Lord Treasurer, was found guilty upon impeachment which charged him with bribery and extortion under color of office. He was sentenced to the loss of his offices, disqualified from holding any office, place or employment "in the state and commonwealth" and was ordered imprisoned in the Tower of London during the King's pleasure; to pay a fine of 50,000 pounds and "that he shall never sit in Parliament any more and that he shall never come within the verge of the court."

On May 8, 1626, in the reign of Charles I, articles of impeachment were voted against George, Duke, Marquis and Earl of Buckingham, Great Admiral of the Kingdom of England and Ireland, charging him with holding a plurality of offices, buying his office as an admiral, buying a wardenship, failure to guard the seas and other acts of abuse of power and extortion, including the selling of places of judicature, procuring honors for his poor kindred and his "transcendent presumption in giving physic to the King".

Parliamentary upheavals resulting in the dissolution of Parliament, and the killing of the Duke on August 23, prevented the completion of his trial upon these charges.

On November 25, 1640, during the reign of the same King, Thomas, Earl of Strafford, Lord Lieutenant of Ireland, was charged in articles

[19] Whitehead, Science and the Modern World (1925) 63.

or impeachment with various acts committed in Ireland aiming to subvert Parliamentary authority and to substitute his own arbitrary power. An old historian of the Long Parliament of England, Thomas May, has summed up the charges against him in the following quaint language:

> The first and second being much alike, concerning his ruling of Ireland, and those parts of England, where his Authority lay, in an Arbitrary way, against the fundamental Lawes of the Kingdome, which Lawes he had endeavoured to subvert. Thirdly, his retaining part of the King's Revenue, without giving a legal account. Fourthly, The abusing of his Power, to the increase and encouragement of Papists. Fifthly, That he maliciously had endeavoured to stir-up Hostility betweene England and Scotland. Sixthly, That, being Lieutenant-General of the Northerne Army, he had wilfully suffered the Scots to defeat the English at Newburne, and take Newcastle: that by such a losse and dishonour, England might be engaged in a National and irreconcileable quarrel with the Scots. Seventhly, That to preserve himselfe from questioning, he had laboured to subvert Parliaments and incense the King against them. Eightly, and lastly, That these things were done during the time of his Authority as Deputy of Ireland, and Lieutenant-General of the Northerne Armies in England.

The King in person attended the trial and took notes. The higher aristocracy were on the side of the accused. May complains:

"The Courtiers cryed him up, and the Ladies (whose voices will carry much with some parts of the State) were exceedingly on his side."

Although the trial lasted from the twenty-second of March until the middle of April, during which time the Earl was on the stand for fifteen days, the Managers of the House of Commons finally decided on April 21, 1641, to proceed against him by Bill of Attainder. He was found guilty and executed on May 12, 1641.

Edward, Earl of Clarendon, Lord Chancellor of England, was impeached on July 10, 1663, in the reign of Charles II, on various charges. Among them were that he had tried to alienate the hearts of His Majesty's subjects from him by artificial insinuations and circulating approbrious scandals against the King, inciting jealously; that he had "wickedly" advised the King to withdraw the English garrisons out of Scotland, and to demolish the forts; that he had endeavored to alienate the affection of the King from Parliament, and that he had advised the King and secured the sale of Dunkirk to the French King. The last Article read:

"That having arrogated to himself a supreme direction of all his majesty's affairs, he hath, with a malicious and corrupt intention, prevailed to have his majesty's customs farmed at a far lower rate than others do offer, and that by persons, with some of whom he goes a share, in that and other parts of money resulting from his majesty's revenue."

Clarendon fled, so the trial could not be held. Parliament, therefore, on December 12, passed a statute banishing him.

The last impeachment of which there is a record in England, is that of Henry, Lord Viscount Melville, Treasurer of His Majesty's Navy, who was impeached for various actions of misappropriation of public funds, on April 29, 1806, in the reign of George III. He was acquitted, after a long trial, on June 12, 1806. Other instances are a judge, (Tresilian) being impeached for misleading a sovereign by rendering unconstitutional opinions; an ambassador, (Wolsey) for betraying

his trust; an advisor of the King, (Halifax) for seeking to obtain exorbitant emoluments to himself.[20]

The American precedents indicate, as do these English precedents, that the misconduct *may*, but *need not*, amount to a violation of law.

None of the eleven articles of impeachment against President Andrew Johnson, the only American President ever to face impeachment, charged a direct offense against either the Constitution or the statutes of the United States, except, perhaps, the violation of the Tenure of Office Act. Nine of the articles concerned the attempted removal of his Secretary of War and the others charged that the President, by his intemperate and inflammatory speeches, had attempted to bring into contempt the Congress of the United States. Judge John Pickering was convicted on impeachment in 1803, although no direct violation of law was charged against him. The charges were that he had released a vessel without bond, refused to hear witnesses in the case, refused to allow an appeal from his judgment; that he was intoxicated and used profanity while on the Bench. The articles of impeachment against Judge Samuel Chase charged unjudicial conduct, such as refusal to allow counsel to argue on the law to a jury, and addressing a grand jury in intemperate political language, in order to bring about an indictment under the Espionage Act. He was acquitted. Judge W. H. Humphreys was charged with treason, neglect of duty, of acting as a judge in a Confederate state and causing the wrongful arrest of citizens while so doing. Judge J. H. Peck was charged with punishing an attorney wrongfully for contempt. He was acquitted. The charges against Judge Swayne related to making wrongful claims for travelling expenses, receiving benefits from a receiver of his appointment, and punishing two attorneys wrongfully for contempt. He was acquitted. Judge R. W. Archbald was tried under five articles, none of which charged a crime. Among the most serious charges against him was the charge that he conducted a secret correspondence with a litigant concerning the merits of a case pending before him.

The impeachment proceedings against other judges, in more recent times, were grounded on misconduct which fell short of being a crime.

In the most recent impeachment—that of Judge Halsted L. Ritter of the Southern District of Florida [21]—the articles of impeachment were in substance:

> I Misbehavior and high crime and misdemeanor in office by corruptly and unlawfully accepting from his former law partner $4,500 out of the avails of a decree made by the respondent.
>
> II Misbehavior and high crime and misdemeanor in office by conspiring with his former law partner and others to continue property in litigation, promoting the conspiracy by keeping jurisdiction of a foreclosure proceeding contrary to the motion of the plaintiff in person, on the basis of interventions filed in the case, appointing as receiver a person alleged to be involved in the con-

[20] The precedents given are summarized from the following texts and authorities: Bacon's Case (1620), 2 Howell, State Trials (1809) 1087; Middlesex's Case (1624), 2 *Id.* at 1183; Buckingham's Case (1624), 2 *Id.* at 1186; Strafford's Case (1640), 3 *Id.* at 1381; May, History of the Parliament of England (1812) 59–65; Clarendon's Case (1663–1667), 6 Howell, State Trials (1810) 291. (The report of this case contains one of the most complete records of an impeachment in England and the procedure followed from beginning to end.) See also: 9 Hughes, Federal Practice (1931) 626, § 7229; Story, Commentaries on the Constitution (3d ed., 1858) § 800.

[21] Sen. Rep. No. 84, 74th Cong., 2nd Sess. (1936) 5360.

spiracy, granting exorbitant fees, and corruptly and unlawfully accepting from such fees $4,500.

III A high misdemeanor in office by practicing law contrary to the Judicial Code and accepting $2,000 from his client while it held and owned large interests in his jurisdiction, and accepting a large amount of securities from his client of a corporation organized to develop holdings within his jurisdiction.

IV A high misdemeanor in office by practicing law on another occasion contrary to the Judicial Code, and receiving for his services $7,500.

V A high misdemeanor by violating 146(b) of the Revenue Act of 1928 in not returning the above-mentioned fees in his income-tax return for the year ending December 31, 1929.

VI A high misdemeanor in office by violating 146(b) of the Revenue Act of 1928 in not returning $5,300 gross taxable income for the year ending December 31, 1930.

VII Misbehavior and high crimes and misdemeanor in office by accepting large fees and gratuities, to-wit, $7,500 from J. R. Francis on or about April 19, 1929, said J. R. Francis having large property within his territorial jurisdiction as a judge, and on, to-wit, the 4th day of April, 1929, accepting $2,000 from Mulford Realty Corporation and a large amount of the securities of Olympia Improvement Corporation, organized to develop holdings within his territorial jurisdiction. Also, "by his conduct as detailed in articles I, II, III, and IV hereof, and by his income-tax evasions, as set forth in articles V and VI hereof." [22]

Judge Ritter was acquitted on Articles I to VI, but was adjudged guilty on Article VII by a vote of 56 to 28. After the vote was announced, a point of order was made that the respondent was not guilty because Article VII is an omnibus article, the ingredients of which are contained in the others upon which he had been acquitted. The president pro tempore of the Senate, however, overruled the point of order stating:

"A point of order is made as to Article VII, in which the respondent is charged with general misbehavior. It is a separate charge from any other charge, and the point of order is overruled." [23]

He then ordered judgment entered removing Judge Ritter from office.

It is very significant that by this ruling the Senate gave sanction to the proposition that to justify removal of a judge it is not necessary that he be guilty of violation of law. So ruling, they made their own the part of Article VII which reads:

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[22] *Id.* at 5753.

[23] *Ibid.* The contention that his acquittal on the charges contained in Articles I to VI inclusive prevented his conviction on Article VII was advanced by Judge Ritter himself in the suit to recover his salary for the month of April, 1936, before the Court of Claims.

The claim was rejected upon the ground that no authority exists in any court of the United States to review or revise the action of the United States Senate in an impeachment proceeding.

The Court said:

"Our conclusion is that we have no authority to review the impeachment proceedings held in the Senate and decide whether the accusations made against the plaintiff were such that he could properly be impeached thereon, nor can we pass upon the question of whether his acquittal on the first six articles was a bar to prosecution under the seventh. In our opinion, the Senate was the sole tribunal that could take jurisdiction of the articles of impeachment presented to that body against the plaintiff and its decision is final." Ritter *v.* United States, 84 Ct. Cl. 293, 300 (1936). See State *ex. rel.* Trapp *v.* Chambers, 96 Okla. 78, 220 Pac. 890 (1923).

The Supreme Court by denying certiorari has approved the ruling Ritter *v.* United States, 300 U.S. 668 (1936).

> The reasonable and probable consequence of the actions or conduct of Halsted L. Ritter, hereunder specified or indicated in this article, since he became judge of said court, as an individual or as such judge, is to bring his court into scandal and disrepute, to the prejudice of said court and public confidence in the administration of justice therein, and to the prejudice of public respect for and confidence in the Federal judiciary, and to render him unfit to continue to serve as such judge.[24]

This ruling definitely lays down the principle that even though upon specific charges amounting to legal violations, the impeaching body finds the accused not guilty, it may, nevertheless, find that his conduct in these very matters was such as to bring his office into disrepute and order his removal upon that ground.

The conclusion thus reached met with vigorous opposition on the part of some of the Senators as the debates show. Nevertheless, it is consistent with the general attitude of courts in cases dealing with the professions. Courts have repeatedly held that an attorney, after aquittal of a charge of law violation, may, nevertheless, be disbarred for his conduct in the very matter of which he stood acquitted. Similar rulings have been made with regard to physicians. The basis of these rulings is that the object of the criminal prosecution is entirely distinct from the proceedings for disbarment or revocation of license—the one aiming to punish, the other to the protection of the public and the profession. These principles are applied with such uniformity in all cases that it is unnecessary to give any citations. They apply with greater force to a judicial office in which the highest rectitude is required. So that instead of seeing danger in the precedent set in the *Ritter case*, we should welcome the ruling of the Senate as notice to the judiciary that they will require compliance with the highest standards of ethical behavior upon their part. And so I agree with the summary of the case made by the Honorable William Gibbs McAdoo, Senator from California, in a memorandum which he filed in the matter:

> Good behavior, as it is used in the Constitution, exacts of a judge the highest standards of public and private rectitude. No judge can besmirch the robes he wears by relaxing these standards, by compromising them through conduct which brings reproach upon himself personally, or upon the great office he holds. No more sacred trust is committed to the bench of the United States than to keep shining with undimmed effulgence the brightest jewel in the crown of democracy—justice.
>
> However disagreeable the duty may be to those of us who constitute this great body in determining the guilt of those who are entrusted under the Constitution with the high responsibilities of judicial office, we must be as exacting in our conception of the obligations of a judicial officer as Mr. Justice Cardozo defined them when he said, in connection with fiduciaries, that they should be held "to something stricter than the morals of the market place. Not honesty alone, but the punctillio of an honor the most sensitive, is then the standard of behavior".[25]

In the only impeachments under the California Constitution involving judges, the charges did not involve violations of law. Judge James

[24] Ibid.

[25] Meinhard v. Salmon, 249 N.Y. 458, 164 N.E. 545 (1928).

H. Hardy was impeached and found guilty in 1862, for using profane language out of court and expressing sympathy with the Confederate cause. In 1929, Judge Carlos S. Hardy, of the Superior Court of Los Angeles County, was impeached and acquitted. The accusations against him were:

(1) that he gave legal advice as attorney and counsellor of law to a well-known evangelist and her mother;

(2) that he aided her in fostering the belief that she had been kidnapped, while the grand jury was investigating the kidnapping;

(3) that, while a judge, he had received a sum of money in compensation for legal services;

(4) that he had sought to intimidate a witness who might be called in a criminal case arising out of the kidnapping;

(5) that in the trial of a criminal case he had caused to be numbered the seats in the courtroom and had distributed tickets for the seats to his friends.

The only other impeachments of California State officers, under the State law, were those of Henry Bates, State Treasurer, in 1857, for defrauding the State, which resulted in his conviction, and, in the same year, of G. W. Whitman, State Comptroller, upon a similar accusation, which resulted in his acquittal. Whitman, however, was suspended from his office pending trial and was never reinstated after his acquittal.

From these precedents, it is evident that the interpretation which is placed upon the words "crimes and misdemeanors" is a broad one; that persons have been impeached and found guilty for acts of misconduct, some of a personal, others of an official character—which do not amount to a crime. So much so that the Committee on Impeachment of the House of Representatives in the case of United States District Judge George W. English, stated in their report that impeachment may be based upon acts not forbidden by either the Constitution or the Federal Statutes. The Report read:

> It is now, we believe, considered that impeachment is not confined to acts which are forbidden by the Constitution or Federal statutes. The better sustained and modern view is that the provision for impeachment in the Constitution applies not only to high crimes and misdemeanors as those words were understood at common law but also acts which are not defined as criminal and made subject to indictment, and also to those which affect the public welfare. Thus an official may be impeached for offenses of a political character and for gross betrayal of public interests. Also for abuses or betrayal of trusts, for inexcusable negligence of duty, for the tyrannical abuse of power, or, as one writer puts its, for 'a breach of official duty by malfeasance or misfeasance, including conduct such as drunkenness, when habitual, or in the performance of official duties, gross indecency, profanity, obscenity, or other language used in the discharge of an official duty imposed by statute or common law'. No judge may be impeached for a wrong decision.[26]

This broad statement of the grounds for removal by impeachment, supported by precedents in our history, justifies the statement made

[26] 3 Willoughby, The Constitution of the United States (1929) 1449, 1450, § 931. See: Simpson, Jr., *Federal Impeachments* (1916) 64 U. of Pa. L. Rev. 651, 677.

in 1913 by Former President William H. Taft, who, in commenting upon the conviction after impeachment of United States Circuit Judge Robert W. Archbald, stated that judges

"must be careful in their conduct outside of court as well as in the court itself, and that they must not use the prestige of their official position, directly or indirectly, to secure personal benefits."

Elsewhere in the same address, Mr. Taft stated:

> Under the authoritative construction by the highest court of impeachment, the Senate of the United States, a high misdemeanor for which a judge may be removed in misconduct involving bad faith or wantonness or recklessness in his judicial action or the use of his official influence for ulterior purposes. . . . By the liberal interpretation of the term 'high misdemeanor' which the Senate has given, there is now no difficulty in securing the removal of a judge for any reason that shows him unfit.[27]

Under the English practice, the House of Lords may impose any punishment it sees fit. So, in addition to removal from office, imprisonment, fines, banishment have been imposed. In one case—that of Archbishop Land—death was imposed. It is evident from this that impeachment under English law aims to punish the individual. The Federal provision, not only by the grounds of impeachment, but also by the punishment it provides, justifies the statement that the proceeding is not intended to punish the individual for wrongdoing, but merely to remove him from office for political offenses. The punishment provided in the Constitution is removal from office and disqualification from holding and enjoying any office of honor, trust or profit under the United States.[28] Conviction is not a bar to prosecution for the same acts under the criminal law.

IV

PROCEDURE ON IMPEACHMENT

By analogy to English practice a procedure has grown up which is substantially as follows:

The impeachment is instituted by the House of Representatives by the adoption of a resolution calling for the appointment of a committee to investigate charges brought against the officer. This committee may, after investigation, recommend the dismissal of the charges, or recommend the impeachment. If the resolution recommending impeachment is adopted, articles of impeachment are drawn setting forth the grounds for impeachment. Following the adoption of a resolution to impeach, the House appoints Managers to conduct the impeachment. The Senate is then informed of these facts by resolution. Upon this resolution reaching the Senate, the Senate adopts a resolution informing the House that the Senate is ready to receive the Managers appointed by the House. The latter then present themselves to the Senate, and present the articles of impeachment, reserving the right to file additional articles later. The Managers then retire. After the Senate has fixed the time for the trial, the House is informed of the fact. On the date of the trial, the Senate resolves itself into a body for trial of the impeachment. The President of the Senate presides over the court,

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[27] A. B. A. Rep. (1913) 431 *et seq.* For precedents, giving accusations against judges, see 9 Hughes, Federal Practice (1931) 631, 632; 3 Hinds, Precedents of House of Representatives (1907); and Simpson, *supra* note 26.

[28] U.S. Const. Art. I, § 3, Cl. 8.

except in case of the impeachment of the President of the United States, when the Chief Justice presides. Upon the organization of the court, the Managers appear and the trial of the case proceeds. In England, the Commons attend the trial in a body. The accused is brought before the court, and may present his demurrer or answer to the charges contained in the articles. The presentation of the evidence takes the usual order of proceedings in a court. The evidence against the accused is first presented, then evidence in defense and concluding evidence by the Managers. In the examination of witnesses and the presentation of testimony, the general rules of evidence obtainable in criminal courts apply, including the constitutional presumptions and guarantees applicable to criminal trials. After the conclusion of the evidence, there is argument, followed by deliberation by the Senate in executive session and the vote in open session.[29] A two-thirds vote is necessary for impeachment. The proceeding may be dismissed in the Senate by the House Managers. The Senate may either acquit or convict the defendant. In England, a person convicted on impeachment may be pardoned or reprieved by the Crown.[30] No pardon is permitted under the Federal Constitution.[31]

V

THE INEFFECTIVENESS OF THE REMEDY

Impeachment has fallen into disuse in England. Dicey explains this disuse by stating that the rule of law—to the observance on which the English people are so definitely committed—makes it unnecessary to resort to extraordinary remedies to enforce its obedience.[32] In the United States, it is significant that it has been used more often against judges than against other civil officers. It has been estimated that fifty percent of the impeachment proceedings were against judges.[33] It is the view of students that the acquittal of President Johnson saved the United States from what might otherwise have been a tragedy—a tragedy that might have branded as unworthy a man whom later generations have come to consider as a great patriot trying to carry on under trying circumstances. A great historical wrong was thus avoided by one vote. The background of Johnson's impeachment is now known to all. The presence of Johnson, of plebeian origin, in the Presidency was objectionable to many people. His intemperate speeches and attacks offended others. Upon the death of Lincoln, it was thought that in Johnson the reunited states had a President who would sanction extreme measures against the defeated South. Johnson, however, after becoming President, withstood the attempts of the radicals and extremists to crush the South. He sought, in his own "undiplomatic" way, to uphold the cause of those who would heal the wounds of the War, as Lincoln had desired. His reward was a trial of impeachment. The trial was presided over by Chief Justice Salmon P. Chase. It began on March 5,

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[29] 9 Hughes, Federal Practice (1931) §§ 7235–7283; Story, Manual of the Constitution (1886) 87.
[30] 21 Halsbury, Laws of England (1912) 651.
[31] U.S. Const. Art. II, § 2, Cl. 1.
[32] Dicey, The Law of the Constitution (1923) 450.
[33] See: Trial of the Impeachment of Judge Carlos S. Hardy (Senate of Cal. 1929) Intro. IX.

1868, and ended on May 26, 1868. The vote was 35 for conviction and 19 for acquittal.[34]

Several State Governors have been convicted after impeachment, in recent years, Governor William Sulzer of New York in 1913, Governor James Ferguson of Texas in 1917, and Governor J. C. Walton of Oklahoma in 1923. Recurring election and the recall statutes make the removal of judges of state courts easy and resort to impeachment unnecessary. This is not the case with Federal judges. The remedy of impeachment is cumbersome and unavailable, except in extreme cases. The convictions secured were in cases which showed grave violations of those standards of probity and ethical conduct which we associate with the high office. There are other faults, however, such as arbitrariness, which as effectively destroy a judge's usefulness, as the more serious lapses which have been made the basis of impeachment.

In the case of the lower Federal courts, at least, which are the creatures of the Congress,[35] an easier method is needed to determine the fitness of an occupant to continue in office. The Constitution provides that such judges shall hold office during "good behavior". But it contains no provision defining "good behavior", or giving anyone the right to do so. It has been suggested recently that such power exists in the Congress. The suggestion is that the Congress give the Supreme Court the right to establish a test of "behavior" with power to remove Federal Judges, other than constitutional judges, when their "behavior" is no longer "good".[36]

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[34] Winston, Andrew Johnson (1928) 404–454; Bowers, The Tragic Era (1929) 143–197.

[35] U.S. Const. Art. I, § 8, Cl. 9.

[36] The proposal is that of Senator William Gibbs McAdoo of California, Chairman of the Senate Committee on Bankruptcies, Receiverships and The Administration of Justice. His statement given to the press at Los Angeles, November 12, 1935 (see Herald-Express) read in part:

"Judges of the Supreme Court and all other courts of the United States, by a provision of the Constitution, hold their offices during their 'good behavior', which ordinarily means for life. Thus a higher standard of conduct is required of the judiciary than that of other government officers, for they must not only avoid the grounds of removal as specified for all others, but must also so demean themselves that their official behavior is good.

"The supreme court is created by the Constitution and it is clear that none of its members could be attacked in any other way than by the impeachment process provided for in the Constitution itself.

"The circuit court of appeals, the district courts and all other courts of the United States are created by Congress under the authority delegated to it by the Constitution. It naturally follows that whatever Congress may do it may undo, and it would seem to be within its power to establish a method independent of the impeachment process, of inquiring into the judicial concept of the judges for those courts it has created.

"I believe it a practical application of the power of Congress, under the Constitution, to pass a law which would give to the Supreme Court, for instance, the right to take evidence upon the conduct of any judge of an inferior court, and to decide the question of his fitness to continue to act as a member of the court."

The junior Senator from California has since embodied the idea in a Bill known as Senate Bill 4527, introduced on April 22, 1936, which would establish a "high court for the trial of judicial officers" to be composed of ten judges of the Circuit Court of Appeals of the United States, ranking in point of seniority and service, one to be drawn from each circuit, together with the Chief Justice of the United States District Court of Appeals of the District of Columbia, who shall be the presiding judge or justice of the court. The jurisdiction of the court would be confined to the trial and determination of charges to be brought against judges of the inferior courts of the United States with power to remove them for misconduct or misbehavior upon quo warranto proceedings instituted before it by the Attorney General.

Defending the proposal, the Senator said, when offering the Bill:

"The procedure I have outlined would be in all respects fair to an accused judge. It would give to him the benefit of a trial in a regular court of law, sitting exclusively to determine the question of his guilt or innocence, and unencumbered and uninterrupted by other duties during the period of the trial. The procedure would be fair to the courts, because it would place in their own hands the determination of the judicial question of the guilt or innocence of a member of the judiciary. It would not impose upon them the performance of any nonjudicial task and would invoke their cooperation in a matter in which they should be supremely interested, namely, the preservation of the honor and integrity of the judicial office.

The writer of what is by many considered one of the leading essays on the subject of Federal impeachments (and to whom all subsequent writers must acknowledge their indebtedness), Mr. Alexander Simpson, Jr.,[37] argues that under the power granted the Congress, by Article I, Section 8, of the Constitution, to make laws necessary and proper for carrying into execution the powers vested in the government of the United States "or of any department or office thereof", it has the power to define what constitutes "good behavior" and to declare the office vacant after a judicial procedure designed to determine that the incumbent's behavior is no longer good. The writer states:

> It would seem that under the latter clause Congress would have power to define what constitutes "good behavior", and to provide a method for ascertaining whether or not the judges are *complying with the tenure* under which they hold, and to cause them to forfeit their offices if they are not, subject, of course, to a review by the courts of the question as to whether or not the definition wholly or partially is within the meaning of those words as used in the Constitution. By this method the question becomes a judicial one, as it should be, and the accused judge will be safeguarded in his right to hold his office exactly as he is safeguarded in all the other rights vested in him by the Constitution. That Congress has the power claimed was expressly asserted by Senator Catron in the Archbald Impeachment.[38]

In my opinion, such power could not be given without a constitutional amendment. The Constitution provides one method only for removing judicial officers, *i.e.*, by impeachment. It is true that the Congress is given power "to constitute tribunals inferior to the Supreme Court".[39] But they are not given power either to determine tenure or to provide for another method of selection, except the general one, by the President, with "the advice and consent of the Senate".[40] The original jurisdiction of the Supreme Court is fixed by the Constitution.[41] Mr. Justice Story, in a famous case decided in 1816,[42] expressed the view that the article creating and defining the judicial power of the United

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"At this point I wish to add that it is my firm conviction, after such studies as I have made of this subject, that the term 'good behavior,' as used in the Constitution, is a justiciable question, and that the Congress, under the authority conferred upon it, has the power to create a tribunal to try that issue whenever it shall be raised in a proper manner.

"The procedure I am suggesting would in no way diminish or cut down the privileges or prerogatives of the Congress. The Congress would be free, whenever it so desired, to resort to the existing process of impeachment. At the same time the Congress could set in motion the alternative procedure by a majority vote of both Houses directing the Attorney-General to institute a suit under the new removal method, as I have already stated, and I merely repeat it to emphasize the point. The freedom of action of the Congress would thus in all respects be preserved." Sen. Rep. No. 84, 74th Cong., 2nd Sess. (1936) 6217.

In the House of Representatives, Chairman Hatton W. Sumner of the House Judiciary Committee, has introduced a bill which provides for the removal of judges of the courts of the United States who hold their office during good behavior, by a court consisting of three judges of the Circuit Court of Appeals designated by the Chief Justice. The Act specifically excepts judges of the United States Court of Appeals for the District of Columbia, judges of the Circuit Courts of Appeal and the Justices of the Supreme Court of the United States. (1937) 21 Journal of American Judicature Society 59.

[37] Simpson, Jr., *Federal Impeachments* (1916) 64 U. of Pa. L. Rev. 651, 803.

[38] *Id.* at § 828. See Shartel, *Retirement and Removal of Judges* (1936) 20 Journal American Judicature Society 133; McCormick, *Removal of Federal Judges* (1937), 31 Ill. L. Rev. 631, 638.

[39] U.S. Const. Art. I, § 8, Cl. 8.

[40] U.S. Const. Art. II, § 2, Cl. 2.

[41] U.S. Const. Art. III, § 2, Cl. 2.

[42] Martin v. Hunter's Lessee, 1 Wheat. 304 (U.S. 1816).

States is mandatory and that the Congress could not refuse to carry it into effect by declining to create the course. In the course of the opinion, he asked the question: "Could Congress *create or limit* any other tenure of judicial office?" His answer was in the negative. The passage in which these statements occur is so significant that it should be given in full. It reads:

> Such is the language of the article creating and defining the judicial power of the United States. It is the voice of the whole American people solemnly declared, in establishing one great department of that government which was, in many respects, national, and in all, supreme. It is a part of the very same instrument which was to act not merely upon individuals, but upon states; and to deprive them altogether of the exercise of some powers of sovereignty, and to restrain and regulate them in the exercise of others.
>
> Let this article be carefully weighed and considered. The language of the article throughout is manifestly designed to be mandatory upon the legislature. Its obligatory force is so imperative that Congress *could not*, without a violation of its duty, have refused to carry it into operation. The judicial power of the United States *shall be vested* (*not may be vested*) in one supreme court, and in such inferior courts as Congress may, from time to time, ordain and establish. Could Congress have lawfully refused to create a supreme court, or to *vest in it the constitutional jurisdiction?* "The judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive, for their services, a compensation which shall not be diminished during their continuance in office." *Could Congress create or limit any other tenure of the judicial office? Could they refuse to pay, at stated times, the stipulated salary, or diminish it during the continuance in office?* But one answer can be given to these questions: *it must be in the negative.* The object of the constitution was to establish three great departments of government; the legislative, the executive and the judicial departments. The first was to pass laws, the second to approve and execute them, and the third to expound and enforce them. Without the latter it would be impossible to carry into effect some of the express provisions of the Constitution. How, otherwise, could crimes against the United States be tried and punished? How could causes between two states be heard and determined? The judicial power must, therefore, be vested in some court, by Congress; and to suppose that it was not an obligation binding on them, but might, at their pleasure, be omitted or declined, is to suppose that, under the sanction of the Constitution they might defeat the Constitution itself; a construction which would lead to such a result cannot be sound.[43]

The only method of removal being by conviction upon impeachment, the procedure suggested would be another method of removal, not sanctioned by the Constitution. It would also add to the original jurisdiction of the Supreme Court. Desirable though a quicker method of removal might be—especially in the case of judges of lower courts—

[43] *Id.* at 327, 328. Italics added.

the power to establish such a method does not, in my opinion, reside in the Congress. The Congress, in establishing inferior courts—under the constitutional mandate—is also under mandate to confer upon the judges appointed to administer them the constitutional tenure—that of holding "during good behavior".[44]

The tenure "during good behavior" can be terminated only upon conviction after impeachment for "high crimes and misdemeanors". The former is referable to the latter. "Good behavior" ceases to exist in an incumbent when he has committed "high crimes and misdemeanors". The fact can only be established by proof in a court of impeachment. Any other method of establishing it is clearly outside of the intendment of the constitutional provisions relating to removal of civil officers.

All students of the problem agree, however, that a change is not only desirable, but needed. Those who, moved by false conceptions of the dignity of the Federal judicial office, would oppose any change in the present method, should remember that courts are social institutions belonging to society as a whole, and that the law itself is merely a form of social control aiming to satisfy the changing needs of a changing society. Because of this, a judge may be unfit who, without being guilty of any moral obliquity, does yet, through arbitrariness or by overlooking the fact that the office he occupies is not a private, personal, life-long sinecure, but an institution established to achieve the needs of society for justice through law, fail to attain that high standard of "good behavior" which should be the ideal of the judge of an enlightened society. A great judge has written:

> The time is past in the history of the world when any living man or body of men can be set on a pedestal and decorated with a halo. True, many criticisms may be, like their authors, devoid of good taste, but better all sorts of criticism than no criticism at all. The moving waters are full of life and health; only in the still waters is stagnation and death.[45]

There is wisdom and security for a free society in such an attitude, even towards the judiciary.

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[44] See: Kentucky & I. Bridge Co. v. Louisville & N.R.R., 87 Fed. 567, 612. (C.C.D. Ky. 1888).

[45] Mr. Justice David J. Brewer in 15 National Corporation Report 849.

"Power of Impeachment," Congressional Quarterly Guide to the U.S. Congress

Power of Impeachment*

Impeachment is perhaps the most awesome though the least used power of Congress. In essence, it is a political action, couched in legal terminology, directed against a ranking official of the Federal Government. The House of Representatives is the prosecutor. The Senate chamber is the courtroom; and the Senate is the judge and jury. The final penalty is removal from office and disqualification from further office. There is no appeal.

Impeachment proceedings have been initiated in the House some 50 times since 1789, but only 12 cases have reached the Senate. Of these 12, two were dismissed for lack of jurisdiction, six resulted in acquittal and four ended in conviction. All of the convictions involved Federal judges: John Pickering of the district court for New Hampshire, in 1804; West H. Humphreys of the eastern, middle and western districts of Tennessee, in 1862; Robert W. Archbald of the Commerce Court, in 1913; and Halsted L. Ritter of the southern district of Florida, in 1936.

Two of the impeachments traditionally have stood out from all the rest. They involved Justice Samuel Chase of the Supreme Court in 1805 and President Andrew Johnson in 1868, the two most powerful and important Federal officials ever subjected to the process. Both were impeached by the House—Chase for partisan conduct on the bench; Johnson for violating the Tenure of Office Act—and both were acquitted by the Senate after sensational trials. Behind both impeachments lay intensely partisan politics. Chase, a Federalist, was a victim of attacks on the Supreme Court by Jeffersonian Democrats, who had planned to impeach Chief Justice John Marshall if Chase was convicted. President Johnson was a victim of Radical Republicans opposed to his reconstruction policies after the Civil War.

Purpose of Impeachment Process

Based on specific constitutional authority, the impeachment process was designed "as a method of national inquest into the conduct of public men," according to Alexander Hamilton in Federalist No. 65. The Constitution declares that impeachment proceedings may be brought against "the President, Vice President and all civil officers of the United States," without explaining who is, or is not, a "civil officer." In practice, however, the overwhelming majority of impeachment proceedings have been directed against Federal judges, who hold

*Reprinted from Guide to the Congress of the United States with the permission of *Congressional Quarterly*.

lifetime appointments "during good behavior," and cannot be removed by any other method. Nine of the 12 impeachment cases that have reached the Senate have involved Federal judges. Federal judges have figured in 33 of the approximately fifty impeachment cases that have failed to reach the Senate.

Others whose impeachment has been sought include Cabinet members, diplomats, customs collectors, a Senator and a U.S. district attorney. These officials are subject to removal by dismissal or explusion as well as by impeachment, and it seldom has been necessary to resort to full-scale impeachment proceedings to bring about their removal. Proceedings against the only Senator to be impeached, William Blount of Tennessee, were dismissed in 1799 after Blount had been expelled from the Senate in 1797. War Secretary William W. Belknap, the only Cabinet member to be tried by the Senate, was acquitted in 1876 largely because Senators questioned their authority to try Belknap, who had resigned as Secretary several months before the trial.

The House Judiciary Committee twice has ruled that certain Federal officials were not subject to impeachment. In 1833, the Committee determined that a territorial judge was not a civil officer within the meaning of the Constitution because he held office for only four years and could be removed at any time by the President. In 1926, the Committee said that a Commissioner of the District of Columbia was immune from impeachment because he was an officer of the District and not a civil officer of the United States.

Debate in Constitutional Convention

The origin of the Congressional impeachment process dates from 14th century England. Under the parliamentary system, an impeachment (indictment) was preferred by the House of Commons and decided by the House of Lords. In America, colonial governments and early state constitutions followed the British pattern of trial before the upper legislative body on charges brought by the lower house.

The Constitution on Impeachment

Following are provisions of the Constitution that deal with the Congressional power of impeachment:

The House of Representatives . . . shall have the sole power of impeachment. (Article I, section 2.)

The Senate shall have the sole power to try all impeachments. When sitting for that purpose, they shall be on oath or affirmation. When the President of the United States is tried, the Chief Justice shall preside. And no person shall be convicted without the concurrence of two-thirds of the Members present. Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust or profit under the United States; but the party convicted shall, nevertheless, be liable and subject to indictment, trial, judgment and punishment, according to law. (Article I, section 3.)

The President . . . shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment. (Article II, section 2.)

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. (Article II, section 4.)

The trial of all crimes, except in cases of impeachment, shall be by jury . . . . (Article III, section 2.)

Despite these precedents, a major controversy arose over the impeachment process in the Constitutional Convention. The issue was whether the Senate should try impeachments. Opposing that role for the Senate, Madison and Pinckney asserted that it would make the President too dependent on the Legislative Branch. Suggested alternative trial bodies included the "national judiciary," the Supreme Court or the assembled chief justices of state supreme courts. It was argued, however, that such bodies would be too small and perhaps even susceptible to corruption. In the end, the Senate was agreed to. Hamilton (a Senate opponent during the Convention) asked later in the Federalist: "Where else than in the Senate could have been found a tribunal sufficiently dignified, or sufficiently independent?"

A lesser issue was the definition of impeachable crimes. In the original proposals, the President was to be removed on impeachment and conviction "for mal or corrupt conduct," or for "malpractice or neglect of duty." Later, the wording was changed to "treason, bribery or corruption," and then to "treason and bribery" alone. Contending that "treason and bribery" were too narrow, George Mason proposed adding "mal-administration," but switched to "other high crimes and misdemeanors against the state" when Madison said that "mal-administration" was too broad. A final revision made impeachable crimes "treason, bribery or other high crimes and misdemeanors."

The provisions of the Constitution on impeachment were scattered through the first three articles. To the House was given the "sole power of impeachment." The Senate was given "the sole power to try all impeachments." Impeachments could be brought against "the President, Vice President, and all civil officers of the United States" for "treason, bribery or other high crimes or misdemeanors." Conviction meant "removal from office and disqualification to hold" further public office.

The first attempt to use the impeachment power was made in 1796. A petition from residents of the Northwest Territory, submitted to the House on April 25, accused Judge George Turner of the territorial supreme court of arbitrary conduct. The petition was referred briefly to a special House committee and then was referred to Atty. Gen. Charles Lee. Impeachment proceedings were dropped after Lee said, May 9, that the territorial government would prosecute Turner in the territorial courts.

Procedures in Impeachment Cases

The first impeachment proceedings, against Turner, failed to provide precedents for later impeachments. In fact, the process has been used so infrequently and under such widely varying circumstances that no uniform practice has emerged.

At various times impeachment proceedings have been initiated by the introduction of a resolution by a Member, by a letter or message from the President, by a grand jury action forwarded to the House from a territorial legislative, by a memorial setting forth charges, by a resolution authorizing a general investigation, or by a resolution reported by the House Judiciary Committee. The five cases to reach the Senate since 1900 were based on Judiciary Committee resolutions.

After submission of the charges, a Committee investigation has been undertaken. If the charges have been supported by the investigation,

the Committee has reported an impeachment resolution, which in four of the five post-1900 cases has included articles of impeachment. The impeachment resolution has been subject to adoption by majority vote. In earlier cases, the impeachment articles were drafted by a select committee named by the House Speaker or by simple resolution. Like the impeachment resolution, the articles too have been subject to adoption by majority vote.

The next step, after the House has adopted an impeachment resolution and articles of impeachment, has been selection of House managers to direct the proceedings in the Senate. House managers have been chosen by a resolution fixing the number of managers and authorizing the Speaker to appoint them, by a resolution fixing the number and making the appointments, and by ballot, with a majority vote for each candidate. Once selected, the House managers have appeared at the bar of the Senate to inform the upper house of the impending impeachment trial and to present the articles of impeachment. The Senate, in turn, has informed the House when it is ready to proceed.

The full House may attend the trial, but the House managers have been its representatives at the proceedings. Following Senate rules adopted March 2, 1868, the trial has been conducted in a fashion similar to a court trial for a criminal offense. Both sides may present witnesses and evidence, and the defendant has been allowed counsel and the right of cross-examination. If the President is on trial, the Constitution requires the Chief Justice of the Supreme Court to preside. The Constitution is silent on a presiding officer for lesser defendants, but Senate practice has been for the Vice President or the President pro tempore to preside. Procedural questions during trial have been decided by majority vote, but conviction has required, according to the Constitution, approval of two-thirds of the Senators present. A separate vote on each article is required by Senate rules, and a two-thirds vote on a single article is sufficient for conviction. Removal upon conviction is required by the Constitution, although the Senate at times has voted removal after conviction. Disqualification is not mandatory; only two of the four convictions have been accompanied by disqualification, which has been subject to a majority vote.

Controversial Question

Three major issues have dominated the history of the impeachment power: the definition of impeachable offenses, possible Senatorial conflicts of interest and alternative removal methods for Federal judges.

Impeachable Offenses. "Treason" and "bribery," as constitutionally designated impeachable crimes, have raised little debate, for treason is defined elsewhere in the Constitution and bribery is a well-defined act. "High crimes and misdemeanors," however, have been anything that the prosecution has wanted to make them. An endless debate has surrounded the phrase, pitting broad constructionists, who have viewed impeachment as a political weapon, against narrow constructionists, who have regarded impeachment as being limited to offenses indictable at common law.

The constitutional debates seemed to indicate that impeachment was to be regarded as a political weapon. Narrow constructionists quickly won a major victory, though, when Chase was acquitted, using as a

defense the argument that he had committed no indictable offense. The narrow constructionists continued to prevail when President Johnson also was acquitted on a similar defense. His lawyers argued that conviction could result only from commission of high criminal offenses against the United States.

The only two convictions to date in the 20th century suggest that the broad constructionists still have powerful arguments. The 20th century convictions removed Robert W. Archbald, associate judge of the U.S. Commerce Court, in 1913, and Halsted L. Ritter, U.S. judge for the southern district of Florida, in 1936. Archbald was convicted of soliciting for himself and for friends valuable favors from railroad companies, some of which were litigants in his court. It was conceded, however, that he had committed no indictable offense. Ritter was convicted for conduct in a receivership case which raised serious doubts about his integrity.

Ritter's was the last impeachment to reach the Senate. But the debate over impeachable offenses is certain to be revived in future Senate cases.

Conflicts of Interest. An equally controversial issue, particularly in earlier impeachment trials, concerned the partisan political interests of Senators, which raised serious doubt about their impartiality as jurors.

President Johnson's potential successor, for example, was the president pro tempore of the Senate, since there was a vacancy in the Vice Presidency. Sen. Benjamin F. Wade (R Ohio), president pro tempore, took part in the trial and voted—for conviction. On the other hand, Andrew Johnson's son-in-law, Sen. David T. Patterson (D Tenn.), also took part in the trial and voted—for acquittal.

In the Johnson trial and in others, Senators have been outspoken critics or supporters of the defendant, yet have participated in the trial and have voted on the articles. Some Senators who had held seats in the House when the articles of impeachment first came up, and had voted on them there, have failed to disqualify themselves during the trial. On occassion, intense outside lobbying for, and against, the defendant has been aimed at Senators. Senators have testified as witnesses at some trials and then voted on the articles.

Senators may request to be excused from the trial, and in recent cases Senators have disqualified themselves when possible conflicts of interest arose.

Removal of Judges. Two forces have combined in the continuing search for an alternative method of removal for Federal judges. One force has been led by Members of Congress anxious to free the Senate, faced by an enormous legislative workload, from the time-consuming process of sitting as a court of impeachment. The other force has been led by Members anxious to restrict judicial power by providing a simpler and swifter means of removal than the cumbersome and unwieldy impeachment process.

The search to date has been unsuccessful. Efforts to revise and accelerate the impeachment process have failed. So, too, have attempts to amend the Constitution to limit the tenure of Federal judges to a definite term of years. A more recent approach has been to seek legislation providing for a judicial trial and judgment of removal for Federal

judges violating "good-behavior" standards. The House passed such a bill on Oct. 22, 1941, by a 124–122 vote, but it died in the Senate.

A 1947 report by the Legislative Reference Service of the Library of Congress concluded:

"1. There is no power in the Executive or Legislative Branches of the Government to remove or limit the tenure of Supreme Court justices, or, indeed, any judges of constitutional courts, except as Congress is expressly authorized to act by impeachment for lack of good behavior. . . .

"2. Means of removal other than impeachment and limitations on tenure could be provided for by constitutional amendment. Among such methods of removal could be that of legislative address.

"3. Congress perhaps can constitutionally provide for judicial removal of Federal judges for lack of good behavior. . . . While the good behavior tenure clause never has been construed by the Supreme Court, it has been contended that the clause must be read with a view to changing needs, and that Congress, therefore, might define the term so as to allow judicial removal for any form of conduct or neglect which according to modern notions tends to corruption or inefficiency."

Attempted Impeachments

Many proposed impeachments have failed to come to a vote in the House because the defendant died or because he resigned or received another appointment, removing him from the disputed office. Among the unsuccessful impeachment attempts have been moves against two Presidents, a Vice President, two Cabinet officers, and a Supreme Court justice.

The House on Jan. 10, 1843, rejected by an 84–127 vote a resolution by Rep. John M. Botts (Henry Clay Whig Va.) to investigate the possibility of initiating impeachment proceedings against President Tyler. Tyler had become a political outcast, ostracized by both Democrats and Whigs, but impeachment apparently was too strong a measure to take against him.

A move developed in 1873 to impeach Vice President Schuyler Colfax because of his involvement in the Credit Mobilier scandal. The matter was dropped when the Judiciary Committee recommended against impeachment on the ground that Colfax had purchased his Credit Mobilier stock before becoming Vice President.

A similar move to impeach Attorney General Harry M. Daugherty in 1922 on account of his action, or lack of action, in the Teapot Dome affair was dropped in 1923 when a Congressional investigation of the scandal got under way. As the Teapot Dome investigation and a separate Justice Department study progressed, Daugherty was forced by President Coolidge to tender his resignation, March 28, 1924.

A running fight between Rep. Wright Patman (D Texas) and Secretary of the Treasury Andrew W. Mellon over Federal economic policy in the depression came to a head in 1932. Patman on Jan. 6 demanded Mellon's impeachment on the ground of conflicting financial interests. To put an end to that move, President Hoover on Feb. 5 nominated Mellon to be ambassador to Great Britan and the Senate confirmed the nomination the same day. Mellon resigned his Treasury post a week later to take on his new duties.

Senate Rules of Procedure and Practice, . . . When Sitting for Impeachment Trials

Following are the major provisions of rules used by the Senate during impeachment trials. With the exception of Rule XI, which was adopted May 26, 1935, the rules have remained unchanged since their adoption March 2, 1868, for the trial of President Johnson.

I. Whensoever the Senate shall receive notice from the House of Representatives that managers are appointed on their part to conduct an impeachment against any person and are directed to carry articles of impeachment to the Senate, the Secretary of the Senate shall immediately inform the House of Representatives that the Senate is ready to receive the managers for the purpose of exhibiting such articles of impeachment, agreeably to such notice.

II. When the managers of an impeachment shall be introduced at the bar of the Senate and shall signify that they are ready to exhibit articles of impeachment against any person, the Presiding Officer of the Senate shall direct the Sergeant at Arms to make proclamation . . . after which the articles shall be exhibited, and then the Presiding Officer of the Senate shall inform the managers that the Senate will take proper order on the subject of the impeachment, of which due notice shall be given to the House of Representatives.

III. Upon such articles being presented to the Senate, the Senate shall, at 1 o'clock afternoon of the day (Sunday excepted) following such presentation, or sooner if ordered by the Senate, proceed to the consideration of such articles and shall continue in session from day to day (Sundays excepted) after the trial shall commence (unless otherwise ordered by the Senate) until final judgment shall be rendered, and so much longer as may, in its judgment, be needful. Before proceeding to the consideration of the articles of impeachment, the Presiding Officer shall administer the oath hereinafter provided to the members of the Senate then present and to the other members of the Senate as they shall appear, whose duty it shall be to take the same.

IV. When the President of the United States or the Vice President of the United States, upon whom the powers and duties of the office of President shall have devolved, shall be impeached, the Chief Justice of the Supreme Court of the United States shall preside; and in a case requiring the said Chief Justice to preside notice shall be given to him by the Presiding Officer of the Senate of the time and place fixed for the consideration of the articles of impeachment, as aforesaid, with a request to attend; and the said Chief Justice shall preside over the Senate during the consideration of said articles and upon the trial of the person impeached therein.

V. The Presiding Officer shall have power to make and issue, by himself or by the Secretary of the Senate, all orders, mandates, writs, and precepts authorized by these rules or by the Senate, and to make and enforce such other regulations and orders in the premises as the Senate may authorize or provide.

VI. The Senate shall have power to compel the attendance of witnesses, to enforce obedience to its orders, mandates, writs, precepts, and judgments, to preserve order, and to punish in a summary way contempts of, and disobedience to, its authority, orders, mandates, writs, precepts, or judgments, and to make all lawful orders, rules, and regulations which it may deem essential or conductive to the ends of justice. And the Sergeant at Arms, under the direction of the Senate, may employ such aid and assistance as may be necessary to enforce, executive and carry into effect the lawful orders, mandates, writs, and precepts of the Senate.

VII. The Presiding Officer of the Senate shall direct all necessary preparations in the Senate Chamber, and the Presiding Officer on the trial shall direct all the forms of proceedings while the Senate is sitting for the purpose of trying an impeachment, and all forms during the trial not otherwise specially provided for. And the Presiding Officer on the trial may rule all questions of evidence and incidental questions, which ruling shall stand as the judgment of the Senate, unless some member of the Senate shall ask that a formal vote be taken thereon, in which case it shall be submitted to the Senate for decision; or he may at his option, in the first instance, submit any such question to a vote of the members of the Senate. Upon all such questions the vote shall be without a division, unless the yeas and nays be demanded by one-fifth of the members present, when the same shall be taken.

VIII. Upon the presentation of articles of impeachment and the organization of the Senate as herein before provided, a writ of summons shall issue to the

accused, reciting said articles, and notifying him to appear before the Senate upon a day and at a place to be fixed by the Senate and named in such writ, and file his answer to said articles of impeachment, and to stand to and abide the orders and judgments of the Senate thereon; which writ shall be served by such officer or person as shall be named in the precept thereof, such number of days prior to the day fixed for such appearance as shall be named in such precept, either by the delivery of an attested copy thereof to the person accused, or if that can not conveniently be done, by leaving such copy at the last known place of abode of such person, or at his usual place of business in some conspicuous place therein; or if such service shall be, in the judgment of the Senate, impracticable, notice to the accused to appear shall be given in such other manner, by publication or otherwise, as shall be deemed just; and if the writ aforesaid shall fail of service in the manner aforesaid, the proceedings shall not thereby abate, but further service may be made in such manner as the Senate shall direct. If the accused, after service, shall fail to appear, either in person or by attorney, on the day so fixed therefor as aforesaid, or, appearing, shall fail to file his answer to such articles of impeachment, the trial shall proceed, nevertheless, as upon a plea of not guilty. If a plea of guilty shall be entered, judgment may be entered thereon without further proceedings.

IX. At 12:30 o'clock afternoon of the day appointed for the return of the summons against the person impeached, the legislative and executive business of the Senate shall be suspended, and the Secretary of the Senate shall administer an oath to the returning officer. . . . Which oath shall be entered at large on the records.

X. The person impeached shall then be called to appear and answer the articles of impeachment against him. If he appear, or any person for him, the appearance shall be recorded, stating particularly if by himself, or by agent or attorney, naming the person appearing and the capacity in which he appears. If he do not appear, either personally or by agent or attorney, the same shall be recorded.

XI. That in the tral of any impeachment the Presiding Officer of the Senate, upon the order of the Senate, shall appoint a committee of twelve Senators to receive evidence and take testimony at such times and places as the committee may determine, and for such purpose the committee so appointed and the chairman thereof, to be elected by the committee, shall (unless otherwise ordered by the Senate) exercise all the powers and functions conferred upon the Senate and the Presiding Officer of the Senate, respectively, under the rules of procedure and practice in the Senate when sitting on impeachment trials.

Unless otherwise ordered by the Senate, the rules of procedure and practice in the Senate when sitting on impeachment trials shall govern the procedure and practice of the committee so appointed. The committee so appointed shall report to the Senate in writing a certified copy of the transcript of the proceedings and testimony had and given before such committee, and such report shall be received by the Senate and the evidence so received and the testimony so taken shall be considered to all intents and purposes, subject to the right of the Senate to determine competency, relevancy, and materially, as having been received and taken before the Senate, but nothing herein shall prevent the Senate from sending for any witness and hearing his testimony in open Senate, or by order of the Senate having the entire trial in open Senate.

XII. At 12:30 o'clock afternoon of the day appointed for the trial of an impeachment, the legislative and executive business of the Senate shall be suspended, and the Secretary shall give notice to the House of Representatives that the Senate is ready to proceed upon the impeachment of——, in the Senate Chamber, which chamber is prepared with accommodations for the reception of the House of Representatives.

XIII. The hour of the day at which the Senate shall sit upon the trial of an impeachment shall be (unless otherwise ordered) 12 o'clock m.; and when the hour for such thing shall arrive, the Presiding Officer of the Senate shall so announce; and thereupon the Presiding Officer upon such trial shall cause proclamation to be made, and the business of the trial shall proceed. The adjournment of the Senate sitting in said trial shall not operate as an adjournment of the Senate; but on such adjournment the Senate shall resume the consideration of its legislative and executive business.

XIV. The Secretary of the Senate shall record the proceedings in cases of impeachment as in the case of legislative proceedings, and the same shall be reported in the same manner as the legislative proceedings of the Senate.

XV. Counsel for the parties shall be admitted to appear and be heard upon an impeachment.

XVI. All motions made by the parties or their counsel shall be addressed to the Presiding Officer, and if he, or any Senator, shall require it, they shall be committed to writing, and read at the Secretary's table.

XVII. Witnesses shall be examined by one person on behalf of the party producing them, and then cross-examined by one person on the other side.

XVIII. If a Senator is called as a witness, he shall be sworn, and give his testimony standing in his place.

XIX. If a Senator wishes a question to be put to a witness, or to offer a motion or order (except a motion to adjourn), it shall be reduced to writing, and put by the Presiding Officer.

XX. At all times while the Senate is sitting upon the trial of an impeachment the doors of the Senate shall be kept open, unless the Senate shall direct the doors to be closed while deliberating upon its decisions.

XXI. All preliminary or interlocutory questions, and all motions, shall be argued for not exceeding one hour on each side, unless the Senate shall, by order, extend the time.

XXII. The case, on each side, shall be opened by one person. The final argument on the merits may be made by two persons on each side (unless otherwise ordered by the Senate upon application for that purpose), and the argument shall be opened and closed on the part of the House of Representatives.

XXIII. On the final question whether the impeachment is sustained, the yeas and nays shall be taken on each article of impeachment separately; and if the impeachment shall not, upon any of the articles presented, be sustained by the votes of two-thirds of the members present, a judgment of acquittal shall be entered; but if the person accused in such articles of impeachment shall be convicted upon any of said articles by the votes of two-thirds of the members present, the Senate shall proceed to pronounce judgment, and a certified copy of such judgment shall be deposited in the office of the Secretary of State.

XXIV. All the orders and decisions shall be made and had by yeas and nays, which shall be entered on the record, and without debate, subject, however, to the operation of Rule VII, except when the doors shall be closed for deliberation, and in that case no member shall speak more than once on one question, and for not more than ten minutes on an interlocutory question, and for not more than fifteen minutes on the final question, unless by consent of the Senate, to be had without debate; but a motion to adjourn may be decided without the yeas and nays, unless they be demanded by one-fifth of the members present. The fifteen minutes herein allowed shall be for the whole deliberation on the final question, and not on the final question on each article of impeachment.

XXV. Witnesses shall be sworn, . . . Which oath shall be administered by the Secretary, or any other duly authorized person.

All process shall be served by the Sergeant at Arms of the Senate, unless otherwise ordered by the court.

XXVI. If the Senate shall at any time fail to sit for the consideration of articles of impeachment on the day or hour fixed therefor, the Senate may, by an order to be adopted without debate, fix a day and hour for resuming such consideration.

Two depression-era attempts by Rep. Louis T. McFadden (R Pa.) to impeach President Hoover on general charges of usurping legislative powers and violating constitutional and statutory law were rejected by the House. The first attempt was tabled Dec. 13, 1932, by a 361–8 vote; the second attempt was tabled Jan. 17, 1933, by a 344–11 vote.

Associate Justice William O. Douglas of the Supreme Court has been subjected to repeated impeachment attempts. The day after Douglas granted a stay of execution to Soviet spies Julius and Ethel Rosenberg on June 16, 1953, Rep. W. M. Wheeler (D Ga.) introduced a resolution to impeach the justice. The resolution was unanimously tabled by the Judiciary Committee on July 7, after a one-day hearing at which Wheeler had been the sole witness. In 1970, two resolutions

for Douglas's impeachment were introduced in the midst of a bitter conflict between President Nixon and the Senate over Senate rejection of two Supreme Court nominations. One impeachment resolution was introduced April 15 by Rep. Andrew Jacobs Jr. (D Ind.); the other on the same day by a large bipartisan group of sponsors. Among the charges cited were possible financial conflicts similar to those that had led to Senate rejection of the Nixon nominees for the Court. A special House Judiciary Subcommittee on Dec. 3 voted 3–1 that no grounds existed for impeachment.

Impeachment Trials

Sen. William Blount. On July 3, 1797, President John Adams sent to the House and Senate a letter from Sen. William Blount (Tenn.) to James Carey, a U.S. interpreter to the Cherokee Nation of Indians. The letter told of Blount's plans to launch an attack by Indians and frontiersmen, aided by a British fleet, against Louisiana and Spanish Florida to achieve their transfer to British control. Adams' action initiated the first proceedings to result in impeachment by the House and consideration by the Senate.

In the Senate, Blount's letter was referred to a select committee, which recommended his expulsion for "a high misdemeanor, entirely inconsistent with his public trust and duty as a Senator." The Senate expelled Blount on July 8 by a 25–1 vote.

In the House, meanwhile, a special committee had recommended that Blount be impeached. The House on July 7 adopted a committee resolution impeaching Blount, and on the same day it appointed a committee to prepare articles of impeachment. On Jan. 29, 1798, the House adopted five articles accusing Blount of attempting to influence the Indians for the benefit of the British.

Senate proceedings did not begin until Dec. 17, 1798. Blount challenged the proceedings, contending that they violated his right to a trial by jury, that he was not a civil officer within the meaning of the Constitution, that he was not charged with a crime committed while a civil officer, and that courts of common law were competent to try him on the charges. On Jan. 11, 1799, the Senate by a 14–11 vote dismissed the charges for lack of jurisdiction. Citing the Senate vote, Vice President Thomas Jefferson ruled Jan. 14, that the Senate was without jurisdiction in the case, thus ending the proceedings.

Judge John Pickering. In a partisan move to oust a Federalist judge, President Jefferson on Feb. 4, 1803, sent a complaint to the House citing John Pickering, U.S. judge for the district of New Hampshire. The complaint was referred to a special committee, and on March 2 the House adopted a committee resolution impeaching the judge. A committee was appointed Oct. 20 to prepare articles of impeachment, and the House on Dec. 30 by voice vote agreed to four articles charging Pickering with irregular judicial procedures, loose morals and drunkenness. At the time of the trial by the Senate, the judge, born about 1738, was known to be insane. He did not attend the trial, which began March 8, 1804, and ended March 12, with votes of 19–7 for conviction on each of the four articles. The Senate then voted, 20–6, to remove Pickering from office, but it declined to consider disqualifying him from further office.

Justice Samuel Chase. In an equally partisan attack on another Federalist judge, the House on Jan. 7, 1804, by an 81–40 vote adopted a resolution by John Randolph (States Rights Democrat Va.) for an investigation of Samuel Chase, associate justice of the Supreme Court, and of Richard Peters, a U.S. district court judge in Pennsylvania. Ostensibly, the investigation was to study their conduct during a recent treason trial. The House dropped further action against Peters by voice vote on March 12. On the same day, by a 73–32 vote, it adopted a committee resolution to impeach Chase. A committee was appointed to draw up articles, and the House in a series of votes on Dec. 4, 1804, agreed to the articles, charging Chase with harsh and partisan conduct on the bench and with unfairness to litigants.

The trial began Feb. 9, 1805. House managers directing proceedings in the Senate included, in addition to Randolph, Caesar A. Rodney (D Del.), Joseph H. Nicholson (D Md.), Peter Early (Ga.), John Boyle (D Ky.), George W. Campbell (D Tenn.), and Christopher Clark (Jeffersonian Democrat Va.). Chase appeared in person. In addition, he was represented by four lawyers, Robert G. Harper, Luther Martin, Philip B. Key and Joseph Hopkinson. The Senate voting on March 1 failed to produce the two-thirds majority required for conviction on any of the eight articles of impeachment; "not guilty" votes outnumbered the "guilty" votes on five of the articles.

Judge James H. Peck. On Dec. 8, 1826, a memorial from a Missouri man was presented to the House and referred to the Judiciary Committee citing James H. Peck, a U.S. judge for the district of Missouri. The memorial lay dormant until Jan. 7, 1830, when the House adopted a resolution authorizing an investigation of Peck's conduct. On April 24, the House by a 123–49 vote adopted a committee resolution impeaching Peck, and later the same day it appointed a committee to prepare articles of impeachment. A single article was adopted May 1 by voice vote, charging Peck with setting an unreasonable and oppressive penalty for contempt of court. The trial stretched from Dec. 20, 1830, to Jan. 31, 1831, when 21 Senators voted for conviction and 22 for acquittal.

Judge West H. Humphreys. During the Civil War, West H. Humphreys, a U.S. judge for the east, middle and west districts of Tennessee, accepted an appointment as a Confederate judge, without resigning from his Union judicial assignment. Aware of the situation, the House on Jan. 8, 1862, by voice vote adopted a resolultion by Horace Maynard (American Tenn.) to authorize a Judiciary Committee investigation of Humphreys. On May 6 the House, also by voice vote, adopted a committee resolution impeaching Humphreys. Articles of impeachment, drafted by a committee appointed May 14, were adopted by voice vote on May 19. The articles charged Humphreys with advocating secession and accepting office as a Confederate judge. In a one-day trial on June 26, the Senate convicted Humphreys on all except one charge, removed him from office by a 38–0 vote and disqualified him from further office on a 36–0 vote.

Johnson's Impeachment and Trial

First Attempt—Radical Republicans in Congress and President Andrew Johnson carried on a running battle over postwar policy to-

ward the Confederate states. Johnson favored a lenient attitude; the Radicals favored repressive tactics. Finally on Jan. 7, 1867, two Radicals, Reps. James M. Ashley (R Ohio) and Benjamin F. Loan (Radical Mo.) introduced a pair of resolutions calling for Judiciary Committee investigations and impeachment of the President. The Committee gathered a mass of general testimony highly critical of Johnson and recommended impeachment. However, the House by a 57–108 vote Dec. 7, rejected a Committee resolution impeaching the President. The resolution was defeated primarily because no specific crime was alleged to have been committed.

Second Attempt—Radical opposition to Johnson continued to run high, and on Jan. 22, 1868, the House by a 99–31 vote adopted a resolution by Rufus P. Spalding (R Ohio) authorizing the Committee on Reconstruction to "inquire what combinations have been made or attempted to be made to obstruct the due execution of the laws. . . ." To help the Committee, the House on Feb. 10 referred to it the impeachment evidence gathered in 1867. Then on Feb. 21, 1868, Johnson formally dismissed Secretary of War Edwin M. Stanton, a leading Radical sympathizer. The dismissal violated the Tenure of Office Act of March 2, 1867, which required Senate concurrence in the removal, as well as the appointment, of certain officers, and which made violation of the Act a "high misdemeanor."

The day after Johnson moved against Stanton, the Committee on Reconstruction recommended impeachment of the President. And on Feb. 24 the House by a 128–47 vote adopted a Committee resolution impeaching Johnson, and by a 124–42 vote appointed a committee to draw up articles of impeachment. In a series of votes March 2 and 3, the House adopted the articles, charging the President with violation of the Tenure of Office Act and with attacking Congress in a series of political speeches. (*See Appendix for complete text of the articles.*)

The impeachment trial opened March 30, 1868. The managers for the House were John A. Bingham (R Ohio), George S. Boutwell (R Mass.), James F. Wilson (R Iowa), Benjamin F. Butler (R Mass.), Thomas Williams (R Pa.), John A. Logan (R Ill.) and Thaddeus Stevens (R Pa.). The President did not appear at the trial. He was represented by a team of lawyers headed by Henry Stanbery, who had resigned as Attorney General to lead the defense. Associated with Stanbery were Benjamin R. Curtis, Jeremiah S. Black, William M. Evarts, Thomas A. R. Nelson and William S. Groesbeck.

After weeks of argument and testimony, the Senate on May 16 took a test vote on Article XI, a general, catch-all charge, thought by the House managers most likely to produce a vote for conviction. The drama of the vote has become legendary. With 36 "guiltys" needed for conviction, the final count was guilty, 35, not guilty, 19. Stunned by the setback, Senate opponents of the President postponed further voting until May 26. Votes were taken then on Article II and Article III. By identical 35–19 votes Johnson was acquitted also on these articles. To head off further defeats for Johnson opponents, Sen. George H. Williams (Union Republican Oreg.) moved to adjourn *sine die*, and the motion was adopted 34–16, abruptly ending the trial.

JOHNSON IMPEACHMENT VOTES

The Senate voted on only three of the 11 articles of impeachment against President Andrew Johnson. The President was acquitted on each article by identical

votes of 35–19, with 36 "guiltys" necessary for conviction. The roll call on the three votes follows:

Guilty: Anthony (R R.I.), Cameron (R Pa.), Cattel (R N.J.), Chandler (R Mich.), Cole (R Calif.), Conkling (Union Republican N.Y.), Conness (Union Republican Calif.), Corbett (Union Republican Ore.), Cragin (American N.H.), Drake (R Mo.), Edmunds (R Vt.), Ferry (R Conn.), Frelinghuysen (R N.J.), Harlan (R Iowa), Howard (R Mich.), Howe (Union Republican Wis.), Morgan (Union Republican N.Y.), Morrill (R Maine), Morrill (Union Republican Vt.), Morton (Union Republican Ind.), Nye (R Nev.), Patterson (R N.H.), Pomeroy (R Kan.), Ramsey (R Minn., Sherman (R Ohio), Sprague (R R.I.), Stewart (R Nev.), Sumner (R Mass.), Thayer (R Neb.), Tipton (R Neb.), Wade (R Ohio), Willey (R W. Va.), Williams (Union Republican Ore.), Wilson (R Mass.), Yates (Union Republican Ill.).

Not guilty: Bayard (D Del.), Buckalew (D Pa.), Davis (D Ky.), Dixon (R Conn.), Doolittle (R Wis.), Fessenden (R Maine), Fowler (Union Republican Tenn.), Grimes (R Iowa), Henderson (D Mo.), Hendricks (D Ind.), Johnson (D Md.), McCreery (D Ky.), Norton (Union Conservative Minn.), Patterson (D Tenn.), Ross (R Kan.), Saulsbury (D Del.), Tarumbull (R Ill.), Van Winkle (Unionist W. Va.), Vickers (D Md.)

Other Impeachments and Trials

War Secretary William W. Belknap. Faced with widespread corruption and incompetence among high officers of the Grant Administration, the House on Jan. 14, 1876, adopted by voice vote a resolution authorizing various committees to conduct general investigations of Government departments. On March 2 the House by voice vote adopted a resolution from the Committee on Expenditures in the War Department impeaching Secretary of War William W. Belknap. Only hours earlier, Belknap had resigned, and President Grant had accepted the resignation. Despite Belknap's resignation, work by the Judiciary Committee on articles of impeachment was continued, and the House agreed to the articles on April 3. They charged Belknap with graft in connection with the appointment and retention of an Indian post trader at Fort Sill in Oklahoma.

As pre-trial maneuvering proceeded, the Senate on May 29 declared by a vote of 37–29 that it had jurisdiction over Belknap regardless of his resignation. The trial, which ran from July 6 to Aug. 1, 1876, ended in acquittal. The majority of "guilty" votes on each article (35, 36 or 37 as against a constant 25 "not guilty" votes) fell short of the two-thirds necessary for conviction. A number of Senators, explaining their positions, said they had voted against conviction on the ground that the Senate lacked jurisdiction.

Judge Charles Swayne. Rep. William B. Lamar (D Fla.) on Dec. 10, 1903, introduced a resolution, adopted by voice vote, for a Judiciary Committee investigation of Charles Swayne, U.S. judge for the northern district of Florida. Months later, the Committee recommended impeachment, and the House on Dec. 13, 1904, adopted by voice vote a Committee resolution impeaching Swayne and authorized a special committee to prepare articles of impeachment. The articles were adopted in a series of votes on Jan. 18, 1905. They charged Swayne with living outside of his district, improperly fining a lawyer for contempt, and using a private railroad car in the hands of a receiver appointed by the judge. Opening arguments in the trial began Feb. 10. The trial ended Feb. 27, when the Senate voted acquittal on all articles; none was given even a simple majority for conviction.

Judge Robert W. Archbald. On May 4, 1912, the House adopted a Judiciary Committee resolution authorizing an investigation of Robert W. Archbald, associate judge of the U.S. Commerce Court. A Committee resolution impeaching Archbald and setting forth articles of impeachment was adopted by the House July 11 by a 223–1 vote. The judge was charged with using improper influence and accepting favors from litigants. The trial, which began Dec. 3, ended Jan. 13, 1913, with Archbald convicted on five of the 13 articles. The Senate on the same day removed him from office by voice vote and, by a 39–35 vote, disqualified him from further office.

Judge George W. English. A resolution asking for an investigation of George W. English, U.S. judge for the eastern district of Illinois, was introduced Jan. 13, 1925, by Rep. Harry B. Hawes (D Mo.). The House on April 1, 1926, adopted by a 306–62 vote a Judiciary Committee resolution to impeach English. The resolution also set forth the articles of impeachment, charging English with partiality, tyranny and oppression. The trial was set to begin Nov. 10, but on Nov. 4 English resigned. Instead of proceeding with the trial, as was done after Belknap's resignation, the Senate on Dec. 13 by a 70–9 vote dismissed the charges at the request of the House managers.

Judge Harold Louderback. A resolution by Rep. Fiorello H. LaGuardia (Republican Progressive N.Y.) for an investigation of Harold Louderback, U.S. judge for the northern district of California, was adopted by a voice vote of the House on June 9, 1932. The Judiciary Committee's study produced mixed results. The majority recommended censuring, but not impeaching Louderback. However, the House on Feb. 24, 1933, by a 183–142 vote adopted a minority resolution by LaGuardia impeaching the judge and specifying the articles. They accused Louderback of favoritism and conspiracy in the appointment of bankruptcy receivers. A trial that lasted from May 15 to May 24 ended in acquittal. The "not guilty" votes outnumbered the "guilty" votes on all except one of the five articles.

Judge Halsted L. Ritter. Rep. J. Mark Wilcox (D Fla.) on May 29, 1933, introduced a resolution for an investigation of Halsted L. Ritter, U.S. judge for the southern district of Florida. The resolution was adopted by a voice vote on June 1. A long delay followed. Then on March 2, 1936, the House by a 181–146 vote adopted a Judiciary Committee impeachment resolution. The articles of impeachment, contained in the resolution, charged Ritter with a variety of judicial improprieties. The trial lasted from April 6 to April 17. Although there were more "guilty" than "not guilty" votes on all except one of the first six articles, the majorities fell short of the two-thirds required for conviction. However, on the seventh article, with 56 votes necessary for conviction, the vote was 56 guilty and 28 not guilty. Thus, Ritter was convicted. He was ordered removed from office, without a vote. An order to disqualify him from further office was defeated, 0–76.

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93d Congress
2d Session

HOUSE COMMITTEE PRINT

IMPEACHMENT

SELECTED MATERIALS ON PROCEDURE

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Foreword

By Hon. Peter W. Rodino, Jr., Chairman, Committee on the Judiciary

In October 1973, the Committee on the Judiciary issued as a Committee Print, *Impeachment: Selected Materials*, a 718-page volume of materials regarding the constitutional bases for the impeachment of officers of the United States.

It was my hope at that time that those materials, some of them previously scattered in select libraries and in some cases out of print for more than a century would be more readily accessible to Members of Congress and to a larger segment of the American community.

The demand for those volumes has been enormous, and the Committee continues to receive daily innumerable requests for additional information regarding the procedures and mechanics of the impeachment process in the House of Representatives and in the United States Senate. For that reason, I am pleased to transmit a second volume of materials, these gleaned exclusively from Hinds' and Cannon's Congressional *Precedents*. Together in one volume for the first time, they offer an extended historical and parliamentary manual of how the impeachment process works in the United States.

January 7, 1974

Contents

Nature of Impeachment*

2001. "Treason, bribery, or other high crimes and misdemeanors" require removal of President, Vice-President, or other civil officers from office on conviction by impeachment.—The Constitution, in Article II, section 4, provides:

> 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.

2002. Impeachments are exempted from the constitutional requirement of trial by jury.—The Constitution, in Article III, section 2, provides:

> The trial of all crimes, except in cases of impeachment, shall be by jury. * * *

2003. Cases of impeachment are excluded by the Constitution from the offenses for which the President may grant reprieves and pardons.—The Constitution in Article II, section 2, provides:

> The President * * * shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment.

2204. The English precedents indicate that jury trial has not been permitted in impeachment cases.

The Commons are considered, in English practice, as having in impeachment cases the function of a grand jury.

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* Hinds' Precedents, vol. 3, p. 307 (1907).

[1] Discussion as to right to demand jury trial. Sec. 2318 of this volume. Impeachment in relation to the courts. Sec. 2314 of this volume. A Senator is not a "civil officer." Secs. 2361, 2318 of this volume. Argument that the power is remedial rather than punitive. Sec. 2510 of this volume. May a civil officer be impeached for offenses committed prior to his term of office? Sec. 2510 of this volume.

As to the impeachment of territorial judges (secs. 2486, 2493) and officers removable by the Executive (secs. 2501, 2515). Is impeachment justified by ascertainment of probable cause? Sec. 2498.

[2] See also sec. 2462 of this volume.

[3] See also secs. 2317, 2444, 2459; but in other cases proceedings have ceased after resignation. Secs. 2489, 2500, 2509, 2512.

[4] As to the impeachment of citizens not holding office. Secs. 2056, 2315.

Nature of impeachment discussed. Sec. 2270; also in the Chase trial, secs. 2356–2362; in the Peck trial, secs. 2379–2382; in the Johnson trial, secs. 2405, 2406, 2410, 2418, 2433; in the case of Watrous, sec. 2498.

The argument that impeachment might be only for indictable offenses. Secs. 2356, 2379, 2405, 2406, 2410, 2418.

Abuse and usurpation of power as grounds of. Secs. 2404, 2508, 2516, 2518.

Authority of Congress to make nonresidence of a judge an impeachable offense. Sec. 2512.

[5] An officer threatened with impeachment may decline to testify. Sec. 1699.

Impeachment and ordinary legislative investigations contrasted. Sec. 1700.

In Chapter LIII of Jefferson's Manual the following is given in the "sketch of some of the principles and practices of England" on the subject of impeachments:

Jury. In the case of Alice Pierce (1 R., 2) a jury was impaneled for her trial before a committee. (Seld. Jud., 123.) But this was on a complaint, not on impeachment by the Commons. (Seld. Jud., 163.) It must also have been for a misdemeanor only, as the Lords spiritual sat in the case, which they do on misdemeanors, but not in capital cases. (Id., 148.) The judgment was a forfeiture of all her lands and goods. (Id., 188). This, Selden says, is the only jury he finds recorded in Parliament for misdemeanors; but he makes no doubt if the delinquent doth put himself on the trial of his country, a jury ought to be impaneled, and he adds that it is not so on impeachment by the Commons; for they are in loco proprio, and there no jury ought to be impaneled. (Id., 124.) The Ld. Berkeley (6 E., 3) was arraigned for the murder of L. 2 on an information on the part of the King and not on impeachment of the Commons; for then they had been patria sua. He waived his peerage, and was tried by a jury of Gloucestershire and Warwickshire. (Id., 126.) In 1 H., 7, the Commons protest that they are not to be considered as parties to any judgment given, or thereafter to be given, in Parliament. (Id., 133.) They have been generally and more justly considered, as is before stated, as the grand jury, for the conceit of Selden is certainly not accurate that they are patria sua of the accused, and that the Lords do only judge but not try. It is undeniable that they do try, for they examine witnesses as to the facts, and acquit or condemn according to their own belief of them. And Lord Hale says "the peers are judges of law as well as of fact" (2 Hale P.C., 275), consequently of fact as well as of law.

2205. Under the parliamentary law an impeachment is not discontinued by the dissolution of Parliament.—In Chapter LIII of Jefferson's Manual the following is given in the "sketch of some of the principles and practices of England" on the subject of impeachments:

Continuance. An impeachment is not discontinued by the dissolution of Parliament, but may be resumed by the new Parliament. (T. Ray., 383; 4 Com. Journ., 23 Dec., 1970; Lord's Journ., May 15, 1791; 2 Wood., 618).

2206. It was decided in 1876 that an impeachment trial could only proceed when Congress was in session.

Instance during an impeachment trial wherein a Member of the Senate called on the managers for an opinion.

On June 19, 1876,[6] in the Senate sitting for the impeachment trial of William W. Balknap, late Secretary of War, the counsel for the respondent asked for a postponement of the trial until some time in the next November.

Thereupon a question arose as to whether or not the trial might proceed when the House of Representatives was not in session, and Mr. John J. Ingalls, a Senator from Kansas, asked for an opinion from the managers for the House of Representatives.

Mr. Manager Scott Lord said:

Perhaps, Mr. President, it will be sufficient for the managers to say in that regard that the managers are not agreed on that question. Some of us have a very fixed opinion one way, and other managers seem to have as fixed an opinion the other way; and not being agreed among ourselves we perhaps ought not to discuss the question until we can come to some agreement.

I will say further, Mr. President and Senators, that the question which is presented by the Senator has not been fully considered by the managers; it has not been very much discussed by them, but it has been sufficiently discussed to enable us to see that there is this difference of opinion. I think myself that when the question is fully discussed by the managers they will come to a conclusion on the subject unanimously; but perhaps one differing with me might think we should come unanimously to a different conclusion from that which I entertain.

[6] First session Forty-fourth Congress, Record of Trial, p. 173.

I will say for myself that I have no doubt of the power of this court to sit as a court of impeachment after the adjournment of the Congress.

* * * * * * *

I ought to say in regard to the opinion which I have expressed that I predicate that opinion upon the action of both the Houses. I think that in order to authorize the sitting of this court beyond all question either the House or the Congress should vote to empower the managers to appear before this court in the recess or absence of the House.

* * * * * * *

I ought to say in furtherance of the view which I have presented, that the question has been settled in the State of New York, the State in which I reside and I, of course, would naturally be influenced somewhat by the decision. In the case of Judge Barnard the trial was had at Saratoga after the adjournment of the legislature, and in the recent impeachment trial in Virginia the same course was taken—the impeachment was not tried until after the adjournment of the legislature. I am also reminded that as far back as 1853 when Mr. Mather, a canal commissioner, was impeached in New York, he was tried after the legislature adjourned. In regard to the English authorities they seem on the whole to warrant the proposition that the House of Lords may proceed as a court of impeachment after the adjournment of the Parliament.

Soon after,[7] while an order was pending providing that the trial should proceed on July 6, Mr. Oliver P. Morton, of Indiana, proposed to add thereto as an amendment the following:

Provided, That impeachment can only proceed in the presence of the House of Representatives.

On motion of Mr. Frederick T. Frelinghuysen, of New Jersey, and without division, the words "in the presence of the House of Representatives" were stricken out and the words "while Congress is in session" were inserted.

Thereupon Mr. Morton asked and obtained leave to withdraw his amendment.

Thereupon Mr. Roscoe Conkling, of New York, offered the proviso again:

Provided, That impeachment can only proceed while Congress is in session.

This proviso was agreed to, yeas 21, nays 19.

Thereupon Mr. Oliver P. Morton proposed to amend by adding the words, "and in the presence of the House of Representatives."

Mr. Eli Saulsbury, of Delaware, proposed to amend Mr. Morton's amendment by adding the words, "or its managers."

Mr. Saulsbury's amendment was disagreed to without division; and Mr. Morton's amendment was disagreed to by a vote of yeas 9, nays 28.

So it was

Provided, That the impeachment can only proceed while the Congress is in session.

The reasons actuating the Senate in coming to this decision do not appear from Senate proceedings, as the debates were in secret; but in a verbal report made to the House of Representatives by the Chairman of the Managers, Mr. Scott Lord, of New York, this statement appears:[8]

The plan of the managers on the part of the House has been this: To induce the Senate, as a court if impeachment, to allow Congress to adjourn and then sit as a court to carry on the case. But there are two reasons against that which

[7] Senate Journal, pp. 957, 959.
[8] Record, p. 3871.

render it conclusive that the Senate will not do so. The first is that many Senators doubt the power of the Senate to sit as a court of impeachment after the adjournment of Congress. The second, and the really practicable reason, is that it will be found impossible to keep a quorum of the court together after the adjournment of Congress.

2007. The Senate decided, in 1876, that William W. Belknap was amenable to trial notwithstanding his resignation of the office before his impeachment for acts therein.

In the Belknap trial the managers and counsel for respondent agreed that a private citizen, apart from offense in an office, might not be impeached.

Discussion as to effect of an officer's resignation after the House has investigated his conduct, but before it has impeached.

On May 4, 1876,[9] in the Senate, sitting for the impeachment trial of William W. Belknap, late Secretary of War, the President pro tempore announced that the Senate had adopted the following:

Ordered, That the Senate proceed first to hear and determine the question whether W. W. Belknap, the respondent, is amenable to trial by impeachment for acts done as Secretary of War, notwithstanding his resignation of said office; and that the managers and counsel in such argument discuss the question whether the issues of fact are material and whether the matters in support of the jurisdiction alleged by the House of Representatives in the pleadings subsequent to the articles of impeachment can be thus alleged if the same are not averred in said articles.

On the first question, whether or not the respondent was amenable to trial for acts done as Secretary of War, notwithstanding his resignation, the argument naturally divided itself into three branches.

1. May a private citizen be impeached, irrespective of whether he has held office or not?

2. May a private citizen who formerly held an office be impeached for acts done as an incumbent of that office?

3. Assuming that a person may not be impeached after he is out of office for acts done in office, does a resignation, after proceedings for impeachment begin, confer immunity?

As to the first question, may a private citizen be impeached, Mr. Montgomery Blair, of counsel for the respondent, said:[10]

Upon the first question I do not know how the managers are to maintain the jurisdiction of this court upon any other principle than that which was asserted in the Blount case, which was that "all persons are liable to impeachment" (Annals of Congress of 1797, vol. 2. p. 2251), because, as was alleged there all persons are liable in England, the country from which we borrow the proceeding, and to whose laws and usages we must therefore look for the extent of its application. But as the court on that occasion overruled this doctrine, and the decision has been acquiesced in for seventy-eight years, the managers ought not now to expect this court to overrule it.

And Mr. Manager Scott Lord, speaking for the House of Representatives, said:[11]

The learned counsel, Mr. Blair, suggested that we should be driven to the position of asserting that a citizen who had never held office was impeachable. We claim no such thing. We claim first, and admit, that the authorities have settled that a mere citizen can be impeached; and if the authorities had not settled it, the Constitution, not by express words, but by its intent, does exclude the idea of impeachment as against a mere private citizen.

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[9] First session Forty-fourth Congress, Senate Journal, p. 928; record of trial, p. 27.
[10] Record of trial, p. 28.
[11] Page 34.

Mr. Matt H. Carpenter, of counsel for the respondent, after an exhaustive discussion of authorities, said:[12]

In Blount's case, where the question I am discussing was first presented to this court, Messrs. Bayard and Harper, managers, understanding the task before them, grappled with the subject, and maintained the broad ground that the power of impeachment under our Constitution reached to every inhabitant of the United States, Blount, not as a Senator, but while a Senator, had committed the acts charged in the articles of impeachment. He pleaded to the jurisdiction, first, that he was not an officer of the United States when he committed the acts complained of, and, secondly, that he was not even a Senator at the time of the impeachment. It appeared from the record that he was a Senator at the time the acts were committed. The managers argued that a Senator was a civil officer. But they also contended that whether a Senator was a civil officer or not was immaterial; because impeachment was not confined to civil officers. And there was no fault in their reasoning, upon their premises. If impeachment lies against any private citizen of the United States, then Blount should have been convicted; because surely he could not interpose his senatorial character as a shield against an impeachment maintainable against any private citizen. And so the question was distinctly presented, whether or not impeachment lies against a private citizen.

The court, as is well known, decided that there was no jurisdiction. And this decision is an authoritative declaration that impeachment can not be maintained against a private citizen.

* * * * * * *

We have been unable to find any case in which a private citizen has been held subject to impeachment for misconduct in an office formerly held by him. In the Barnard case, it is true, the court held that the accused might be convicted and removed from office on account of offenses committed in a former term of the same elective office which he was holding at the time of impeachment.

In the State of Ohio, Messrs. Pease, Huntingdon, and Tod held a certain act of the legislature unconstitutional and void. At the session of the legislature 1807–8 steps were taken to impeach them therefor, but the resolution was not acted upon at that session; but at the next session steps were taken toward the impeachment of the offending judges, and articles of impeachment were reported against Pease and Tod, but not against Huntingdon, who in the meantime had been elected governor of the State, and of course had ceased to be a judge of the court. This discrimination is an authority in favor of the proposition that no man can be impeached after he is out of office. (Cooley on Constitutional Limitations, p. 160, note 3.)

(2) The main force of the argument was expended on the second question, whether or not a private citizen who has formerly held an office may be impeached for acts done as an incumbent of that office. The question of the right to impeach a private citizen was argued only for its relation to this second question.

Mr. Montgomery Blair, of counsel for the respondent, began the argument with a review of the nature of impeachment in America and England, and continued:[13]

This settles the principle upon which impeachment must be exercised. It is strictly confined to the cases expressly enumerated in the Constitution, as much so as any other court established by the Federal Constitution.

And this brings me to the consideration of what are the cases enumerated by this Constitution as within the power of impeachment. There is no other enumeration except what is contained in the fourth section of the second article, as follows:

"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."

[12] Pages 39–42.
[13] Page 29.

The enumerated cases of persons, therefore, against whom this court can entertain articles of impeachment are "the President, Vice-President, and all civil officers of the United States;" not persons who have been President, Vice-President, or civil officers, but only persons who can be at the time truly described as President, Vice-President, or as civil officers, and who can "be removed from office on impeachment and conviction of treason," etc. "If there must be a judgment of removal," says Story, "it would seem to follow that the party was still in office;" but it is not necessary to rely upon this inference, plain and necessary as it is, because the only persons specified as subject to impeachment are officers, and it would be equally plain that only officers were amenable to impeachment if nothing was said in the section about removal, and it were simply "that the President, Vice-President, and all civil officers shall be subject to impeachment for and conviction of treason, bribery," etc., because it is only by these descriptions as officers that they are made subject to impeachment. Hence the only question before the court is whether the term "officer" can be applied to a person not at the time in the holding of an office.

And this has been the accepted construction. From the day when Blount was tried until now no attempt has been made to impeach a private citizen, and that not because there have not been plenty of proper subjects for impeachment if the law had authorized the proceeding against ex-officers. Within a few years past it is notorious that a number of officers who were under investigation and who were threatened with impeachment resigned to avoid it, and the proceedings against them were abandoned. Several judges were among the number, all whose names I do not now recall, and it is not necessary to do so, because the Senate knows to whom I refer, who resigned their places and thereby arrested the proceedings. So in New York, where the high court of impeachment is composed of the judges of the court of appeals and the senate, and the provisions of whose constitution, if not in identical words with those of the national Constitution, are substantially the same, an impeachment was dismissed against Judge Cardozo, within a few years, on the presentation of his resignation. The judiciary committee of the house of representatives of that State, composed of persons who will, I understand, be recognized by some of the managers as among the ablest lawyers of that State, reported against the power of impeachment of any person not actually in office. The language of the resolution in Fuller's case (the case referred to) is:

"That no person can be impeached who was not at the time of the commission of the alleged offense and at the time of the impeachment holding some office under the laws of the State."

This resolution and the accompanying report form part of the report of the trial of George G. Barnard, page 158.

I have examined all the constitutions of all the States with reference to the provisions therein contained on the subject of impeachment. With two exceptions, they correspond in substance with the national Constitution; and I have not learned that any impeachments against ex-officers have taken place under those constitutions.

Mr. Blair next cited opinions of the framers of the Constitution, and the comments of Judge Story, saying:[14]

All of the reasons upon which the proceeding was supposed to be necessary were applicable only to a man who wielded at the moment the power of the Government, when only it was necessary to put in motion the great power of the people, as organized in the House of Representatives, to bring him to justice. It is a shocking abuse of power to direct so overwhelming a force against a private man. It may be deemed by some of small moment, because it can only effect his disfranchisement; but the effect is to dishonor him, and it is simply tyranny to put this man's honor in peril by the application of that overwhelming force. The great authors of England, as well as the great commentator on our Constitution mentioned, hold that impeachment ought only to be brought into action to arrest the wrongdoing of another power in the Government. The arena of impeachment is in fact a place in which a controversy takes place between the high powers of the Government. The only theory upon which it can be justified is to enable the people, massed and organized in their representative houses, to assail their oppressors, armed with the power of the Executive and the patronage and prestige which that gives them. Do you seek to prostitute that power

[14] Pages 30, 31.

to the oppression of a private individual, wasting his means by an action that, as this author says, has invariably ruined every private man who has been the subject of it in Great Britain?

Mr. Matt H. Carpenter held that there were two theories in regard to impeachment—one that the proceeding was so broad that private persons might fall within its reach, as in England, and the other that impeachment "was only a proceeding to remove an unworthy public officer." And he declared that one of these theories must be accepted, and that there was no middle ground. He then proceeded at length to cite authorities [15] to show that a private citizen might not be impeached, and then said: [16]

Bearing in mind this method, when we read that the "House of Representatives shall have the sole power of impeachment, and the Senate the sole power to try impeachment;" and learn from the debates in the convention that impeachment was intended as a method of removal from office, we naturally look elsewhere in the Constitution for the extent of this power; in other words, for the officers who may be removed by this method, which we find in section 4 of article 2, as follows:

"The President, Vice-President, and all civil officers of the United States, shall be removed from office on impeachment, etc."

There is a strong implication arising from the provision that punishment in cases of impeachment shall extend no further than removal from office, or removal and disqualification, that impeachment only lies against those in office. But section 4 of article 2 is perfectly conclusive.

Consider the language of this fourth section of the second article. The President shall be removed, etc. Suppose General Jackson still alive, and to be impeached to-day for removing the deposits from the Bank of the United States? Who would preside over the trial?

Section 3 of article 1 provides:

"When the President of the United States is tried, the Chief Justice shall preside."

Suppose General Jackson living and impeached for removing the deposits. Would the Chief Justice preside? Manifestly not, because General Grant is President, and the case supposed would be an impeachment of a private citizen, and not of the President. And yet, upon the theory now maintained, that once a President is always a President for the purposes of impeachment, the Chief Justice would have to preside. This is as absurd as it would be to construe a statute giving Members of Congress the franking privilege, as giving that privilege to every one who had been a Member of Congress.

The Constitution does not authorize the impeachment of certain crimes—that is, crimes committed in offices—but it authorizes an impeachment of certain persons, described by the class to which they belong; that is, civil officers of the United States.

I may assume therefore that the purpose for which the power of impeachment was incorporated in the Constitution will be observed by this court, in exercising the jurisdiction which the Constitution confers. And upon this subject the debates in the convention are not only satisfactory, but absolutely conclusive.

Before passing from the subject of these debates let me say that considerable opposition was developed against embodying this power in the Constitution. Those who opposed it did so upon the ground that conferring the power would make the President a subservient tool of Congress and destroy the proper equilibrium of the three departments. On the other hand, it was urged that without the impeachment clause it would be in the power of the President, especially in time of war, when he would have large military and naval forces at command, and public moneys at his disposal, to overthrow the liberties of the people. Near the close of the debate Mr. Morris said his views had been changed by the discussion, and he expressed his opinion to the effect that—

[15] Pages 38, 39.
[16] Page 40.

"The Executive ought to be impeached. He should be punished, not as a man, but as an officer, and punished only by degradation from his office."

This was the only debate upon the general subject of impeachment. Thus it will be seen that those who favored and those who opposed incorporating the power in the Constitution, contemplated the impeachment of officers while holding office.

Mr. Jeremiah S. Black, also of counsel for the respondent, said: [17]

We must then fall back on the one question whether an officer who has resigned is subject to the power of impeachment, or whether he is to be regarded as a private citizen after he goes out, and therefore amenable only to the courts.

The words are "the President, Vice-President, and all civil officers." Who is the President? If that means an ex-President, a person who has once held the office of President, but whose term has expired or who has resigned, then the same interpretation must be given to the other words, and the words "the Vice-President and all civil officers" may include all persons who have held office at any period of their lives. When we speak about the President, do we ever refer to anybody except the incumbent of that office? A half-grown boy reads in a newspaper that the President occupies the White House; if he would understand from that that all ex-Presidents are in it together he would be considered a very unpromising lad.

The managers would not assign that absurd meaning to any other part of the Constitution. Where it is provided that the Vice-President shall preside in the Senate, they know very well that nobody is included but the actual incumbent. Statutes have been passed declaring that the Members of Congress shall have certain privileges, such as franking letters and receiving an annual compensation out of the Tresaury. Did anybody ever claim that this extended to old Members retired from public life? Any law which declares that public officers as a class shall be entitled to pay as privileges would be confined to those persons in office, and no sensible man would think of a Constitution extending it to former officers. When, therefore, the Constitution says that all civil officers may be impeached, it is a violation of common sense to hold that the power may be applied to a late Secretary of War or other person who does not at the time actually hold any office at all.

The Constitution declares that when the President is impeached the Chief Justice shall preside. The question has been propounded repeatedly, and by several Senators, who would preside if an ex-President was impeached? I admit that that is a puzzle. The puzzle arises out of the absurdity of impeaching an ex-President. Our friends on the other side are so hampered by their own theory that they are obliged simply to decline answering. There is one answer and only one consistent with their logic, and that is this: That when an ex-President is impeached an ex-Chief Justice ought to preside at the trial.

But then the reductio ad absurdum is furnished to their argument when they read on that the President, the Vice-President, and all other civil officers of the United States shall be removed upon conviction. The single sentence uttered by Governor Johnstone in the North Carolina convention puts this in a light so perfectly clear that it would be throwing words away to talk about it. How can a man be removed from office who holds no office? How turn him out if he is not in? The object and purpose of impeachment was removal—removal, mind you, not for a day, not for an hour, not a removal which might be rendered nugatory the next moment by his reappointment or reelection, but a permanent removal. You find an officer misbehaving himself, and you get hold of him while he is still in the possession of power. When you get your grasp upon him, you hurl him down, and give him such a pernicious fall that he can never rise again.

Removal is not only the object of impeachment, but it is the sole object. Removal and disqualification are so associated together that they can not be separated. You can not pronounce a judgment of removal without disqualifying; and you can not pronounce a judgment of disqualification without removal, because the judgment which the Constitution requires you to pronounce is a judgment of removal and disqualification—not removal or disqualification; and this is made perfectly manifest to my mind from the experience we have had in Pennsylvania. It was thought by the convention that framed our Constitution desirable that the Senate, upon conviction of an offender of this kind, should have the discretion to say that he might be removed without being disqualified; and accordingly they changed the provision which had previously been copied from the Con-

[17] Page 71.

stitution of the United States, and instead of saying what is said here, that judgment shall extend to removal and disqualification, it says it shall extend to removal, or to removal and disqualification. The effect of that was to allow of a judgment of removal alone, but not of disqualification alone—removal alone, or removal and disqualification.

On the other hand, the managers for the House of Representatives maintained, with careful citation of authorities, that impeachment was intended to reach a public officer while in office or after he had left office. Mr. Manager Scott Lord said: [18]

Therefore we claim that the limitation of the Constitution is not as to time; it simply relates to a class of persons, and the word "officer" is used as descriptive precisely as it is used in the very statute to which the counsel referred. If it be true because the word "office" or "officer" is used in the Constitution, without saying anything about a person after he is out of office, that the defendant is not impeachable, then he can not be indicted, because the statute relating to his indictment simply speaks of him as an officer.

What is the real intent and meaning of the word "officer" in the Constitution? It is but a general description. An officer in one sense never loses his office. He gets his title and he wears it forever, and an officer is under this liability for life; if he once takes office under the United States, if while in office and as an officer he commits acts which demand impeachment, he may be impeached even down to the time to which the learned counsel, Mr. Carpenter, so eloquently referred the other day—down to the time that he takes his departure from this life.

It is supposed by many that because an officer must be removed no judgment can be pronounced without pronouncing the judgment of removal. This, it seems to me, is a very great error. If he is in office, of course under the Constitution he must be removed; but if out of office, the sentence of disqualification or some inferior sentence may be passed upon him, for the obvious reason that the sentence is divisible. This was distinctly held in the Barnard case, to which reference has been made. In that case the court proceeded unanimously to vote that he should be removed from office; but when the question came up on the other point, shall he be disqualified? several members of the court voted in the negative.

I do not see, then, any possible view in which there is difficulty; and the learned counsel on the other side will not be able to create any difficulty excepting under the claim that a person in office, having so conducted himself as to be worthy of impeachment, finding that it is impossible to escape the facts or pervert them, may, I repeat, defeat the Constitution for the purpose of preventing his punishment.

Messers. Managers George A. Jenks and George F. Hoar examined the English precedents and the history of the Constitution at length, the latter summarizing his conclusions [19] thus:

The history of the steps by which these constitutional provisions found their place, the few authorities which can be found on the subject, the narrower argument drawn from the language of the Constitution and the broader argument drawn from a consideration of the great public object to be accomplished all point the same way and bring us irresistibly to the conclusion that the power of the Senate of the United States over all grades of public official national wrongdoers, a power conferred for the highest reasons of state and on fullest deliberation, to interpose by its judgment a perpetual barrier against the return to power of great political offenders, does not depend upon the consent of the culprit, does not depend upon the accidental circumstance that the evidence of the crime is not discovered until after the official term has expired or toward the close of that term, but is a perpetual power, hanging over the guilty officer during his whole subsequent life, restricted in its exercise only by the discretion of the Senate itself and the necessity of the concurrence of both branches, the requirement of a two-thirds' vote for conviction, and the constitutional limitation of the punishment

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[18] Page 34.
[19] Page 57.

But I think I can show to the Senate of the United States, from the history of the formation of this Constitution, that the jurisdiction conferred was complete, and that the unanimous purpose of the convention to confer the power of impeachment over everybody committing crime in office is to be found and proved by its debates, and that the clause saying that civil officers can be removed on conviction is put there as an exception to the clauses which previously had determined the tenure of those offices. In other words, the framers of the Constitution had given power of impeachment to the House, given the power of trial to the Senate, extended the power to all cases of national official wrongdoers, prescribed the mode of proceeding, the numbers necessary to convict, limited the judgment, and passed from that question.

Mr. Aaron A. Sargent, a Senator from California, asked if Members of the Senate who had in times past been civil officers of the United States were, in Mr. Hoar's view, liable to impeachment. Mr. Hoar replied:[20]

They are, undoubtedly. The logic of my argument brings us to that result, and undoubtedly they are as safe from the operation of that process practically as the newly-born infant in his mother's arms. Does anybody suppose that there is to be a two-thirds vote of the American Senate which will rake up and try and punish for political offenses, when the public judgment of this people has demanded an amnesty? The whole power to punish, the whole judgment after the offender has left office is disqualification to hold office, and that judgment is a judgment in the discretion of the Senate. Hunt in Massachusetts, a justice of the peace—the language being exactly the same as this—was sentenced simply to suspension from his office and disqualification to hold any other for twelve months. That was the case of a justice of the peace in the town of Watertown, I think, early in this century.

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Let me sum up the argument, drawn from the language of the Constitution. The power of impeachment is not defined in the grant in the Constitution. It is conferred as a general common-law power. The judgment is then limited to removal and disqualification, and two-thirds required for conviction. No limit of its application to persons is inserted in the grant. But a subsequent limitation on the tenure of office is inserted, namely, the case of a removal by impeachment, to guard against the argument that officers, whose term is fixed in the Constitution, can not be removed under the power of impeachment, just as impeachment is excepted in the clause securing the right of trial by jury and in the clause conferring the power to pardon.

But suppose we grant the phrase, all civil officers, to be inserted as a definition of the persons who may be reached by this process. Is the definition to be taken to apply to them at the time of the commission of the offense or at the time of the punishment? Suppose a statute enact that all wrongdoers may be punished. Is it not clear that if they be wrongdoers when they commit the act the liability to punishment attaches? The very statute which punishes bribery would fail by this construction to reach anybody, because it is in this respect, as has already been said, almost identical with the provision of the Constitution in its description.

The provision that the judgment shall extend no further than removal from office and perpetual disqualification authorizes any lesser penalty included within those limits to be imposed at the discretion of the Senate. In Hunt's case, in Massachusetts, the sentence was disqualification for a year under a like constitutional provision.

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The whole constitutional provision, so far as affects our present purpose, can be summed up in two sentences which are scarcely a paraphrase or change of the existing text of the existing law, and these two sentences I think state precisely the contentions on the one side and on the other. We say that the Constitution in substance is this: "The Senate shall have the sole power to try impeachments, and civil officers shall be removed on conviction." The counsel for the defendant would state it to be: "Judgment in case of conviction shall be removal from office and disqualification. If the defendant is willing." That is the summing up of the two propositions.

[20] Page 60.

But the meaning of these provisions of the Constitution must be ascertained after all by a broad consideration of the great public objects they were intended to accomplish. "Never forget," says Chief Justice Marshall, in McCulloch *v.* Maryland—and that sentence is the keynote to his whole judicial power—"Never forget that it is a constitution you are interpreting."

(3) As to the third branch of the inquiry, assuming that an ex-officer may not be impeached, whether or not a resignation after proceedings begin confers immunity, there was not very extended debate. Mr. Manager Scott Lord said,[21]

I now propose to call the attention of the court to the other questions of this case referred to in the order of the Senate. The first question of the second replication is: "Can the defendant escape by dividing the day into fractions?" This question is also presented by the articles and plea. The allegation on page 5 is not denied. Therefore, as I propose to show this court by an unbroken series of decisions that the law does not permit a day to be divided into fractions in such a case as this, and if it be true that the defendant was Secretary of War on the 2d of March, on any part of that day, and therefore impeachable, then that question, perhaps, can be argued independent of this replication. I propose, now, to argue the question under the second replication. The authorities will bear upon both the plea and replication. First, I say a judicial act dates from the earliest minute of the day in which it is done.

After citing authorities, he continued—[22]

The next question presented by their replication is, Did the impeachment relate back to the inception of the proceedings by an authorized committee of the House? Whether the committee was authorized or not is a question of fact. Therefore the comments of the learned counsel relating thereto were not in order, because it is affirmed on the part of the House of Representatives that this committee had authority. If it should appear that the committee had no authority, then another principle would be invoked, and that is the principle of adoption. But it is not necessary to discuss that now, because for the purposes of this argument the authority is conceded. In regard to the principle of relation it is this: That the House of Representatives before this resignation having instituted proceedings against Mr. Belknap for the purpose of investigating these crimes and for the purpose of impeaching the defendant, when the impeachment was made it related back to the original proceeding which was instituted, as is confessed, before this resignation. When divers acts concur to a result, the original act is to be preferred, and to this the other acts have relation.

And after citing other authorities:

In this case we claim that the House of Representatives, having obtained jurisdiction of the subject-matter by instituting these proceedings against the defendant, he could no more defeat them by resigning midway than he could defeat the Constitution itself. When the House of Representatives by its solemn act impeached him of high crimes and misdemeanors, that was a judicial act, the highest judicial act that can be performed in this nation save one, and that is the act to be performed by this tribunal when it pronounces "guilty" or "not guilty" upon the proofs before it.

Therefore, we say the defendant in this case should not be allowed his dilatory plea, because these proceedings had been instituted against him long before he had resigned his office, long before he had attempted to escape the penalty due to his crime by this resignation. This impeachment is in furtherance of justice, not in furtherance of injustice. It is due to the defendant; it is due to the dead whom he claims to represent; it is due to all the associations that surround him, if he is an innocent man, that he establish his innocence in this tribunal. Therefore to hold jurisdiction in this case, to give him the opportunity to establish his innocence, or the House of Representatives to establish his guilt, is in furtherance of justice. To deny jurisdiction under these circumstances would be in furtherance of injustice.

[21] Page 35.
[22] Page 36.

In this case before the court the doctrine of relation prevents injustice, for it changes no rule of evidence, and does not affect the merits.

Mr. Carpenter, of counsel for respondent, argued,[23] on the other hand:

If I am right in saying that the only purpose of impeachment is to remove a man from office, when the man is out of office the object of impeachment ceases, and the proceedings must abate. There would be no further object to attain by the proceeding. Suppose the man committed suicide while his trial was progressing, would not that be good matter of abatement? Suppose he commits official suicide by resigning, why should this not have the same effect? I have attempted to show that the sole object for which the power of impeachment was given is removal from office.

There is another proposition which I intended to argue in that connection. The disqualification clause of punishment was evidently put in for the purpose of making the power of removal by impeachment effectual. After providing that the officers of the United States might be removed on impeachment, although the President could not pardon the offender convicted and removed, yet if he could reinstate him the next morning he would have substantially the power of pardon. To prevent this was the object of the disqualifying clause; which Story says is not a necessary part of the judgment. You might impose it where you had removed an officer appointed by the President whom the President could reinstate. You could stop that by fixing disability upon the officer; and that I take to have been the sole purpose of this clause.

If I am right in this position, if the man died in the middle of the trial, or if he died after finding against him, but before judgment had been pronounced, the suit would abate. Must this court go on and sentence a man after he is dead—either physically or officially dead? It is equally absurd to talk of removing a man from an office which he no longer fills, as to talk of removing a man from office after he is dead. So far as its effect upon the suit is concerned I see no difference between the case of his natural death and his official death. The suit abates because there is no further object to be attained by its prosecution.

Let me remind the Senate that there is not a writer on this subject who does not maintain that the power of impeachment was never intended for punishment.

This is conclusively shown by the fact that the party, after he is impeached, is to be indicted and punished for his crime. And it should be remarked that, if impeachment lies against one not in office, he must either not be punished at all, which would show the absurdity of the proceeding; or you must inflict the disqualification, which, Story says, you need not inflict on one removed from office.

Returning from this digression to the line of my argument, let me say that Rawle's Commentaries and the report of the Blount case were considered by Judge Story in writing his Commentaries; and he quotes from them both, but evidently disagrees with Rawle's parenthetic suggestion, and the concessions made by the counsel of Blount.

Mr. Roscoe Conkling, a Senator from New York, asked Mr. Carpenter this question:

Is there no distinction on the point of jurisdiction to try an impeachment, between the case of a resignation before articles are found and the case of resignation not till after articles, have been found?

Mr. Carpenter replied:[24]

The question put to me by the Senator from New York is very specific, and, in reply, I would say that a distinction exists between the case where a resignation precedes the exhibition of the articles and the case where a resignation comes between the exhibition of the articles and final judgment. And this court might hold that after jurisdiction had attached by exhibition of the articles, or even by the formal impeachment which precedes exhibition of articles, the jurisdiction had attached, and resignation would not prevent final judgment. Speaking, however, for myself, I still incline to the opinion that if the officer, who alone can be impeached, is out of the office before judgment of removal

[23] Page 42.
[24] Page 43.

passes, this would abate a proceeding, which, I have endeavored to show, can only be had for the purpose of removal. It is said the law will not require a vain thing; from which I infer that the highest court in the Republic will not render a vain judgment.

Mr. Carpenter also said,[25] after citing authorities:

But against this array of authorities, showing that a private citizen can not be impeached, the managers say that Belknap was in office at the time of the impeachment. It is not denied that Belknap resigned, and his resignation was accepted by the President, at 10 o'clock and 20 minutes a. m., March 2, 1876; nor is it denied that the first proceedings in the House in relation to him took place after 3 p.m. of that day. But the managers say that, in legal contemplation, he was in office at the time of impeachment, because the law will not notice fractions of a day; and, second, that he resigned to evade impeachment, and therefore was in office for the purpose of impeachment after his resignation was accepted.

Fractions of a day! I did not suppose this case would be determined on a question of special pleading, or a fiction of law, until I heard the argument of the learned manager [Mr. Lord] yesterday. I supposed we could strike through the fog and place our feet upon the solid rock of jurisdiction. But the managers propose to hold us by a fiction. They maintain that, although the respondent had resigned, and his resignation had been accepted, nevertheless, this court must decide that he was in office all day, and until after his impeachment on the afternoon of that day, because this court can not distinguish between the forenoon and afternoon of a day.

Suppose a man is sentenced by a criminal court to be hanged at 2 p. m. of a certain day; and suppose the President pardons him at 10 a. m. of that day. Must he be hanged at 2 p. m. because the law knows no fraction of a day? We have heard of men being hanged on the gallows; hanged at the yard-arm; but we never heard of a man being hanged on the fraction of a day.

Suppose in time of war the colonel of a regiment is relieved from duty, or his resignation accepted at 9 o'clock in the morning, and at 4 p. m. of the same day the regiment is engaged in battle. Could the colonel be court-martialed because he was not at the head of his regiment at 4 o'clock?

But having answered the managers on the substance of their claim of jurisdiction, we shall not yield to their fictions.

Mr. Manager Jenks replied [26] to Mr. Carpenter:

Of the second portion of this proposition, which is concerning the collateral facts, I shall say but little, if anything, more than this: It has been considered by the chairman of the managers; he has advanced three or four propositions in support of the view that it is material to consider all the surrounding facts. One of those propositions is, that in law there is no fraction of a day. He has cited authorities to establish that; that was the general rule, that in law there is no fraction of a day. This being the general rule, an exception was introduced by the honorable counsel for the defendant, that is, that if it be necessary to subserve the purposes of justice, a court will consider the fractions of a day. Then the matter stands thus: As a rule, courts will not recognize the fractions of a day; but as an exception, if it be necessary to subserve the purposes of justice, they will recognize the fractions of a day. Hence, when the counsel cited those authorities to show that they would consider it as an exception, it was essential to show that it was necessary to subserve the purposes of justice to bring his case within the exception. He left off just where the real contest began: Is it necessary to subserve the purposes of justice that this court should recognize the fractions of a day? It seems to me that there is no necessity in subserving the purposes of justice that this court should recognize any fraction of a day. Put the question in this form: How can it subserve the interests of justice, when a defendant is charged with having surreptitiously filched from the pockets of from eight hundred to a thousand men from 10 to 25 cents every day for five years, that that defendant shall plead this as an excuse, that the ends of justice are subserved by recognizing the fractions of a day? If he had discussed this, and shown that this defendant would have been wronged did you not consider it, he would then have brought his case within the exception; but, having failed to do that, he leaves

[25] Page 44.
[26] Page 48.

it as my colleague, the chairman, left it; that is, that the general rule, if the defendant have not brought himself within the exception, still exists, and the court will not recognize the fractions of a day.

With reference to the question of relation, that was not considered at all by the counsel for the defendant, and we shall leave it, as our chairman has left it, with you.

The Senate debated the question from the 15th to the 29th of May.[27] The debates were behind closed doors and were not reported.

On May 16[28] the following questions were submitted by Senators for consideration:

By Mr. Oliver P. Morton, of Indiana:

Is there power in Congress to impeach a person for crime committed while in office if such person had resigned the office and such resignation had been accepted before the finding of articles of impeachment by the House?

By Mr. Justin S. Morrill, of Vermont:

Has the Senate power to entertain jurisdiction in the pending case of the impeachment by the House of Representatives of William W. Belknap, late Secretary of War, notwithstanding the facts alleged in relation to his resignation?

By Mr. John Sherman, of Ohio, on May 25:[29]

Resolved, That notwithstading the resignation of William W. Belknap prior to his impeachment by the House of Representatives he is still liable to such impeachment for the misdemeanors charged in the articles presented by the House of Representatives, and his plea of such resignation is not sufficient in law to bar the trial upon such articles.

On May 29[30] the Presiding Officer announced that the proposition pending was that offered by Mr. Morton on the 16th instant. Thereupon Mr. Morton modified his proposition to read as follows:

Resolved, That the power of impeachment created by the Constitution does not extend to a person who is charged with the commission of a high crime while he was a civil officer of the United States and acting in his official character, but who had ceased to be such officer before the finding of articles of impeachment by the House of Representatives.

Mr. Justin S. Morrill, of Vermont, moved to amend the resolution by striking out all after the word "resolved," in the first line, and in lieu thereof inserting:

That the demurrer of the respondent to the replication of the House of Representatives to the plea of the respondent be, and the same is hereby, overruled; and that the plea of the respondent to the jurisdiction of the Senate me, and the same is hereby, overruled; and that the articles of impeachment are sufficient to show that the Senate has jurisdiction of the case, and that the respondent answer to the merits of the accusation contained in the articles of impeachment.

Mr. Isaac P. Christiancy, of Michigan, moved to amend the amendment of Mr. Morrill, of Vermont, by striking out all after the word "that" in the first line thereof, and inserting:

W. W. Belknap, the respondent, is not amenable to trial by impeachment for acts done as Secretary of War, he having resigned said office before impeachment.

Mr. George G. Wright, of Iowa, moved to lay the resolution of Mr. Morton on the table, and this motion was agreed to, yeas 36, nays 30.

Thereupon Mr. Allen G. Thurman, of Ohio, proposed a resolution, which was in this form, after the words "before he was impeached" had been added on motion of Mr. Roscoe Conkling, of New York:

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[27] Senate Journal, pp. 932–947; Record of trial, pp. 72–76.
[28] Senate Journal, p. 933; Record of trial, p. 73.
[29] Senate Journal, p. 939; Record of trial, p. 74.
[30] Senate Journal, pp. 942–947; Record of trial, p. 76.

Resolved, That in the opinion of the Senate William W. Belknap, the respondent, is amenable to trial by impeachment for acts done as Secretary of War, notwithstanding his resignation of said office before he was impeached.

Mr. Algernon S. Paddock, of Nebraska, moved to amend the said resolution by striking out all after the word "resolved" and in lieu thereof inserting:

That William W. Belknap, late Secretary of War, having ceased to be a civil officer of the United States by reason of his resignation before proceedings in impeachment were commenced against him by the House of Representatives, the Senate can not take jurisdiction in this case.

This amendment was disagreed to, yeas 29, nays 37.

Then the resolution was agreed to, yeas 37, nays 29.

Mr. Thurman also presented a further resolution, which, after amendment at the suggestion of Mr. Thomas F. Bayard, of Delaware, was agreed to by a vote of 35 yeas, 22 nays:

Resolved, That at the time specified in the foregoing resolution [June 1 was fixed by a separate resolution] the President of the Senate shall pronounce the judgment of the Senate as follows: "It is ordered by the Senate sitting for the trial of the articles of impeachment preferred by the House of Representatives against William W. Belknap, late Secretary of War, that the demurrer of said William W. Belknap to the replication of the House of Representatives to the plea to the jurisdiction filed by said Belknap be, and the same hereby is, overruled; and, it being the opinion of the Senate that said plea is insufficient in law and that said articles of impeachment are sufficient in law, it is therefore further ordered and adjudged that said plea be, and the same hereby is, overruled and held for naught;" which judgment thus pronounced shall be entered upon the Journal of the Senate sitting as aforesaid.

In the final arguments Messrs. Montgomery Blair [31] and Matthew H. Carpenter [32] also argued this question.

2008. Reference to discussions as to what are impeachable offenses.—In the course of the arguments during the impeachment trial of Andrew Johnson, President of the United States, the question, "What are impeachable offenses?" was discussed at length and learnedly. Mr. Manager Benjamin F. Butler, of Massachusetts, argued [33] learnedly in favor of this definition:

We define therefore an impeachable high crime or misdemeanor to be one in its nature or consequences subversive of some fundamental or essential principle of government or highly prejudicial to the public interest, and this may consist of a violation of the Constitution, of law, of an official oath, or of duty, by an act committed or omitted, or, without violating a positive law, by the abuse of discretionary powers from improper motives or for any improper purpose.

Mr. Butler also appended to his argument [34] an exhaustive brief on the "law of impeachable crimes and misdemeanors," prepared by Mr. William Lawrence, of Ohio.[35] This view was also supported by Mr. Manager John A. Logan, of Illinois.[36] Of the Senators who filed written opinions, Mr. Charles Sumner, of Massachusetts, argued at length that political offenses were impeachable offenses.[37] So also argued Mr. Richard Yates, of Illinois.[38]

Mr. Benjamin R. Curtis, of Massachusetts, of counsel for the President, argued, on the other hand, that impeachable offenses could only

[31] Record of trial, pp. 287–289.
[32] Pp. 330–334.
[33] Second session Fortieth Congress. Globe, Supplement, p. 29.
[34] Pages 41–50.
[35] Globe, p. 1559.
[36] Pages 252–254.
[37] Pages 484–466.
[38] Page 487.

be offenses against the laws of the United States.[39] Mr. Thomas A. R. Nelson, of Tennessee, also of President's counsel, argued in the same line,[40] and Mr. William M. Evarts, of New York, also of counsel for the President, argued at length against the definition given by Mr. Manager Butler.[41] Of the Senators who filed written opinions on the case, this view was sustained by Mr. Garrett Davis, of Kentucky.[42]

2009. Argument that the phrase "high crimes and misdemeanors" is a "term of art," of fixed meaning in English parliamentary law, and transplanted to the Constitution in unchangeable significance.—On February 22, 1905,[43] in the Senate sitting for the impeachment trial of Judge Charles Swayne, Messrs. Anthony Higgins and John M. Thurston, of counsel for the respondent, offered a brief in support of their plea of jurisdiction as to the first seven articles. This brief, which was signed by them as counsel, but which, as they said, had been prepared by another, covered many questions relating to impeachment, the following being among them:

I. WHAT ARE IMPEACHABLE "HIGH CRIMES AND MISDEMEANORS," AS DEFINED IN ARTICLE II, SECTION 4, OF THE CONSTITUTION OF THE UNITED STATES?

By a strange coincidence, the death of parliamentary impeachment, as a living and working organ of the English constitution, synchronizes with its birth in American constitutions, State and Federal. Leaving out of view the comparatively unimportant impeachment of Lord Melville (1805), really the last of that long series of accusations by the Commons and trials by the Lords, which began in the fiftieth year of the reign of Edward III (1376), was the case of Warren Hastings, who was impeached in the very year in which the Federal Convention of 1787 met at Philadelphia. Before that famous prosecution, with its failure and disappointment, drew to a close, the English people resolved that the ancient and cumbrous machinery of parliamentary impeachment was no longer adapted to the wants of a modern and progressive society. But before this ancient method of trial thus passed into desuetude in the land of its birth it was embodied, in a modified form, first in the several State constitutions and finally in the Constitution of the United States.

Article II, section 4, of the Federal Constitution, provides that "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." Article I, section 2, provides that "the House of Representatives shall choose their Speaker and other officers; and shall have the sole power of impeachment." Article I, section 3, provides that "the Senate shall have the sole power to try all impeachments. When sitting for that purpose, they shall be on oath or affirmation. When the President of the United States is tried, the Chief Justice shall preside; and no person shall be convicted without the concurrence of two-thirds of the Members present. Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust, or profit under the United States; but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment, and punishment, according to law." Article III, section 2, provides that "the trial of all crimes, except in cases of impeachment, shall be by jury."

II. PROVISIONS BORROWED FROM THE ENGLISH CONSTITUTION

Mr. Bayard said in his argument in Blount's trial (Wharton's St. Tr., 264): "On this subject, the Convention proceeded in the same manner it is manifest they did in many other cases. They considered the object of their legislation as a known thing, having a previous definite existence. Thus existing, their work was solely to mold it into a suitable shape. They have given it to us, not as a thing of their creation, but merely of their modification. And therefore I shall insist

[39] Page 134.
[40] Pages 293, 294.
[41] Pages 343, 344.
[42] Pages 439, 440.
[43] Third session Fifty-eighth Congress, Record, pp. 3026–3028.

that it remains as at common law, with the variance only of the positive provisions of the Constitution. * * * That law was familiar to all those who framed the Constitution. Its institutions furnished the principles of jurisprudence in most of the States. It was the only common language intelligible to the members of the Convention."

A recent writer of note, speaking on the same subject, has said: "If we examine the clauses of the Constitution, we perceive at once that the phraseology is applied to a method of procedure already existing. 'Impeachment' is not defined, but is used precisely as 'felony,' 'larceny,' 'burglary,' 'grand jury,' 'real actions,' or any other legal term used so long as to have acquired an accepted meaning, might be. The Constitution takes impeachment as an established procedure, and lodges the jurisdiction in a particular court, declaring how and by whom the process shall be put in motion, and how far it shall be carried. They have given to us a thing not of their creation, but of their modification. To ascertain, then, what this established procedure was, what were, at the time of the Constitutional Convention, impeachable offenses, we must look to England, where the legal notions contained in the clauses quoted had their origin." (American Law Review, vol. 16, p. 800. Article by G. Willett Van Nest.) Madison, in No. 65 of the Federalist, said: "The model from which the idea of this institution has been borrowed pointed out the course to the Convention. In Great Britain it is the province of the House of Commons to prefer the impeachment and of the House of Lords to decide upon it. Several of the State constitutions have followed the example."

III. HIGH CRIMES AND MISDEMEANORS AS DEFINED IN ENGLISH PARLIAMENTARY LAW

The English Parliament as a whole has always been considered and styled "The high court of Parliament," which is governed by a single body of law peculiarly its own. As Sir Thomas Erskine May (Parl. Prac., pp. 71 and 72) has well expressed it: "Each house, as a constituent part of Parliament, exercises its own privileges independently of the other. They are enjoyed, however, not by a separate right peculiar to each, but solely by virtue of the law and custom of Parliament." In the words of Lord Coke (4 Inst., 15), "As every court of justice hath laws and customs for its direction—some the civil and canon, some the common law, others their own peculiar laws and customs—so the high court of Parliament hath also its own peculiar law, called the lex et consuetudo parliamenti." Blackstone (Bk. I, 163) in commenting upon the statement of Coke, that the law of Parliament, unknown to many and known by few, should be sought by all, observes that, "It is much better to be learned out of the rolls of Parliament and other records and by precedents and continual experience than can be expressed by any one man." Chitty, in commenting upon the statement of Blackstone, has said:

"The law of Parliament is part of the general law of the land, and must be discovered and construed like all other laws. The members of the respective houses of Parliament are in most instances the judges of that law; and, like the judges of the realm, when they are deciding upon past laws, they are under the most sacred obligation to inquire and decide what the law actually is, and not what, in their will and pleasure, or even in their reason and wisdom, it ought to be. When they are declaring what is the law of Parliament, their character is totally different from that with which, as legislators, they are invested when they are framing new laws; and they ought never to forget the admonition of that great and patriotic chief justice, Lord Holt, viz, 'that the authority of the Parliament is from the law, and as it is circumscribed by law, so it may be exceeded; and if they do exceed those legal bounds and authority their acts are wrongful, and can not be justified any more than the acts of private men.' (1 Salk, 505.)" (Chitty's Blackstone, vol. I, p. 119, note 21.) It has always been conceded that the phrase "other high crimes and misdemeanors," embodied in Article II, section 4, of the Constitution of the United States, must be construed in the light of the definitions fixing its meaning in the parliamentary law of England as that law existed in 1787. The construction then given to the phrase in question was incorporated into our Federal Constitution as a part of the phrase itself, which is unintelligible and meaningless without such construction. The following elementary principles (as stated by Hon. William Lawrence, in the brief prepared by him for use in the trial of Andrew Johnson, Vol. I, pp. 125, 136), seem upon that occasion, to have passed unchallenged:

"As these words are copied by our Constitution from the British constitutional and parliamentary law, they are, so far as applicable to our institutions and condi-

tion, to be interpreted not by English municipal law but by the lex parliamentaria. * * * Whatever 'crime and misdemeanors' were the subject of impeachment in England prior to the adoption of our Constitution, and as understood by its framers, are therefore subjects of impeachment before the Senate of the United States, subject only to the limitations of the Constitution. * * * 'Treason, bribery, and other high crimes and misdemeanors' are, of course, impeachable. Treason and bribery are specifically named, but 'other high crimes and misdemeanors' are just as fully comprehended as though each was specified. The Senate is made the sole judge of what they are. There is no revising court. The Senate determines in the light of parliamentary law. Congress can not define or limit by law that which the Constitution defines in two cases by enumeration and in others by classification, and of which the Senate is sole judge. * * * Now, when the Constitution says that all civil officers shall be removable on impeachment for high crimes and misdemeanors, and the Senate shall have the sole power of trial, the jurisdiction is conferred and its scope is defined by common parliamentary law."

While the Senate sitting as a court of impeachment is the sole and final judge of what impeachable "high crimes and misdemeanors" are, no arbitrary discretion so to determine is vested. The power of the court simply extends to the construction of the phrase in question as defined in English constitutional and parliamentary law as it existed in 1787. That is made plain by Story in his Commentary on the Constitution, section 797, when he says: "Resort then must be had either to parliamentary practice, and the common law, in order to ascertain what high crimes and misdemeanors; or the whole subject must be left to the arbitrary discretion of the Senate for the time being. The latter is so incompatible with the genius of our institutions that no lawyer or statesman would be inclined to countenance so absolute a despotism of opinion and practice, which might make that a crime at one time or in one person which would be deemed innocent at another time or in another person. The only safe guide in such cases must be the common law."

IV. A RULE OF CONSTITUTIONAL CONSTRUCTION AS DEFINED BY THE SUPREME COURT OF THE UNITED STATES

The fundamental principles of English constitutional law were first reproduced in the constitutions of the several States. In the light of the construction put upon them there, they were embodied, so far as applicable and desirable, in the Constitution of the Unted States. Thus the Federal Supreme Court was called upon at an early day to interpret the immemorial formulas or "terms of art" through which the cardinal principles of English constitutional law were incorporated in our governmental systems, State and Federal. The uniform rule for construing such formulas or "terms of art" adopted at the outset has been continued in force until the present time. When, in the trial of Aaron Burr, Chief Justice Marshall was called upon to construe Article III, section 3, of the Constitution, which provides that "treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort," he said, "What is the natural import of the words 'levying war?' and who may be said to levy it? * * * The term is not for the first time applied to treason by the Constitution of the United States. It is a technical term. It is used in a very old statute of that country whose language is our language and whose laws form the substratum of our laws. It is scarcely conceivable that the term was not employed by the framers of our Constitution in the sense which had been affixed to it by those from whom we borrowed it. So far as the meaning of any terms, particularly terms of art, is completely ascertained, those by whom they are employed must be considered as employing them in that ascertained meaning, unless the contrary be proved by the context. It is therefore reasonable to suppose, unless it be incompatible with other expressions of the Constitution, that the term 'levying war' is used in that instrument in the same sense in which it was understood in England and in this country to have been used in the statute of twenty-fifth of Edward III, from which it was borrowed." (Burr's Trial, vol. 2, pp. 401, 402.)

When in the case of Murray *v.* The Hoboken Land Co. (18 How., 272) it became necessary for the Supreme Court to construe the formula "due process of law," as embodied in the fifth amendment, Mr. Justice Curtis, speaking for the court, said: "The words 'due process of law' were undoubtedly intended to convey the same meaning as the words 'by the law of the land' in Magna Carta. Lord Coke, in his commentary on those words (2 Inst., 50), says they mean due process of

law. The constitutions which had been adopted by the several States before the formation of the Federal Constitution, following the language of the Great Charter more closely, generally contained the words 'but by the judgment of his peers, or the law of the land.' The ordinance of Congress of July 13, 1787, for the government of the territory of the United States northwest of the river Ohio, used the words."

When in the case of Davidson *v.* New Orleans (96 U.S. 97) it became necessary to again construe the same formula—"due process of law," as embodied in the fourteenth amendment—Mr. Justice Miller, speaking for the court, said: "The prohibition against depriving the citizen or subject of his life, liberty, or property without due process of law is not new in the constitutional history of the English race. It is not new in the constitutional history of this country, and it was not new in the Constitution of the United States when it became a part of the fourteenth amendment, in the year 1866. The equivalent of the phrase 'due process of law,' according to Lord Coke, is found in the words 'law of the land,' in the Great Charter, in connection with the writ of habeas corpus, the trial by jury, and other guarantees of the rights of the subject against the oppression of the Crown." In Smith *v.* Alabama (124 U.S., 465) it was held that "the interpretation of the Constitution of the United States is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in the light of its history," a statement affirmed by the adoption in United States *v.* Wong Kim Ark (169 U.S. 649).

V. IMMEMORIAL FORMULAS TRANSPLANTED FROM THE ENGLISH CONSTITUTION, UNCHANGEABLE BY SUBSEQUENT CONGRESSIONAL LEGISLATION

The foregoing authorities put the fact beyond all question that the immemorial formulas or "terms of art" transferred from the English constitution to our own were adopted, not as isolated or abstract phrases, but as epitomes or digests of the great principles which they embodied. That is to say, the term "levying war" carried with it the identical meaning given it as a part of the statute of Edward III; the term "due process of law," the identical meaning given to it as a part of Magna Charta; the term "high crimes and misdemeanors," the identical meaning given it as a part of the law of the High Court of Parliament. Or, in other words, when such formulas were embedded in the Constitution of 1787, their historical meaning and construction went along with them as completely as if such meaning and construction had been written out at length upon the face of the instrument itself. If that be true, the conclusion is self-evident that no subsequent Congressional legislation can change in any way, by addition or subtraction, the definitions embodied in such formulas at the time of their adoption. If the contrary were true, Congress could any day give to the term "levying war" or "due process of law" a definition, conveying ideas of which the fathers never dreamed. Or if the term "high crimes and misdemeanors" could be subjected to a new Congressional definition, acts which were such in 1787 could be relieved of all criminality, and new acts not then criminal could be added to the list of impeachable offenses. So obvious is the fact that Congress can not legislate at all on the subject that Mr. Lawrence, whose brief has been heretofore quoted, frankly admitted, while striving to give to the powers of Congress the widest possible construction, that "Congress can not define or limit by law that which the Constitution defines in two cases by enumeration, and in others by classification, and of which the Senate is sole judge."

The last phrase is specially suggestive of the fact that if Congress could, by subsequent legislation, "define or limit by law that which the Constitution defines," the Senate sitting as a court of impeachment could be entirely deprived by such legislation of the power to determine what were impeachable high crimes and misdemeanors as defined by the fathers in 1787. In other words, if Congress can add to or subtract from the constitutional definition in any particular, it can destroy it altogether. In the great case of Marbury *v.* Madison (1 Cranch, 137) the first in which an act of Congress was ever declared unconstitutional, the question of questions was this: Does the fact that the Constitution itself has defined the original jurisdiction of the Supreme Court prohibit Congress from enlarging such original jurisdiction by subsequent legislation? The solemn answer was that the attempt of Congress to do so was void. Why? Because the dividing line between the original and appellate jurisdiction having been drawn by the Constitution itself, it is immovable by legislaton. In the words of the great Chief Justice: "If Congress remains at liberty to give this court

appellate jurisdiction where the Constitution has declared their jurisdiction shall be original, and original jurisdiction where the Constitution has declared it shall be appellate, the distribution of jurisdiction made in the Constitution is form without substance." Thus it follows that any act of Congress which attempts to change the constitutional definition of impeachable high crimes and misdemeanors, by adding to the list some offense unknown to the parliamentary law of England as it existed in 1787, is simply void and of no effect.

2010. Argument of Mr. John M. Thurston, counsel, that judges may be impeached only for judicial misconduct occurring in the actual administration of justice in connection with the court. Argument that an impeachment trial is a criminal proceeding.

On February 25, 1905,[44] in the Senate, sitting for the impeachment of Judge Charles Swayne, Mr. John M. Thurston, of counsel for the respondent, in final argument, said:

In the printed brief originally filed in behalf of the respondent a demonstration, based upon the authorities, was made, to the effect that no clear light is to be derived as to the meaning of the phrase "other high crimes and misdemeanors," so far as that phrase relates to the impeachment of English and American judges, except from the English and American judicial impeachment cases in which it has been applied to that subject. Instead of attempting to meet that reasonable and obvious contention upon its merits, the managers have evaded it by propounding a series of generalities, based upon principles drawn, in the main, from political impeachments which throw no real light upon the subject. In the course of that evasion the following remarkable statement has been made:

Said the managers in their brief:

"For the first time in impeachment trials in this or any other country the claim is made that a judge can be impeached only for acts done in his official capacity."

The fact that that statement does not fully relate the history of impeachment cases will appear by consideration of those cases. After the impeachments for bribery, pure and simple, of English judges are put aside, but two judicial impeachments remain in the entire history of the English people—that is, the impeachment of judges.

Judges, like all others, can be impeached for treason not committed upon the bench or in judicial affairs. They can be impeached for bribery by the strict terms of the Constitution, bribery committed anywhere, without regard to whether they were sitting upon the bench at the time. But as to other causes of impeachment I challenge the honorable managers to show me any case in history, English or American, where a judge has been impeached for any other crime or high misdemeanor except one alleged to have been committed in connection with his exercise of judicial authority. In saying that, I do not refer to some impeachment cases that have happened in States and under State constitutions, for many of the constitutions of the several States have provisions largely at variance with those of the Constitution of the United States upon this subject.

But four judicial impeachments have taken place under the Constitution of the United States. It was admitted by the House of Commons in England and by the House of Representatives in the United States by the form of the articles they presented in these judicial impeachment cases that, excepting treason or bribery, neither an English nor a Federal judge could be impeached except for judicial misconduct occurring in the actual administration of justice in connection with his court, either between private individuals or between the Government and the citizen.

The statement of the honorable managers in their brief—

"For the first time in impeachment trials in this or any other country the claim that a judge can be impeached only for acts done in his official capacity"—

is contradicted by the judicial history of every case of impeachment of a judge in Great Britain and the United States.

Mr. Manager Olmsted was greatly mistaken when he said in his argument:

"One year later, the Senate having convicted John Pickering, Federal judge in a New Hampshire district, upon a charge of drunkenness"—

The article exhibited against John Pickering charged him with drunkenness upon the bench, and was limited to that charge, for framers of that impeachment well knew that the drunkenness of the judge was no ground for impeach-

[44] Third session Fifty-eighth Congress, Record, pp. 3365–3366.

ment under the Constitution of the United States unless he carried that drunkenness upon the bench.

The articles against Pickering read:

"Being then judge of the district court in and for the district of New Hampshire, did appear on the bench of the said court for the purpose of administering justice in a state of total intoxication, produced by the free and intemperate use of inebriating liquors, and did then and there frequently in a most profane and indecent manner"—

That is, on the bench, while administering justice—"invoke the name of the Supreme Being, etc."

It was perfectly understood by every constitutional lawyer then, as it should be understood now, that the personal misconduct of an English judge off the bench has never furnished the ground for impeachment, and for the well-understood reason that under the English constitution, as it has been called, they provided for two methods of removing judges from the bench—one by impeachment for high crimes and misdemeanors and the other upon address to the sovereign by both houses of Parliament.

When we came to frame our Constitution we adopted from the English constitution the term "treason, bribery, and other high crimes and misdemeanors." The question was mooted in that convention as to whether or not we should also embody in our Constitution the English provision for the removal of Federal judges by address of the two Houses of Congress to the President. Understanding perfectly well, as the debates will show, that impeachment would only lie for a crime or offense committed in connection with the judicial office and the administration of justice, they rejected the proposed clause providing for removal by address. The framers of our Constitution did this because they were tenacious of the stability of the tenure of office of our Federal judges, and were fearful that if they enlarged the impeachment provision some of the States, by reason of local prejudice, might proceed criminally against them, and upon conviction of crime base articles of impeachment thereon.

Mr. President, I state here and now that the contention made by one of the honorable managers that a judge can be impeached under the Constitution of the United States for a crime committed as an individual against a State law has no foundation in any case that has ever been known of on the earth, was not thought of as possible by the framers of our Constitution, and is not the law to-day. It would leave a Federal judge at the mercy of a local condition, inimical as it might be to the Federal Constitution.

The case of Humphreys has been cited as a case where a Federal judge was impeached for other than judicial misconduct. Yes, Humphreys was impeached for treason. Any judge can be impeached for treason or for bribery, no matter where or how committed; but the only charge in his impeachment other than treason was the charge of judicial misconduct as the judge of the court, in the court, and acting in the administration of justice.

Mr. President, that the framers of our Constitution well knew the limitations they were imposing upon the right of impeachment is further attested by the fact that in the original draft of that great document the language was "for treason, bribery, or maladministration," and the word "maladministration" has crept into some of the constitutions of our several States. Upon the consideration of that question on the floor of the convention it was moved to strike out "maladministration" and insert "other high crimes and misdemeanors," and for the very reason that the term "maladministration" was a loose term that might mean, under the decisions of the Senate in the future, much or little; that it might cover impeachments at one period of time by one party in power that it would not cover at another period of time with another party in power. They struck it out because it was too large a term, too loose a term, and they inserted in its place those definite words, "high crimes and misdemeanors," taken from the English constitution with parliamentary construction already attached.

We took that provision from the English constitution and with it we took the interpretation that was placed upon it by the lex parliamenti, the law of Parliament, established by the adjudications in the great tribunal. That provision meant then what it meant in England at the time. Mr. President, that provision meant then what it has meant ever since. It meant then what it always must mean. From the debates in that convention it does appear that those words were adopted with that construction upon them because it was claimed that it would be unwise to permit even the Congress of the United States, by ever making something a crime that was not then a crime, to enlarge the operation

of that impeachment provision of the Constitution, or to repeal some of those things which then constituted crimes and thereby prevent the impeachment of those who committed them.

Sir, that provision of the Constitution was embodied in that great instrument with a meaning that can never be changed by the Congress of the United States. It was embodied there with a meaning which will remain the same to the end of time. It furnishes the limitation with which the power of Congress can be exercised in impeachment cases.

I insist that for the first time in this case is it even suggested by constitutional lawyers that that term permits the impeachment of a judge simply because he has been tried and convicted in a court of a State for a crime against the statutes of a State, or because in his private life he has been impure or improvident, or because of any other shortcomings or failures exhibited in his career except those which relate to the administration of justice in the court over which he presides.

Mr. President, before proceeding to discuss the articles and the evidence, I call your attention to the fact that this is a criminal proceeding, and the respondent is charged with a crime. That question was settled by the Senate some days since upon the vote taken on the question of the admissibility of evidence. It is certain that this proposition is true, because the last portion of section 2 of article 3 of the Constitution of the United States provides that "the trial of all crimes except in cases of impeachment, shall be by jury," and thereby the framers of that great instrument declared that an offense to be impeachable must be a crime, or, what is equivalent to it, a high misdemeanor.

Mr. President, this respondent, being on trial charged with crime, is entitled to every reasonable doubt that may arise upon the evidence in the case. I do not come here to claim that he needs the application of this rule, for I insist that the evidence in this case shows that he is guiltless beyond a reasonable doubt; but I invoke the attention of the Senate to that beneficent rule of law now because it is the outgrowth of the spirit of liberty and justice so strong in the Anglo-Saxon race. It is the common safeguard and heritage of every American citizen. It is the shield of the accused and is a bulwark for the protection of the liberty and life of every man, woman, and child in the land.

2011. Argument of Mr. Manager Perkins that a judge may be impeached for personal misconduct.—On February 24, 1905,[45] in the Senate, sitting for the impeachment trial of Judge Charles Swayne, Mr. Manager James B. Perkins, of New York, in concluding argument, said in relation to the articles charging nonresidents in the district:

The argument made in behalf of the respondent is this: That a judge, under the precedents of the English courts, can not be impeached for any act except one done in the course of his duty as a judge, and that the sixth and seventh articles do not charge an omission of duty as a judge, but an omission of duty as an individual.

Mr. President, this can best be answered by an illustration of what is the logical and necessary result of the argument on the other side, that a judge of the United States court can not be impeached by the Senate of the United States unless for some strictly judicial act. Let us suppose that a judge commits a crime; that he forges a note; that he embezzles money. He is indicted and tried and convicted in the State courts of these crimes and sentenced to bear the punishment. Then it is sought to remove him from office by impeachment. The judge having committed these crimes is impeached. He employs my learned friends on the other side, and they claim before the Senate then, as they claim now, that the Senate has no power to impeach a judge except for acts done as a judge. They say, and say justly, that when this judge forged a note, or embezzled money, he was not acting as a judge, but as an individual. And if the argument be just, we have this extraordinary conclusion: A judge can not be removed except by impeachment. The judge, for the crime committed in his private capacity, is serving his term in State's prison. As he marches to perform hard labor, he will once a month receive the consolation of opening the envelope containing the check which will be monthly sent to him to pay him his salary as

[45] Third session Fifty-eighth Congress, Record, p. 3246.

a judge of the United States court. Such a result shows the absurdity of the position.

The English cases are cited, but in England, apart from the remedy by impeachment, a judge can be removed for any cause deemed sufficient by a bill of attainder. That is unknown in this country. Bills of attainder were not put in our Constitution, and the remedy by impeachment by the Senate is the sole remedy by which a judge can be removed.

But a word more. What offense is Judge Swayne charged with? It is that he did not reside within his district. The law could not say that Judge Swayne as an individual should reside in the northern district of Florida or anywhere else, but the law says that when he is a judge he, because he is a judge, shall reside within his district; and when he failed so to do he omitted a judicial requirement made of him just as much as if he had sold justice or made unrighteous decisions.

I shall say no more on that point, but come at once to what is the important, the great question in this case—not whether the offense is impeachable, but whether the offense was committed. It has already been suggested that a judge of the United States court is the one officer in the land who holds his office by a life tenure. He can not be removed by the people. He can not be removed by the President. Nothing but the act of God or the vote of the Senate can remove a man who holds the office of United States judge. His dignity is great; his responsibility is correspondingly great. The people who complain, the people who lack confidence in their judges, can look to the Senate and can look here alone for relief. If they can not get it here they can not get it anywhere.

2012. Argument of Mr. Anthony Higgins, counsel, that impeachable offenses by a judge are confined to acts done on the bench in discharge of his duties.—On February 24, 1905,[46] in the Senate, sitting for the impeachment trial of Judge Charles Swayne, Mr. Anthony Higgins, of counsel for the respondent, said in final argument:

Mr. President, I conceive it is of no slight interest or importance to the Senate that of the four learned managers who have now taken part in the presentation of the prosecution of this case three of them have devoted as much time as they have to the question whether the offenses charged in the first seven articles constitute impeachable offenses—the alleged offense or crime of the respondent of making a false claim, or obtaining money by false pretenses; of using a car belonging to a railroad company, contrary to good morals, and, third, in not obeying the statute to reside in his district. All three have united in presenting the argument of ab inconvenienti—one which seldom weighs much with courts, and one which, it seems to us, after the conclusive discussion of the subject in the argument which it has been our privilege to present to the Senate on the constitutional question, is not left in the case really for discussion. That argument shows beyond peradventure that the framers of the Constitution in leaving out of the Constitution any provision for the removal of an official subject to impeachment by address did it purposely and with a view of giving stability to those who hold the offices, and especially the judges.

"Mr. Dickinson," says Elliott in his Debates on the Constitution, "moved, as an amendment to Article XI, section 2, after the words 'good behavior,' the words '*Provided*, That they may be removed by the Executive on the application by the Senate and House of Representatives.'"

This was in respect of the judges.

Mr. Gerry seconded the motion. Mr. Gouverneur Morris thought it a contradiction in terms to say that the judges should hold their offices during good behavior and yet be removable without a trial. Besides, it was fundamentally wrong to subject judges to so arbitrary an authority.

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"Mr. Randolph opposed the motion as weakening too much the independence of the judges.

* * * * * * *

"Delaware alone voted for Mr. Dickinson's motion."

Says Judge Lawrence in a paper on this subject, which he filed in the Johnson impeachment case:

[46] Third session Fifty-eighth Congress, Record, pp. 3258–3259.

"Impeachment was deemed sufficiently comprehensive to cover every proper case for removal.

* * * * * * *

"The first proposition was to use the words 'to be removable on impeachment and conviction for malpractice and neglect of duty.' It was agreed that these expressions were too general. They were therefore stricken out."

* * * * * * *

Mr. Mason said:

"Treason, as defined in the Constitution, will not reach many great and dangerous offenses. Hastings is not guilty of treason. Attempts to subvert the Constitution may not be treason as above defined."

He moved to insert after "bribery" the words "or maladministration."

Mr. Madison replied:

"So vague a term will be equivalent to a tenure during the pleasure of the Senate."

Mr. Mason withdrew "maladministration" and substituted "other high crimes and misdemeanors against the State."

Mr. President, there are in the States of Pennsylvania, Delaware, South Carolina, Alabama, Arkansas, Florida, Illinois, Kentucky, Louisiana, and Texas provisions substantially the same as those contained in the constitutions of Pennsylvania and of Delaware. The constitution of the State of Pennsylvania of 1790 provides:

"ARTICLE V.

"SEC. 2. The judges of the supreme court and of the several courts of common pleas shall hold their offices during good behavior. But for any reasonable cause, which shall not be sufficient ground of impeachment, the governor may remove any of them on the address of two-thirds of each branch of the legislature."

The clause of the constitution of Delaware is similar. The Pennsylvania constitution as amended in 1838 provides:

"SEC. 3. The governor and all other civil officers under this Commonwealth shall be liable to impeachment for any misdemeanor in office, but judgment in such cases shall not extend farther than a removal from office and disqualification to hold any office of honor, trust, or profit under the Commonwealth. The party, whether convicted or acquitted, shall, nevertheless, be liable to indictment, trial, judgment, and punishment according to law." (Page 1561.)

So that there are in those constitutions the direct provision that power of removal by address is given as punishment for cases which by the very words of the constitution are said not to be the subject of impeachment.

An examination of the constitutions of the several States will show that there are not more than two or three State constitutions which do not contain the power of removal by address. That power was placed in the English constitution by a great and famous historic statute—the Act of Settlement—passed early in the reign of William and Mary, or of Anne, at the time when the present dynasty of the British throne was placed upon the authority of an act of Parliament. Then it was that the provision was placed in the statute that judges should be removable by address for causes that were not the subject of impeachment. Therefore, in the face of this state of the constitutional law and of the terms and provisions of the Constitution, where is there room for an argument that that construction shall not hold because there is no other way of getting rid of judges but by impeachment?

Now, but one word more on this, and that is in respect to the case that was cited by the learned manager, Mr. Olmsted, of an impeachment in Massachusetts. I call attention to the fact that the constitution of Massachusetts of 1780 makes provision for the impeachment of judges broader than the other States, or at least most of them.

"ART. VIII. The Senate shall be a court with full authority to hear and determine all impeachments made by the house of representatives against any officer or officers of the Commonwealth for misconduct and maladministration in their offices."

So in Massachusetts the judge who took illegal fees upon the ministerial side of his probate court was clearly impeachable under the provision of the Massachusetts constitution, which extended to ministerial functions.

2013. Argument from review of English impeachments that the phrase "high crimes and misdemeanors," as applied to judicial

conduct, just mean only acts of the judge while sitting on the bench.

History of removal by address in England and the state as bearing on the nature of impeachable offenses on the part of a judge.

On February 22, 1905,[47] in the Senate sitting for the impeachment trial of Judge Charles Swayne, Messrs. Anthony Higgins and John M. Thurston, of counsel for the respondent, offered a brief in support of their plea of jurisdiction as to the first seven articles. This brief, which was signed by them as counsel, but which, as they said, had been prepared by another, covered many questions relating to impeachments, the following being among them:

The only pertinent definitions of the term "high crimes and misdemeanors," as contained in Article II, section 4, of the Federal Constitution, must be drawn (1) from the law of Parliament as it existed in 1787; (2) from the contemporaneous expositions of that law embodied in the constitutions of the several States. In order to present anything like an adequate statement of the English law of impeachment as it existed at the time in question, some account must be given of the process of growth through which it had passed prior to that time. The history of that growth is divided into two epochs, easily distinguishable from each other. The first begins with the proceedings against the Lords Latimer and Neville, which took place in the Good Parliament in the fiftieth of Edward III (1376). These proceedings are regarded by the constitutional historians as the earliest instances of a trial by lords upon a definite accusation made by the Commons. (Hallam, M. A., Vol. III, p. 56; Stubbs, Const. Hist., Vol. II, p. 431.) Not until early in the reign of Edward III was Parliament definitely and finally divided into two houses that deliberated apart; not until near the close of that reign did the Commons, as the grand jury of the whole realm, attempt to present persons accused of grave offenses against the State to the Lords for trial. At the outset, the new method of accusation was rivaled by what were known as "appeals," which have been thus defined: "It was the regular course for private persons, even persons who were not members of Parliament, to bring accusations of a criminal nature in Parliament, upon which proceedings were had." (Stephen, Hist. of the Criminal Law of England, Vol. I, 151.)

The results of the private warfare thus instituted were so inconvenient that "appeals" were finally abolished by the statute of I Hen. 4, c. 14. Thus left without rival, proceedings by impeachment were occasionally employed during the reigns of Richard II, Henry IV, Henry V, and Henry VI. In the reign last named Lord Stanley was impeached in 1459 for not sending his troops to the battle of Bloreheath. That trial terminates the first epoch in the history of the law of impeachment in England. It was not again employed during the period that divides 1459 from 1621, an interval of one hundred and sixty-two years. The primary cause for the suspension is to be found in the fact that during that interval it was that the decline in the prestige and influence of Parliament was such that the directing power in the state passed to the King in council, the judicial aspect of which was known as "the star chamber." There it was that the great state trials took place during the reign of Edward IV and during the following reigns of the princes of the house of Tudor. Such impeachment trials as did take place during the first or formative epoch are not as distinctly defined as those that occurred during the later period, and have now only an antiquarian interest.

VII. IMPEACHMENTS IN ENGLAND: SECOND EPOCH

With the revival of the powers of Parliament in the reign of James I, impeachment was resumed as a weapon of constitutional warfare. From that time its modern history, with which this discussion is concerned, really begins. The first impeachment case to occur during the second epoch was that of Sir Giles Mompesson in 1621, the last that of Lord Melville in 1805. Including the first and last the total is 54. [Here follows the list.]

An examination of the foregoing list reveals the fact that many of the impeachments in question were directed against private individuals, it having

[47] Third session Fifty-eighth Congress, Record, pp. 3028–3031.

always been the law of England that all subjects, as well out of office as in office, might be thus accused and tried. A good illustration may be found in the notable case of Doctor Sacheverell, rector of St. Savior's, Southwark, who was impeached by the Commons and convicted by the Lords for having preached two sermons inculcating the doctrine of unlimited passive obedience. (State Trials, XV. p. 1.) As that branch of the law of impeachment which authorized the accusation of private individuals out of office was never reproduced in this country, cases of that class may be dismissed from consideration. By far the greater number of the remaining cases are what are known as "political impeachments," whereby one party in the State would attempt to crush its adversaries in office by impeaching them for high treason, which generally involved commitment to the Tower.

As illustrations, reference may be made to the case of Portland, Halifax, and Somers, three Whig peers impeached of high treason by a Tory House of Commons for their share in promoting the Spanish partition treaties in 1700; and to that of Oxford, Bolingbroke, and Ormond, Tory ministers impeached by the triumphant Whigs in the Commons for their share in negotiating the peace of Utrecht in 1718. (State Trials, Vol. XIV, p. 233. Parl. Hist., Vol. VII. p. 105.) A well-known English writer has described the latter as "the instance of purely political impeachment." (Taswell-Langmead, English Const. Hist., p. 549, note.) Cases of that class shed but a dim light upon the definition of the term "high crimes and misdemeanors" as applied to those offenses for which English judges have been punished for misbehavior in office. No clear or authoritative definitions of the term in question can be found, as applied to that subject, outside of what are known as judicial impeachments as contradistinguished from political. As the purely judicial impeachment cases which have occurred in England are very few in number, their results may be stated within narrow limits.

The earliest of the accusations which have been made against English judges have been for the crime of bribery, the crime for which Lord Bacon was impeached by the Commons in 1621. The charges against Bacon particularly set forth instances of judicial corruption by the acceptance of bribes, and in his "confession and submission" he said: "I do plainly and ingeniously confess that I am guilty of corruption, and do renounce all defense." (State Trials, Vol. II, 1106). Such cases, though rare, had occurred before Bacon's time. In the words of Sir J. F. Stephen, Coke "gives two instances in which judges were punished for taking bribes, namely, Sir William Thorpe, in 1351, who took sums amounting in all to £90 for not awarding an exigent against five persons at Lincoln assizes, and certain commissioners (probably special commissioners) of oyer and terminer, who were fined 1,000 marks each for taking a bribe of £4. I have elsewhere referred to the impeachment of the Chancellor Michael de la Pole, by Cavendish, the fishmonger for taking a bribe of £40, 3 yards of scarlet cloth, and a quantity of fish, in the time of Richard II. * * *

"Lord Macclesfield was also impeached and removed from his office for bribery in 1725." (Hist. of the Crim. Law of Eng., Vol. III, pp. 251–52, citing as to the case of Lord Macclesfield Sixteen State Trials, p. 767.) That case was the last judicial impeachment in England. It is not, therefore, strange that bribery, as an distinct and substance offense, should have been named, side by side with treason, as an impeachable crime, in the Constitution of the United States. After the bribery cases of Lord Chancellor Bacon and Lord Chancellor Macclesfield have been subtracted from the forgoing list, but two judicial impeachments remain in the entire history of the English people. Only in those two cases have the Commons impeached and the Lords tried English judges upon charges of judicial misconduct other than bribery.

IX. IMPEACHMENT OF SIR ROBERT BERKLEY AND OTHER JUDGES

In 1635 Charles I announced his attention to extend the exaction of ship money to the inland counties. When the writs of that year were resisted, the judges gave answers in favor of the prerogative. When in 1636 another set of ship writs were issued, Hampden made a test case by refusing to pay the assessment on his lands at Great Missenden, and the issue thus raised was argued in November and December, 1637, before a full bench. The contention made in favor of the Crown was sustained by seven of the judges—Finch, chief justice of the common pleas; Bramston, chief justice of the king's bench; Berkley, one of the justices of that court; Crawley, one of the judges of the common pleas; Davenport, lord chief baron of the exchequer; Weston and Trevor, barons of that court. When the day of reckoning came, Finch fled to Holland, and the remaining six were im-

peached by the Commons for their judgments rendered in favor of the royal contention, the charges being delivered to the Lords July 6, 1641. As Berkley's opinion in favor of the legality of ship money was the most emphatic, he was made the special object of attack in articles which charged him not only with the ship-money opinion, but with other acts of judicial misconduct on the bench. The nature of the accusations against him can be best explained by extracts from the articles themselves, which open with the general statement "that the said Sir Robert Berkley, then being one of the justices of the said court of king's bench, hath traitorously and wickedly endeavored to subvert the fundamental laws and established government of the realm of England, and instead thereof to introduce an arbitrary and tyrannical government against law, which he hath declared, by traitorous and wicked words, opinions, judgments, practices, and actions appearing in the several articles ensuing."

The following are a fair sample of the special charges: "4. That he, the said Robert Berkley, then being one of the justices of the king's bench, and having taken an oath for the due administration of justice, according to the laws and statutes of the realm, to His Majesty's liege people, on or about the last of December subscribed an opinion, in haec verba: 'I am of opinion, that where the benefit doth more particularly redound to the good of the ports,' etc. * * * 6. That he, the said Sir. Robert Berkley, then being one of the justices of the court of king's bench, and duly sworn as aforesaid, did on———deliver his opinion in the exchequer chamber against John Hampden, esq., in the case of ship money. * * * 7. That he, the said Sir. Robert Berkley, then being one of the justices of the court of king's bench, and one of the justices of the assize for the county of York, did, at the assizes held at York in Lent, 1636, deliver his charge to the grand jury, that it was a lawful and inseparable flower of the Crown for the King to command, not only the maritime counties, but also those that were inland, to find ships for the defense of the kingdom.' * * * 8. The said Sir R. Berkley then being one of the justices of the court of king's bench, in Trinity term last, then sitting on the bench in said court, upon debate of the said case between the said chambers and Sir E. Bromfield, said openly in the court, 'that there was a rule of law, and a rule of government;' and that 'many things which might not be done by the rule of law might be done by the rule of government;' and would not suffer the point of legality of ship money to be argued by chambers' counsel. * * * 9. The said Sir R. Berkley, then and there sitting on the bench, did revile and threaten the grand jury returned to serve at the said session, for presenting the removal of the communion table in All Saints Church in Hertford aforesaid. * * * 11. He, the said Sir R. Berkley, being one of the justices of the said court of king's bench, and sitting in said court, deferred to grant a prohibition to the said Court-Christian in said cause, although the counsel did move in the said court many several times and several for a prohibition." (State Trials, vol. 3, pp. 1283–1291.) The impeachment against Berkley ended in his paying a fine of £10,000.

X. IMPEACHMENT OF SIR WILLIAM SCROGGS, CHIEF JUSTICE OF THE KING'S BENCH

In the reign of Charles II, Sir William Scroggs, chief justice of the king's bench, was impeached of high crimes and misdemeanors, the nature of which may be best explained by the following extracts from the articles themselves. The general accusation is "that the said William Scroggs, then being chief justice of the court of king's bench, hath traitorously and wickedly endeavored to subvert the fundamental laws, and the established religion and government of this Kingdom of England; and instead thereof to introduce popery and arbitrary and tyranical government against law; which he has declared by divers traitorous and wicked words, opinions, judgments, practices, and actions." Chief among the special charges are the following: II. "That he, the said Sir William Scroggs, in Trinity term last, being then chief justice of the said court, and having taken an oath duly to administer justice according to the laws and statutes of this realm, in pursuance of his said traitorous purposes, did, together with the rest of the justices of the said court, several days before the end of said term, in an arbitrary manner, discharge the grand jury which then served for the hundred of Oswaldston, in the county of Middlesex, before they had made their presentments, etc. * * * III. That, whereas one Henry Carr had, for some time before, published every week a certain book, entitled 'The Weekly Pacquet of Advice from Rome, or The History of Popery,' wherein the superstitutions and cheats of the Church of Rome were from time to time exposed, he, the said Sir William Scroggs, then chief justice of the court of king's bench, together with the other judges of the

said court, before any legal conviction of the said Carr, of any crime did in the said Trinity term, in a most illegal and arbitrary manner, make and cause to be entered a certain rule of that court against the printing of said book, in hæc verba. * * * IV. That the said Sir William Scroggs, since he was made chief justice of the king's bench, hath, together with the other judges of the said court, most notoriously departed from all rules of justice and equality in the imposition of fines upon persons convicted of misdemeanors in said court." The result was that the chief justice was removed from office and given a pension for life. (State Trials, Vol. VIII, pp. 195, 216.)

XI. PROCEEDING AGAINST LORD CHIEF JUSTICE KEELING.

Intervening between the case of Berkley and other judges (1640) and that of Sir William Scroggs (1680) are proceedings by the Commons against Lord Chief Justice Keeling, which occurred in 1667, notable for the reason that they clearly illustrate what kind of judicial acts were considered as impeachable high crimes and misdemeanors at that time. "A copy of Judge Keeling's case, taken out of the Parliament Journal, December 11, 1667: 'The House resumed the hearing of the rest of the report touching the matter of restraint upon juries; and that upon the examination of divers witnesses, in several causes of restraints put upon juries, by the Lord Chief Justice Keeling; whereupon the committee made their resolutions, which are as follows: 1. That the proceedings of the Lord Chief Justice, in the cases now reported, are innovations in the trial of men for their lives and liberties; and that he hath used an arbitrary and illegal power, which is of dangerous consequence to the lives and liberties of thhe people of England, and tends to the introducing of an arbitrary government. 2. That in the place of judicature, the Lord Chief Justice hath undervalued, vilified, and condemned Magna Charta, the great preserver of our lives, freedom, and property. 3. That he be brought to trial, in order to condign punishment in such manner as the House shall judge most fit and requisite.'" (State Trials, vol. 6, p. 991, seq.)

"On the 16th of October, 1667, the House being informed 'that there have been some innovations of late in trials of men for their lives and deaths, and in some particular cases restraints have been put upon juries in the inquiries,' this matter is referred to a committee. On the 18th of November this committee are empowered to receive information against the Lord Chief Justice Keeling for any other misdemeanors besides those concerning juries. And on the 11th of December, 1967, the committee report several resolutions against the Lord Chief Justice Keeling of illegal and arbitrary proceedings in his office. The chief justice desiring to be heard, he is admitted on the 13th of December and heard in his defense to the matters charged against him, and being withdrawn, the House resolve 'that they will proceed no further in the matter against him.'" (4 Hatsel Prec., pp. 123–4, cited in Chase's Trial, Vol. II, p. 461.)

XII. REMOVAL BY ADDRESS PROVIDED BY THE ACT OF SETTLEMENT

By the foregoing analysis of the only English precedents to which we can look for expositions of the meaning of the phrase "high crimes and misdemeanors," as applied to the conduct of English judges, the fact is put beyond all question that the only judicial acts which the House of Commons ever regarded as falling within that category are such acts as a judge performs while sitting upon the bench, administering the laws of the realm, either between private persons or between the Crown and the subject. In the case of Mr. Justice Berkley the gravamen of the charge was that he rendered a judgment in the matter of ship money in conflict with what his triers considered the law of the realm to be. In the case of Chief Justice Scroggs the gravamen of the charge was that he arbitrarily discharged grand juries; that in a libel case he rendered an illegal judgment, and that he imposed unjust fines upon those convicted of misdemeanors. In the proceedings against Chief Justice Keeling the gravamen of the charge was that he had put "restraint" upon juries by fining them for their verdicts. "Wagstaff and others of a jury were fined an hundred marks a piece by Lord Chief Justice Keeling." (4 Hatsell Prec., p. 124, note.) Excepting bribery there is no case in the parliamentary law of England which gives color to the idea that the personal misconduct of a judge, in matters outside of his administration of the law in a court of justice, was ever considered or charged to constitute a high crime and misdemeanor. When the question is asked, By what means is the personal misconduct of an English judge, not amounting to a high crime and misdemeanor, punished? the answer is easy.

Prior to the passage in 1701 of the famous Act of Settlement (12 and 13 Will. III, C. 2) neither the tenure nor the compensation of English judges rested upon a firm or definite foundation. Hallam (Const. Hist., Vol. III, p. 194) tells us that "it had been the practice of the Stuarts, especially in the last years of their dynasty, to dismiss judges, without seeking any other pretense, who showed any disposition to thwart government in political prosecutions." As the hasty and imperfect Bill of Rights had failed to provide a remedy for that condition of things, it became necessary for the authors of the Act of Settlement, "the complement of the Revolution itself and the Bill of Rights," to provide that English judges *should* hold office during good behavior (quandiu se bene gesserint), and that they *should* receive ascertained and established salaries. But, while the judges were being thus entrenched in their offices, the fact was not forgotten that the remedy by impeachment extended only to high crimes and misdemeanors which did not embrace personal misconduct. Therefore a method of removal was provided by address, which was intended to embrace all misconduct not included in the term "high crimes and misdemeanors."

In the light of that statement it will be easier to understand the full purport of that section of the Act of Settlement which provides "that after the said limitations shall take effect as aforesaid, judges' commissions be made quandiu se bene gesserint, and their salaries ascertained and established; but upon the address of both Houses of Parliament it may be lawful to remove them." Thus, for seventy-five years prior to the severance of the political tie which bound the English colonies in America to the parent State, the twofold method for the removal of English judges was clearly defined and perfectly understood on both sides of the Atlantic. The twofold method embraced (1) the removal by impeachment for all acts constituting "high crimes and misdemeanors," a term then clearly defined in English parliamentary law; (2) the removal by address for all lesser acts of personal misconduct not embraced within that term. That such was the general and accepted view on this side of the Atlantic in 1776 of the English parliamentary law on impeachment and address will be put beyond all question by the following references to the several State constitutions in which that law reappeared.

XIII. IMPEACHMENT AND ADDRESS AS DEFINED IN THE CONSTITUTIONS OF THE SEVERAL STATES

On May 10, 1776, the Continental Congress recommended to the several conventions and assemblies of the colonies the establishment of independent governments "for the maintenance of internal peace and the defense of their lives, liberties, and properties." (Charters and Constitutions, vol. 1, p. 3.) Before the end of the year in which that recommendation was made the greater part of the colonies had adopted written constitutions, in which were restated, in a dogmatic form, all of the vital principles of the English constitutional system. Illustrations of the adoption of the English plan for the removal of judges by impeachment and address may be drawn from the following State constitutions: The constitution of Pennsylvania of 1776, Article V, section 2, provides that "the *judges* of the supreme court and of the several courts of common pleas shall hold *their* offices during good behavior. But for any reasonable cause, which shall not be sufficient ground for impeachment, the governor may remove any of them, on the address of two-thirds of each branch of the legislature."

The constitution of Delaware of 1792, Article VI, section 2, provides that "the chancellor and the judges of the supreme court of common pleas shall hold their offices during good behavior; but for any reasonable cause, which shall not be sufficient ground for impeachment, the governor may in his discretion, remove any of them on the address of two-thirds of all the members of each branch of the legislature." The constitution of South Carolina of 1868, Article VII, section 4, provides that "for any willful neglect of duty or other reasonable cause, which shall not be sufficient ground of impeachment, the governor shall remove any executive or judicial officer on the address of two-thirds of each house of the general assembly." Here are explicit and dogmatic statements of the settled rule of English parliamentary law that judges may be removed by impeachment for grave offenses of judicial misconduct, and by address for lesser offenses of personal misconduct. As this distinction was so well known, many of the State constitutions simply presuppose it without stating it in express terms. The constitution of Massachusetts of 1780, Chapter III, article 1, after providing for removal by impeachment, declares that "all judicial officers duly appointed, commissioned,

and sworn shall hold their offices during good behavior, excepting such concerning whom there is different provision made in this constitution: Provided, nevertheless, the governor, with consent of the council, may remove them upon the address of both houses of the legislature."

The constitution of Georgia of 1798, Article III, section 1, provides that "the judges of the superior court shall be elected for the term of three years, removable by the governor on the address of two-thirds of both houses for that purpose, or by impeachment and conviction thereon." The constitution of New Hampshire of 1784, Article I, part 2, provides that "all judicial officers, duly appointed, commissioned, and sworn, shall hold their offices during good behavior, excepting those concerning whom there is a different provision made in this constitution: Provided, nevertheless, the president, with the consent of council, may remove them upon the address of both houses of the legislature." The constitution of Connecticut of 1818, Article V, section 3, provides that "the judges of the supreme court and of the superior court shall hold their offices during good behavior; but may be removed by impeachment, and the governor shall also remove them on the address of two-thirds of the members of each house of the general assembly." It is said that the Constitution of New York of 1777 was the model from which the impeachment clauses of the Constitution of the United States were copied. (6 Am. Law Reg., N. S., 277.)

The New York constitution of that date expressly limited impeachment to persons in office, and omitted removal by address. Such an omission was, however, exceptional. The rule was to introduce into the State constitutions both processes of removal by impeachment and address. And if it were not for fear of wearying the court by reiteration, the list of instances could be greatly lengthened in which both methods were introduced into later State constitutions not here mentioned, together wih the recognized distinction between impeachable offenses and the lesser acts of misconduct justifying only removal by address, expressed in the words "not sufficient ground of impeachment." (See Appendix.)

2014. Arguments that Congress might not by law make nonresidence a high misdemeanor in a judge.

Discussion of the intent of a judge as a primary condition needed to justify impeachment.

On February 22, 1905,[48] in the Senate sitting for the impeachment trial of Judge Charles Swayne, Messrs. Anthony Higgins and John M. Thurston, of counsel for the respondent, offered a brief in support of their plea of jurisdiction as to the first seven articles. This brief, which was signed by them as counsel, but which, as they said, had been prepared by another, covered many questions relating to impeachments, the following being among them:

First. That the definition of the term "high crimes and misdemeanors," as employed in Article II, section 4, of the Constitution, must be drawn from the parliamentary law of England as it existed in 1787, construed in the light of the contemporeaneous expositions of that law embodied in the provisions of the constitutions of the several States as to impeachment and address.

Second. That the definition of that term, as fixed at the time of the adoption of the Federal Constitution, is organic and unchangeable by subsequent Congressional legislation; that no act not an impeachable offense when the Constitution was adopted can be made so by a subsequent act of Congress.

Third. That the "high crimes and misdemeanors" for which English judges were impeachable in 1787 can only be clearly ascertained from an examination of what are known as the English judicial impeachment cases, as contradistinguished from the political.

Fourth. That English judges have never been impeached except for bribery, or for judicial misconduct occurring in the actual administration of justice in court, either between private individuals or between the Crown and the subject.

Fifth. That since the act of settlement (1701), when the tenure and compensation of English judges was first fixed on a definite basis, such judges have been removable for judicial misconduct not amounting to an impeachable high crime and misdemeanor, by address.

[48] Third session Fifty-eighth Congress, Record, pp. 3033-3034.

Sixth. That the plain distinction between the acts for which a judge may be impeached and the acts for which he may be removed by address was clearly recognized and defined in the constittuions of many of the States.

Seventh. That after careful consideration and debate the Federal Convention of 1787, with only one dissenting vote, rejected the proposition to embody the removal of Federal judges by address in the Constitution of the United States "as weakening too much the independence of the judges." After rejecting the more ample provisions upon the subject of impeachment embodied in some of the State constitutions, it was resolved that Federal judges should only be removed by impeachment for and conviction of "high crimes and misdemeanors" in the limited sense in which that phrase was defined in the parliamentary law of England as it existed in 1787.

Eighth. That in no one of the four judicial impeachments which have taken place since the adoption of our Federal Constitution has the House of Representatives ever attempted to impeach a Federal judge for "high crimes and misdemeanors," except in those cases in which he would have been impeachable under the English parliamentary precedents. That is to say, the proceedings against Justice Berkley and other judges (1640), the proceedings against Chief Justice Keeling (1667), the proceedings against Chief Justice Scroggs (1680), the proceedings against Judge Pickering (1803), the proceedings against Judge Chase (1804), the proceedings against Judge Peck (1830), the proceedings against Judge Humphreys (1862), so far as they relate to judicial misconduct, rest upon a single proposition, which is this: In English and American parliamentary and constitutional law the judicial misconduct which rises to the dignity of a high crime and misdemeanor must consist of judicial acts, performed with an evil or wicked intent, by a judge while administering justice in a court, either between private persons or between a private person and the government of the State. All personal misconduct of a judge occurring during his tenure of office and not coming within that category must be classed among the offenses for which a judge may be removed by address, a method of removal which the framers of our Federal Constitution refused to embody therein.

When the allegations contained in articles 1, 2, and 3, presented against this respondent, are examined, it appears that they set forth in three forms an identical charge, which is in substance that the respondent, in settling his accounts with certain United States marshals under a certain act of Congress providing for the reasonable expenses for travel and attendance of a district judge, when lawfully directed to hold court outside of his district, exacted and received in payment for such expenses from the said marshals sums in excess of the amounts contemplated in said act. It is charged that such acts constitute "a high crime, to wit, the crime of obtaining money from the United States by a false pretense, and of a high misdemeanor in office." The short answer to such a charge is that no such offense was ever thought of or defined in the parliamentary law of England as a high crime and misdemeanor in 1787, or at any other time: that it bears no relation whatever to the acts known in English parliamentary law as an impeachable offense. If it be true, as alleged, that the respondent was guilty in making such settlements of "obtaining money from the United States by a false pretense," then the remedy is by indictment by a grand jury and a trial by a petit jury, as in the case of any other citizen of the country. The Constitution expressly provides, Article I, section 3, that persons subject to impeachment "shall nevertheless be liable and subject to indictment, trial, judgment, and punishment according to law." While it is quite possible to understand how such personal misconduct upon the part of a judge, entirely disconnected with the conduct of judicial business on the bench, might subject him to removal by address in a State which had adopted that plan of removal for nonimpeachable offenses, it is hard to conceive how many effort of the imagination could reach the conclusion that such an act constitutes an impeachable high crime and misdemeanor as defined in English parliamentary law.

The same comments are applicable to the charges made in articles 4 and 5 as to the use by the respondent of a certain car belonging to a certain railroad, "the said railroad company being at the time in the possession of a receiver appointed by said Charles Swayne, judge as aforesaid, on the petition of creditors." Even if it could be established that the circumstances attending such a transaction would warrant removal by address, no advance would be made toward the conclusion that such acts constitute an impeachable high crime and misdemeanor as defined in English parliamentary law, because the further allegation that

"the said Charles Swayne, acting as judge, allowed the credit claimed by the said receiver for and on account of the said expenditure as part of the necessary expenses of operating said road" falls far short of the English and American rule as to the evil or wicked intent which must accompany a judgment or opinion delivered on the bench in order to render it impeachable. Nothing is better settled than the fact that a judge is not impeachable even for a judgment, order, or opinion rendered contrary to law unless it is alleged and proved that it was rendered with an evil, wicked, or malicious intent. Justice Berkley was impeached not simply because he decided in favor of ship money, but because he "traitorously and wickedly endeavored to subvert the fundamental laws" of the realm thereby. Chief Justice Scroggs was impeached not simply for imposing "fines upon persons convicted of misdemeanors in said court," but because he imposed them "for the further accomplishing of his said traitorous and wicked purposes."

Justice Chase was impeached because he, "with intent to oppress and procure the conviction of the said Callender, did overrule the objection of John Bassett, one of the jury;" "that, with intent to oppress and procure the conviction of the prisoner, the evidence of John Taylor, a material witness on behalf of the aforesaid Callender, was not permitted by the said Samuel Chase to be given in." Judge Peck was inpeached not because he punished Lawless for contempt, but because he did so "with intention wrongfully and unjustly to oppress, imprison, and otherwise injure the said Luke Edward Lawless under color of law, * * * under the color and pretense aforesaid and with the intent aforesaid, in the said court then and there did unjustly, oppressively, and arbitrarily order and adjudge," etc. If further illustrations of the necessity for averments as to the wicked and malicious intent with which a judicial act must be performed need be given, they may be drawn from articles 8, 9, 10, 11, and 12, presented against this respondent, in which impeachable offenses are properly charged under the rule which the Constitution prescribes—that is to say, the rule of English parliamentary law. It is charged in one article that the said Charles Swayne "did maliciously and unlawfully adjudge guilty of contempt of court and impose a fine of $100 upon and commit to prison for a period of ten days E. T. Davis, an attorney at law, for an alleged contempt of the circuit court of the United States;" and in another that he "did maliciously and unlawfully adjudge guilty of a contempt of court and impose a fine of $100 upon and commit to prison for a period of ten days Simeon Belden, an attorney and counselor at law, for an alleged contempt of the circuit court of the United States."

With the plain and settled rule thus recognized clearly in view, the draftsmen of articles 4 and 5 have not only failed to charge that the respondent "allowed the credit claimed by said receiver for and on account of the said expenditure," etc., "maliciously and unlawfully," but, what is more to the point, they have failed to charge that he did so "knowingly." There is no reason to suppose, in the absence of such an allegation, that a judge, approving the mass of accounts presented to the court by a receiver of a railroad, would have personal knowledge of every trivial item which such accounts contain. The presumption is clearly to the contrary. In articles 4 and 5 there is no charge either that the respondent ever "knowingly" passed upon the items of expense in question or that he approved them "maliciously and unlawfully." In the absence of such allegations articles 4 and 5 fall to the ground.

The charge of nonresidence contained in article 6 presupposes the validity of section 551, Revised Statutes of the United States, which provides that "a district judge shall be appointed for each district, except in cases hereinafter provided. Every judge shall reside in the district for which he is appointed, and for offending against this provision shall be deemed guilty of a high misdemeanor." If the foregoing argument proves anything, it is the fact that when the phrase "high crimes and misdemeanors" was embodied in the Federal Constitution in 1787 it drew along with it, as an integral part of it, the definitions which fixed its meaning in English parliamentary law at that time. The phrase, coupled with the definitions of it, thus became organic and unchangeable by subsequent Congressional legislation, just as the definition of the original and appellate jurisdiction of the Supreme Court became organic and unchangeable. The convention pointedly refused to make impeachable offenses an uncertain or changeable quantity. "The first proposition was to use the words 'to be removable on impeachment and conviction for malpractice and neglect of duty.' It was agreed that these expressions were too general. They were therefore stricken out. * * * Colonel Mason said: 'Treason, as defined in the Constitution, will not reach many great and dangerous offenses. Hastings is not guilty of treason. Attempts to subvert the Constitution may not be treason as above defined.' He moved

to insert after 'bribery' the words 'or maladministration.' Madison: 'So vague a term will be equivalent to a tenure during the pleasure of the Senate.' Mason withdrew 'maladministration' and substituted 'other high crimes and misdemeanors against the State.'" (American Law Review, vol. 16, p. 804.)

The fathers knew exactly the limitations of the phrase adopted, and they repelled the idea that it was ever to be enlarged or diminished. If nonresidence of a judge in his district could be added by Congress to the list of impeachable offenses, that list could be thus indefinitely extended; or, by the same authority, every impeachable offense as understood in 1787 could be abolished. If it is admitted that Congress can change the organic definition, either by addition or subtraction, it follows as clearly as a mathematical demonstration that the scheme of impeachment provided in the Constitution can be entirely remodeled by legislation. The validity of the section in question, making nonresidence a high misdemeanor, can not be supported by serious argument. Even if it could be, the fact can not be lost sight of that its plain provision is that "every such judge shall reside in the district for which he is appointed." It will not be disputed that Judge Swayne was so residing in the district for which he was appointed at the time that subsequent legislation excluded the place of his residence from such district. Certainly nothing more can be put forward by those who assert the validity of section 551 than the contention that it was respondent's duty to remove, within a reasonable time, from the district for which he was appointed into the new one for which he was not appointed. It follows, therefore, that the accusation now made amounts to nothing more than the charge that respondent did not act with sufficient alacrity; that he did not remove his residence into the new district with sufficient promptness. How could such laches possibly constitute an impeachable high crime and misdemeanor?

2015. Argument that an impeachable offense is any misbehavior that shows disqualifications to hold and exercise the office, whether moral, intellectual or physical.

Answer to the argument that a judge may be impeached only for acts done in his official capacity.

Answer to the argument that Congress might not make nonresidence a high misdemeanor.

By permission, before the final arguments in the Swayne trial, the managers filed a brief on the respondent's plea to jurisdiction.

On February 23, 1905,[49] in the Senate sitting for the impeachment trial of Judge Charles Swayne, Manager Henry W. Palmer, of Pennsylvania, filed, by permission the following brief:

A BRIEF OF AUTHORITIES ON THE LAWS OF IMPEACHMENT

The purpose of this brief is to show—

First. That the framers of the Constitution intended that the House of Representatives should have the right to impeach and the Senate the power to try a judicial officer for any misbehavior that showed disqualification to hold and exercise the office, whether moral, intellectual, or physical.

The provisions of the Constitution relating to the subject of impeachment are as follows:

"The House of Representatives shall choose their Speaker and other officers, and shall have the sole power of impeachment. (Art. I, sec. 2.)

"Judgment in cases of impeachment shall not extend further than to removal from office and disqualification to hold and enjoy any office of honor, trust, or profit under the United States: but the party convicted shall, nevertheless, be liable and subject to indictment, trial, judgment, and punishment, according to law. (Art. II, sec. 1.)

"The President * * * shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment. (Art. II, sec. 2.)

"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, and other high crimes and misdemeanors. (Art. II, sec. 4.)

[49] Third session Fifty-eighth Congress, Record, pp. 3179–3181.

"The trial of all crimes, except in cases of impeachment, shall be by jury." (Art. 3, sec. 2.)

The convention that framed the Constitution did not define words, but used them in the sense in which they were understood at that time.

The convention did not invent the remedy by impeachment, but adopted a well-known and frequently used method of getting rid of objectionable public officers, modifying it to suit the conditions of a new country.

In England all the King's subjects were liable to impeachment for any offense against the sovereign or the law. Floyd was impeached for speaking lightly of the Elector Palatine and sentenced to ride on horseback for two successive days through certain public streets with his face to the horse's tail, with the tail in his hands; to stand each day two hours in pillory; to be pelted by the mob, then to be branded with the letter "K" and be imprisoned for life in the Tower. The character and extent of the punishment was in the discretion of the House of Lords.

The Constitution modified the remedy by confining it to the President, Vice-President, and all civil officers, and the punishment to removal from office and disqualification to hold office in future.

That it was not intended as a punishment of crime clearly appears when we read that a party convicted shall nevertheless be liable and subject to indictment, trial, judgment, and punishment according to law.

Said Mr. Bayard, in Blount's trial:

"Impeachment is a proceeding of a purely political nature. It is not so much designed to punish the offender as to secure the State. It touches neither his person nor his property, but simply divests him of his political capacity." (Wharton's State Trials, 263.)

Subject to these modifications and adopting the recognized rule, the Constitution should be construed so as to be equal to every occasion which might call for its exercise and adequate to accomplish the purposes of its framers. Impeachment remains here as it was recognized in England at and prior to the adoption of the Constitution.

These limitations were imposed in view of the abuses of the power of impeachment in English history.

These abuses were not guarded against in our Constitution by limiting, defining, or reducing impeachable crimes, since the same necessity existed here as in England for the remedy of impeachment, but by other safeguards thrown around it in that instrument. It will be observed that the sole power of impeachment is conferred on the House and the sole power of trial on the Senate by Article I, sections 2 and 3. These are the only jurisdictional clauses, and they do not limit impeachment to crimes and misdemeanors. Nor is it elsewhere so limited. Section 4 of Article II makes it imperative when the President, Vice-President, and all civil officers are convicted of treason, bribery, or other high crimes and misdemeanors that they shall be removed from office. There may be cases appropriate for the exercise of the power of impeachment where no crime or misdemeanor has been committed.

Whatever crimes and misdemeanors were the subjects of impeachment in England prior to the adoption of our Constitution, and as understood by its framers, are, therefore, subjects of impeachment before the Senate of the United States, subject only to the limitations of the Constitution.

"The framers of our Constitution, looking to the impeachment trials in England, and to the writers on parliamentary and common law, and to the constitutions and usages of our own State, saw that no act of Parliament or of any State legislature ever undertook to define an impeachable crime. They saw that the whole system of crimes, as defined in acts of Parliament and as recognized at common law, was prescribed for and adapted to the ordinary courts." (2 Hale, Pl. Crown, ch. 20, p. 150; 6 Howell State Trials, 313, note.)

They saw that the high court of impeachment took jurisdiction of cases where no indictable crime had been committed, in many instances, and there was then, as there yet are, two parallel modes of reaching some, but not all offenders—one by impeachment, the other by indictment.

With these landmarks to guide them, our fathers adopted a Constitution under which official malfeasance and nonfeasance, and, in some cases, misfeasance, may be the subject of impeachment, although not made criminal by act of Congress, or so recognized by the common law of England, or of any State of the Union. They adopted impeachment as a means of removing men from office whose misconduct imperils the public safety and renders them unfit to occupy official position. All American text writers support this view.

[Story on the Constitution, p. 583.]

"Congress have unhesitatingly adopted the conclusion that no previous statute is necessary to authorize an impeachment for any official misconduct; and the rules of proceeding and the rules of evidence, as well as the principles of decision, have been uniformly regulated by the known doctrines of the common law and parliamentary usage. In the few cases of impeachment which have hitherto been tried no one of the charges has rested upon any statutable misdemeanors. It seems, then, to be the settled doctrine of the high court of impeachment that, though the common law can not be a foundation of a jurisdiction not given by the Constitution or laws, that jurisdiction, when given, attaches, and is to be exercised according to the rules of the common law, and that what are and what are not high crimes and misdemeanors is to be ascertained by a recurrence to that great basis of American jurisprudence. The reasoning by which the power of the House of Representatives to punish for contempts (which are breaches of privileges and offenses not defined by any positive laws) has been upheld by the Supreme Court stands upon similar grounds; for if the House had no jurisdiction to punish for contempts until the acts had been previously defined and ascertained by positive law it is clear that the process of arrest would be illegal.

"In examining the parliamentary history of impeachments it will be found that many offenses not easily definable by law, and many of a purely political character, have been deemed high crimes and misdemeanors worthy of this extraordinary remedy. Thus lord chancellors, and judges, and other magistrates have not only been impeached for bribery and acting grossly contrary to the duties of their offices, but for misleading their sovereign by unconstitutional opinions, and for attempts to subvert the fundamental laws and introduce arbitrary power. So where a lord chancellor has been thought to have put the great seal to an ignominious treaty, a lord admiral to have neglected the safeguard of the sea, an ambassador to have betrayed his trust, a privy councilor to have propounded or supported pernicious and dishonorable measures, or a confidential adviser of his sovereign to have obtained exorbitant grants or incompatible employments—these have been all deemed impeachable offenses. Some of these offenses, indeed, for which persons were impeached in the early ages of British jurisprudence would now seem harsh and severe; but perhaps they were rendered necessary by existing corruptions, and the importance of suppressing a spirit of favoritism and court intrigue.

"Thus persons have been impeached for giving bad counsel to the King, advising a prejudicia peace, enticing the King to act against the advice of Parliament, purchasing offices, giving medicine to the King without advice of physicians, preventing other persons from giving counsel to the King except in their presence, and procuring exorbitant personal grants from the King. But others, again, were founded in the most salutary public justice, such as impeachments for malversations and neglects in office, for encouraging pirates, for official oppression, extortions, and deceits, and especially for putting good magistrates out of office and advancing bad. One can not but be struck, in this slight enumeration, with the utter unfitness of the common tribunals of justice to take cognizance of such offenses, and with the entire propriety of confiding the jurisdiction over them to a tribunal capable of understanding and reforming and scrutinizing the policy of the state, and of sufficient dignity to maintain the independence and reputation of worthy public officers.

[Page 587.]

"The other point is one of more difficulty. In the argument upon Blount's impeachment it was pressed with great earnestness, while there is not a syllable in the Constitution which confines impeachments to official acts, and it is against the plainest dictates of common sense that such restraint should be imposed upon it. Suppose a judge should countenance or aid insurgents in a meditated conspiracy or insurrection against the Government. This is not a judicial act, and yet it ought certainly to be impeachable. He may be called upon to try the very persons whom he has aided. Suppose a judge or other officer to receive a bribe not connected with his judicial office, could he be entitled to any public confidence? Would not these reasons for his removal be just as strong as if it were a case of an official bribe? The argument on the other side was that the power of impeachment was strictly confined to civil officers of the United States, and this necessarily implied that it must be limited to malconduct in office."

[American and English Encyclopedia of Law, Vol. XV, p. 1006]

"In the United States.—The Constitution of the United States provides that 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. If impeachment in England be regarded merely as a mode of trial for the punishment of common-law or statutory crimes, and if the Constitution has adopted it only as a mode of procedure, leaving the crimes to which it is to be applied to be settled by the general rules of criminal law, then, as it is well settled that in regard to the National Government there are no common-law crimes, it would seem necessarily to follow that impeachment can be instituted only for crimes specifically named in the Constitution or for offenses declared to be crimes by Federal statute. This view has been maintained by very eminent authority. But the cases of impeachment that have been brought under the Constitution would seem to give to the remedy a much wider scope than the above rule would indicate.

"In each of the only two cases of impeachment tried by the Senate in which a conviction resulted the defendant was found guilty of offenses not indictable either at common law or under any Federal statute, and in almost every case brought offenses were charged in the articles of impeachment which were not indictable under any Federal statute, and in several cases they were such as constituted neither a statutory nor a common-law crime. The impeachability of the offenses charged in the articles was, in most of the cases, not denied. In one case, however, counsel for the defendant insisted that impeachment would not lie for any but an indictable offense, but after exhaustive argument on both sides this defense was practically abandoned. The cases, then, seem to establish that impeachment is not a mere mode of procedure for the punishment of indictable crimes; that the phrase 'high crimes and misdemeanors' is to be taken, not in its common-law but in its broader parliamentary sense, and is to be interpreted in the light of parliamentary usage; that in this sense it includes not only crimes for which an indictment may be brought, but grave political offenses, corruptions, maladministration, or neglect of duty involving moral turpitude, arbitrary and oppressive conduct, and even gross improprieties, my judges and high officers of state, although such offenses be not of a character to render the offender liable to an indictment either at common law or under any statute. Additional weight is added to this interpretation of the Constitution by the opinions of eminent writers on constitutional and parliamentary law and by the fact that some of the most distinguished members of the convention that framed it have thus interpreted it."

[Rawle on the Constitution, p. 210.]

"Impeachments are thus introduced as a known definite term, and we must have recourse to the common law of England for the definition of them."

In England the practice of impeachments by the House of Commons before the House of Lords has existed from very ancient times. Its foundation is that a subject intrusted with the administration of public affairs may sometimes infringe the rights of the people and be guilty of such crimes as the ordinary magistrates either dare not or can not punish. Of these, the representatives of the people, or House of Commons, can not judge, because they and their constituents are the persons injured, and can therefore only accuse. But the ordinary tribunals would naturally be swayed by the authority of so powerful an accuser. That branch of the legislature which represents the people, therefore, brings the charge before the other branch, which consists of the nobility, who are said not to have the same interests or the same passions as the popular assembly.

"The delegation of important trusts, affecting the higher interests of society, is always from various causes liable to abuse. The fondness frequently felt for the inordinate extension of power, the influence of party and of prejudice, the seductions of foreign states, or the basest appetite for illegitimate emoluments are sometimes productive of what are not inaptly termed political offenses, which it would be difficult to take cognizance of in the ordinary course of judicial proceedings."

[Cushing's Law and Practice of Legislative Assemblies, p. 980, par. 2539.]

"The purpose of impeachment, in modern times, is the prosecution and punishment of high crimes and misdemeanors, chiefly of an official or political character, which are either beyond the reach of the law, or which no other authority in the

State but the supreme legislative power is competent to prosecute, and, by the law of Parliament, all persons, whether peers or commoners, may be impeached for any crimes or offenses whatever."

[Trial of Judge Peck, p. 427. Mr. Buchanan's argument.]

"What is an impeachable offense? This is a preliminary question which demands attention. It must be decided before the court can rightly understand what it is they have to try. The Constitution of the United States declares the tenure of the judicial office to be 'during good behavior.' Official misbehavior, therefore, in a judge is a forfeiture of his office. But when we say this we have advanced only a small distance. Another question meets us. What is misbehavior in office? In answer to this question and without pretending to furnish a definition, I freely admit we are bound to prove that the respondent has violated the Constitution or some known law of the land. This, I think, was the principle fairly to be deduced from all the arguments on the trial of Judge Chase, and from the votes of the Senate in the articles of impeachment against him, in opposition to the principle for which his counsel in the first instance strenuously contended, that in order to render an offense impeachable it must be indictable. But this violation of law may consist in the abuse as well as in the usurpation of authority.

"The abuse of a power which has been given may be as criminal as the usurpation of a power which has not been granted. Can there be any doubt of this? Suppose a man to be indicted for an assault and battery. He is tried and found guilty, and the judge, without any circumstances of peculiar aggravation having been shown, fines him a thousand dollars and commits him to prison for one year. Now, although the judge may possess the power to fine and imprison for this offense, at his discretion, would not this punishment be such an abuse of judicial discretion and afford such evidence of the tyrannical and arbitrary exercises of power as would justify the House of Representatives in voting an impeachment? But why need I fancy cases? Can fancy imagine a stronger case than is now, in point of fact, before us? A member of the bar is brought before a court of the United States guilty, if you please, of having published a libel on the judge—a libel, however perfectly decorous in its terms and imputing no criminal intention, and so difficult of construction that though the counsel of the respondent have labored for hours to prove it to be a libel still that question remains doubtful. If in this case the judge has degraded the author by imprisonment and deprived him of the means of earning bread for himself and his family by suspending him from the practice of his profession for eighteen months, would not this be a cruel and oppressive abuse of authority, even admitting the power to punish in such a case to be possessed by the judge?

"A gross abuse of granted power and an usurpation of power not granted are offenses equally worthy of and liable to impeachment. If, therefore, the gentleman could establish, on the firmest foundation, that the power to punish libels as contempts may be legally exercised by all the courts of the United States, still he would not have proceeded far toward the acquittal of his client.

"It has been contended that even supposing the judge to have transcended his power and violated the law, yet he can not be convicted unless the Senate should believe he did the act with a criminal intention. It has been said that crime consists in two things, a fact and an intention; and in support of this proposition the legal maxim has been quoted that 'actus non fit reum, nisi mens rea.' This may be true as a general proposition, and yet it may have but a slight bearing upon the present case.

"I admit that if the charge against a judge be merely an illegal decision on a question of property in a civil cause, his error ought to be gross and palpable, indeed, to justify the interference of a criminal intention and to convict him upon an impeachment. And yet one case of this character has occurred in our history. Judge Pickering was tried and condemned upon all the four articles exhibited against him, although the three first contained no other charge than that of making decisions contrary to law in a cause involving a mere question of property, and then refusing to grant the party injured an appeal from his decision, to which he was entitled.

"And yet am I to be told that if a judge shall do an act which is in itself criminal; if he shall, in an arbitrary and oppressive manner and without the authority of law, imprison a citizen of this country and thus consign him to infamy, you are not to infer his intention from the act?"

[Judge Spencer's argument, p. 290.]

"It is necessary to a right understanding of the impeachment to ascertain and define what offenses constitute judicial misdemeanors. A judicial misdemeanor consists, in my opinion, in doing an illegal act colore officii with bad motives, or in doing an act within the competency of the court or judge in some cases, but unwarranted in a particular case from the facts existing in that case, with bad motives. To illustrate the last proposition: The eighth article of the amendments of the Constitution forbids the requirement of excessive bail, the imposition of excessive fines, or the infliction of cruel or unusual punishment. If a judge should disregard these provisions, and from bad motives violate them, his offense would consist, not in the want of power, but in the manner of his executing an authority intrusted to him and for exceeding a just and lawful discretion."

[Mr. Wickliffe's argument, p. 308.]

"By the third article of the Constitution of the United States it is declared that the judges of the supreme and inferior courts shall hold their office during good behavior.

"I maintain the proposition that any official act committed or omitted by the judge, which is a violation of the condition upon which he holds his office, is an impeachable offense under the Constitution.

"The word misdemeanor, used in its parliamentary sense as applied to offenses, means maladministration, misconduct not necessarily indictable, not only in England, but in the United States.

"'In the Senate, July 8, 1797, it was resolved that William Blount, esq., one of the Senators of the United States, having been guilty of a high misdemeanor, entirely inconsistent with his public trust and duty as a Senator, be, and he hereby is, expelled from the Senate of the United States.' (Wharton's State Trials, 202.)

"He was not guilty of an indictable crime. (Story on the Constitution, sec. 799, note.)

"The offense charged, Judge Story remarks, was not defined by any statute of the United States. It was an attempt to seduce a United States Indian interpreter from his duty, and to alienate the affections and conduct of the Indians from the public officers' residing among them."

Blackstone says: "The fourth species of offense more immediately against the King and Government are entitled 'misprisions and contempts.' Misprisions are, in the acceptance of our law, generally understood to be all such high offenses as are under the degree of capital, but nearly bordering thereon. * * * MispriSions which are merely positive are generally denominated contempts or high misdemeanors, of which the first and principal is maladministration of such high offices as are in public trust and employment. This is usually punished by the method of parliamentary impeachment." (Vol. 4, p. 121. See Prescott's trial, Mass., 1821, pp. 79–80, 109, 117–120, 172–180, 191.)

On Chase's trial the defense conceded that to misbehave or to misdemean is precisely the same. (2 Chase's Trial, 145.)

The Constitution declares that judges, both of the Supreme and inferior courts, shall hold their commissions during good behavior. This tenure of office was introduced into the English law to enable a removal to be made for misbehavior. (Chase's Trial, 357.)

At common laws, an ordinary violation of a public statute, even by one not an officer, though the statute in terms provides no punishment, is an indictable misdemeanor. (Bishop, Constitutional Law, 3d ed., 187, 535.)

The term "misdemeanor" covers every act of misbehavior in a popular sense. Misdemeanor in office and misbehavior in office mean the same things. (7 Dane Abgt., 3 5.) Misbehavior, therefore, which is a mere negative of good behavior, is an express limitation of the office of a judge.

We may therefore conclude that the House has the right to impeach and the Senate the power to try a judicial officer for any misbehavior or misconduct which evidences his unfitness for the bench, without reference to its indictable quality. All history, all precedent, and all text writers agree upon this proposition. The direful consequences attendant upon any other theory are manifest.

For the first time in impeachment trials in this or any other country the claim is made that a judge can be impeached only for acts done in his official capacity.

If that position is well taken, a judge might be a common drunkard, an open frequenter of disreputable resorts; he might be a common theif, an embezzler of trust funds, a gambler, even a murderer. If he could manage to keep out of

jail and attend to his judicial duties, the remedy by impeachment would not reach him. To state the proposition, is to argue it.

Removal of a judge for misbehavior or lack of good behavior is impossible unless it can be done through the impeaching power. Otherwise the people are powerless to rid themselves of the most unworthy, disgraceful, and unfit official.

But the exigencies of this case do not demand even a discussion of the proposition that a judge can be impeached only for acts done in his official capacity.

The claim is in the nature of a demurrer to the first seven articles. It admits the truth of the averments contained in them. It admits that the respondent, as judge of the district court he held at Waco, Tex., that as judge he knowingly made a false certificate; that as judge he receipted for and received money to which he was not entitled as reimbursement for expenses incurred as judge which he never did incur. All these acts were done in his official capacity. If he had not been a judge, he could not have held the court, incurred any expense, or receipted for or received any money. The stamp of his official character is on every act. His official position enabled him to do what he did do; without it he could not have violated the law.

In the case of the use of the property of the bankrupt corporation, which was in his hands for preservation, it was because he was judge that he had the opportunity to use the property. It was to bring him to hold court that the car was sent. An officer of his court sent it. He had the right and it was his duty to approve the account covering the expenses of the trip. If he had not been a judge, he could not have used the property of the railroad company. The article charges that Charles Swayne, judge, appropriated the property to his own use without making compensation under a claim of right, viz, that what he did was done in his official capacity.

The articles that charge him with violating the residence law assert that he did it while exercising his office of judge. The act is directed against judges; a private person can not violate it. The act commands a judge to reside in his district—that is, the official must live there; it is to be his official residence, so that he will be where he is wanted to perform his official duty. The violation of the law is the violation of an official duty, which the law imposes on him in his official duty, which the law imposes on him in his official character. All this the demurrer confesses, and yet the argument is made that for a violation of the act a judge is not impeachable, because it is not an official act.

But the proposition is seriously advanced that no act of Congress can create an impeachable offense or make a crime or misdemeanor the subject of impeachment for which impeachment would not lie in England before the adoption of the Constitution.

Impeachable offenses were not defined in the English law by act of Parliament or otherwise: any offense was impeachable that Parliament chose to so consider. Therefore when Congress makes that a crime or misdemeanor which was not so denominated at the time of the adoption of the Constitution it does not follow that the acts made crimes were not the subject of impeachment before the adoption of the Constitution.

For example, suppose no English law condemned the making of false certificates by a judge for the purpose of obtaining money from the Treasury. Can it be said that if an English judge had been guilty of such an offense that he would not have been subject to imeachment? If so, then neither can it be said that Congress created new impeachable offenses when the act was passed pertaining to false certificates.

The power to impeach for misbehavior of civil officials is vested in the House and the power to try in the Senate as fully as it was exercised by the English Parliament before 1787. That power covered every offense from high treason to slander against a ruler. Subject only to the limitation that the remedy by impeachment is confined to civil officers—for high crimes and misdemeanors—the power was conferred and may be exercised as fully now as then.

We have seen that according to the law of Parliament misdemeanor and misbehavior of public officers are synonymous terms. Another proposition advanced by counsel for respondent is that no judge was ever impeached in England for a misbehavior not committed in the discharge of his judicial functions. This is believed to be an error; judges were impeached for giving extrajudicial opinions. But suppose the fact to be as stated, the conclusion would not follow that because no English judge ever so misbehaved himself outside of his official duties as to make him a subject of impeachment that therefore he could not have been impeached if he had so misbehaved.

But however interesting discussion of such question may be it is quite unimportant in this case. All the charges against this respondent grow out of his official acts. Nothing that he did of which complaint is made could have been done by a private person, or by anyone who did not hold a judicial office. Because the respondent was a judge he had the right to make a certificate upon which to draw money from the Treasury; because he was a judge a private car was sent to bring him from Guyencourt to hold court at Jacksonville; because he was a judge the law imposed upon him the duty of living in a certain district; because he violated the law in all these cases in his official capacity he is charged.

The conclusion is therefore not to be resisted that even if the contention of the respondent's counsel is correct a judge can be impeached for nothing but official misconduct, these offenses are within the rule, and of them this court has jurisdiction.

2016. Argument of Mr. Manager Clayton that a judge may be impeached for misbehavior not necessarily connected with his judicial functions.—On February 24, 1905,[50] in the Senate sitting for the impeachment trial of Judge Charles Swayne, Mr. Manager Henry D. Clayton, of Alabama, said in final argument:

Mr. President, I desire to call attention to the fact that repeatedly in impeachment trials before the Senate it has been asserted that civil officers can not be impeached except for the commission of indictable offenses, but it was never before this time seriously contended that a judge can not be impeached except for wrongful conduct committed strictly in the performance of an act purely judicial.

Therefore in this case we are brought to a consideration of what is an impeachable offense. The Constitution denounces impeachable offenses under the terms of "treason, bribery, and other high crimes and misdemeanors" are general terms, and for their import and meaning reference may be had to English jurisprudence and parliamentary law, to the provisions of the constitutions of the several States relating to impeachments in existence prior to and at the time of the adoption of the Federal Constitution, and to the interpretation put upon the words in the debates in and by the action of the United States Senate in impeachment cases which have heretofore been tried.

In the present case the House of Representatives has charged this judge with crimes and misdemeanors, and also contends that he has forfeited his tenure of office because he has not conformed to the good behavior required by Article III, section 1, upon which his right to hold office is predicated. The judge is entitled to hold his office during good behavior, but not otherwise. The provision of the Constitution conversely stated would be that he shall not hold office after having been guilty of misbehavior. If I understand the contention of the counsel for the respondent here, they insist that high crimes and crimes and misdemeanors and the words "the judges both of the Supreme and inferior courts shall hold their offices during good behavior" are limited or restricted to such acts as may be committed by a judge in his purely judicial capacity. In other words, however serious the crime, the misdemeanor, or misbehavior of the judge may be, if it can be said to be extrajudicial he can not be impeached. To illustrate this contention, the judge may have committed murder or burglary and be confined under a sentence in a penitentiary for any period of time, however long, but because he has not committed the murder or burglary in his capacity as judge he can not be impeached. That contention, carried out logically, might lead to the very defeat of the performance of the function confided to the judicial branch of the Government.

In the History of the Constitution of the United States, by George Ticknor Curtis, in volume 2, page 260, is found this language:

"The purposes of an impeachment lie wholly beyond the penalties of the statute or the customary law. The object of the proceeding is to ascertain whether cause exists for removing a public officer from office. Such a cause may be found in the fact that, either in the discharge of his office or aside from its functions, he has violated a law or committed what is technically denominated a crime. But a cause for removal from office may exist when no offense against positive law has been committed, as when the individual has from immorality or imbecility or maladministration become unfit to exercise the office."

[50] Third session Fifty-eighth Congress, Record, pp. 3249–3250.

In the Commentaries on the Constitution of the United States, by Roger Foster, volume 1, page 569, this statement is made:

"The object of the grant of the power of impeachment was to free the Commonwealth from the danger caused by the retention of an unworthy public servant."

Again, on page 586, this statement:

"The Constitution provides that 'the judges, both of the Supreme and inferior courts, shall hold their office during good behavior.'

"This necessarily implies that they may be removed in case of bad behavior. But no means, except impeachment, is provided for their removal, and judicial misconduct is not indictable by either a statute of the United States or the common law."

Again, on page 591, this statement:

"An impeachable offense may consist of treason, bribery, or a breach of official duty by malfeasance or misfeasance, including conduct such as * * * an abuse or reckless exercise of a discretionary power."

In Rawle on The Constitution, page 201, in speaking of the court of impeachment, it is said:

"The subjects of its jurisdiction are those offenses which proceed from the misconduct of public men, or, in other words, from the abuse or violation of some public trust."

In Story on The Constitution (5th edition), section 796, it is said:

"Is the silence of the statute book to be deemed conclusive in favor of the party until Congress have made a legislative declaration and enumeration of the offenses which shall be deemed high crimes and misdemeanors? If so, then, as has been truly remarked (citing Rawle on The Constitution), the power of impeachment, except as to the two expressed cases, is a complete nullity and the party is wholly dispunishable, however enormous may be his corruption or criminality. It will not be sufficient to say that, in the cases where any offense is punished by any statute of the United States, it may and ought to be deemed an impeachable offense. It is not every offense that by the Constitution is so impeachable. It must not only be an offense, but a high crime and misdemeanor."

The further answer to this contention may be that it is repugnant to the Constitution, which especially provides for the impeachment of a civil officer for high crimes and misdemeanors, and especially provides that the judge shall hold his office during good behavior.

Again, it is repugnant to the spirit and genius of our institutions; and, if it were correct, it would be to throw around the judge, as a civil officer, a protection not afforded any other officer under the Government. It is also repugnant to the precedents in impeachment trials before the Senate, to the precedents in impeachment trials in the different States that had similar provisions in their constitutions and had impeachment trials before the adoption of the Federal Constitution.

Any civil officer can be impeached. The President of the United States can be impeached. The removal from office can be had in respect to any officer under the Government, and it would be anomaly to say that in a free representative government the people are deprived of the power and the right to remove from office an unworthy officer. If it be true that a judge can not be impeached except for what he may have done strictly in his capacity as judge, then this extraordinary protection is afforded to him: He is put upon a pedestal by himself; he is raised above the military, because they can be tried and gotten rid of; he is raised above the Executive, for he can be tried by impeachment and removed from office; he is raised above the Members of the Senate and the Members of the House of Representatives, for they may be expelled upon a two-third vote of the members of their respective bodies. I say it would be anomaly. So far as the power of getting rid of an unworthy official is concerned, if that contention be correct it would be a hiatus in the power of government.

Did the fathers intend that it should ever come to pass that an unworthy officer, although a judge, guilty of murder or burglary or any other disgraceful crime which brings his high position into disrepute, can wrap a mantle of protection around him and say, "Although I am guilty of an infamous crime, I did not commit it in my judicial capacity, and therefore, convicted felon though I am, I can continue to be judge and to draw the emoluments of that high office?" I do not believe that this contention has even been made in any of the cases heretofore presented to the Senate.

In Judge Pickering's case it will be remembered that he was accused of drunkeness. He was also accused of releasing a ship which had been libeled

without requiring bond. It might be argued that he did not get drunk in his official capacity; and yet the Senate in that case did impeach him and remove him from office, and that was one of the charges.

In the case of Judge Humphreys, the other judge who was convicted and removed from office, the charge was that he had made secession speeches and that he had acted as a judge of a Confederate court. Certainly he did not make secession speeches in his capacity as a judge of the United States court; it was not done in the trial of any cause before him. He did that in his individual capacity, and yet the Senate did vote to convict him, and did remove him from office, because, among other things, he had made these speeches and had held and exercised the office of a Confederate judge during the civil war.

I have here Foster on the Constitution. I will not tax the patience of the Senate by reading it; but, availing myself of the privilege heretofore referred to, I shall ask to have inserted in the Record that portion of the text which I have marked.

The extract referred to is as follows:

"The only difficulty arises in the construction of the term, 'other high crimes and misdemeanors.' As to this, four theories have been proposed: That, except treason or bribery, no offense is impeachable which is not declared by a statute of the United States to be a crime subject to indictment. That no offense is impeachable which is not subject to indictment by such a statute or by the common law. That all offenses are impeachable which were so by that branch of the common law known as the 'law of Parliament.' And that the House and Senate have the discretionary power to remove and stigmatize by perpetual disqualification an officer subject to impeachment for any cause that to them seems fit. The position that, except treason or bribery, no offense is impeachable which is not indictable by law was maintained by the counsel for the respondents on the trials of Chase and Jackson. * * *

"The first two theories are impracticable in their operation, inconsistent with other language of the Constitution, and overruled by precedents. If no crime, save treason and bribery, not forbidden by a statute of the United States, will support an impeachment, then almost every kind of official corruption or oppression must go unpunished. Suppose the Chief Justice of the United States were convicted in a State court of a felony or misdemeanor, must he remain in office unimpeached and hold court in a State prison?

"The term 'high crimes and misdemeanors' has no significance in the common law concerning crimes subject to indictment. It can be found only in the law of Parliament, and is the technical term which was used by the Commons at the bar of the Lords for centuries before the existence of the United States.

"The Constitution provides that—

" 'The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior.'

"This necessarily implies that they may be removed in case of bad behavior. But no means except impeachment is provided for their removal, and misconduct is not indictable by either a statute of the United States or the common law.

"In 1803 Pickering, a district judge of the United States, was convicted on impeachment for his official action in surrendering to the claimant, without requiring the statutory bond, a vessel libeled by the United States, for refusing to allow an appeal from this order, and for drunkenness and profane language on the bench.

"None of these offenses was indictable by the common law or by statute.

"Humphreys, a district judge of the United States, was convicted on impeachment, not only for treason, but also for refusing to hold court, for holding office under the Confederate States, and for imprisoning citizens for expressing their sympathy with the Union. The managers of the House of Representatives who opened the case admitted that none of these offenses except the treason was indictable.

"Some advocates have gone so far as to maintain by a misapplication of a term of the common law that the proceedings on an impeachment are not a trial, but a so-called 'inquest of office,' and that the House and Senate may thus remove an officer for any reason that they approve. That Congress has the power to do so may be admitted. For it is not likely that any court would hold void collaterally a judgment on an impeachment where the Senate had jurisdiction over the person of the condemned. And undoubtedly a court of impeachment has the jurisdiction to determine what constitutes an impeachable offense. But the judgments of the Senate of the United States in the cases of Chase and Peck, as well as those of the State senates in the different cases

which have been before them, have established the rule that no officer should be impeached for any act that does not have at least the characteristics of a crime. And public opinion must be irremediably debauched by party spirit before it will sanction any other course.

"Impeachable offenses are those which were the subject of impeachment by the practice in Parliament before the Declaration of Independence, except in so far as that practice is repugnant to the language of the Constitution and the spirit of American institutions. An examination of the English precedents will show that, although private citizens as well as public officers have been impeached, no article has been presented or sustained which did not charge either misconduct in office or some offense which was injurious to the welfare of the State at large.

"In this class of cases, which rests so much in the discretion of the Senate, the writer would be rash who were to attempt to prescribe the limits of its jurisdiction in this respect.

"An impeachable offense may consist of treason, bribery, or a breach of official duty by malfeasance, or misfeasance, including conduct such as drunkenness, when habitual or in the performance of official duties, gross indecency, and profanity, obscenity, or other language used in the discharge of an official function which tends to bring the office into disrepute, or an abuse or reckless exercise of a discretionary power, as well as a breach or omission of an official duty imposed by statute or common law; or a public speech when off duty which encourages insurrection. It does not consist in an error in judgment made in good faith in the decision of a doubtful question of law, except, perhaps, in the violation of the Constitution."

2017. Review of impeachments in Congress to show that judges have been impeached only for acts of judgment performed on the bench, as contradistinguished from personal acts performed while in office.—On February 22, 1905,[51] in the Senate sitting for the impeachment trial of Judge Charles Swayne, Messrs. Anthony Higgins and John M. Thurston, of counsel for the respondent, offered a brief in support of their plea of jurisdiction as to the first seven articles. This brief, which was signed by them as counsel, but which, as they said, had been prepared by another, covered many questions relating to impeachments, the following being among them:

Seven impeachment trials have taken place under the machinery provided for that purpose by the Constitution of the United States: That of William Blount (1798), that of John Pickering (1803), that of Samuel Chase (1804), that of James H. Peck (1830), that of West H. Humphreys (1862), that of Andrew Johnson (1868), and that of William W. Belknap (1876). Three of the foregoing were political impeachments and four judicial, as those terms are understood in English parliamentary law. The articles presented by the House of Representatives against the four judges—Pickering, Chase, Peck, and Humphreys—illustrate in the most emphatic manner possible that the popular branch of Congress has heretofore always perfectly understood the meaning of the term "high crimes and misdemeanors," as applied to the misconduct for which a judge may be impeached. When placed side by side with the English precedents on that subject heretofore examined they agree in every particular. The House of Representatives, in the only four cases of the kind ever tried, limited its accusations, with the greatest strictness, to the acts of judgment performed by the judge on the bench, as contradistinguished from personal acts performed by the judge while in office, which might have been the ground of removal by address.

Turning first to the case against John Pickering, judge of the district court of New Hampshire, for practical illustrations, we find that judge charged with misconduct while adjudicating a certain admiralty case pending in said district court: "Yet the said John Pickering, being then judge of the said district court, and then in court sitting, with intent to defeat the just claims of the United States, did refuse to hear the testimony of the said witnesses so as aforesaid produced in behalf of the United States, and without hearing the said testimony so adduced in behalf of the United States in the trial of said cause did order and decree the ship *Eliza*, with her furniture, tackle, and apparel, to be re-

[51] Third session Fifty-eighth Congress, Record, pp. 3032, 3033.

stored to the said Eliphalett Ladd, the claimant, contrary to his trust and duty as judge of the said district court, in violation of the laws of the United States and to the manifest injury of their revenue." (Art. II.) Again (Art. III), when an appeal was prayed in open court in behalf of the United States, the charge is that "the said John Pickering, judge of the said district court, disregarding the authority of the laws, and wickedly meaning and intending to injure the revenues of the United States, and thereby to impair their public credit, did absolutely and positively refuse to allow the said appeal as prayed for."

And again (Art. IV), after the statement was made that said Pickering was "a man of loose morals and intemperate habits," he was thus accused: "On the eleventh and twelfth days of November, in the year one thousand eight hundred and two, being then judge of the district court in and for the district of New Hampshire, did appear upon the bench of said court, for the purpose of administering justice, in a state of total intoxication, produced by the free and intemperate use of inebriating liquors, and did then and there frequently, in a most profane and indecent manner, invoke the name of the Supreme Being, to the evil example of all good citizens of the United States, and was then and there guilty of other high misdemeanors, disgraceful to his own character as a judge and degrading to the honor and dignity of the United States." It should be specially noted here that no pretense was made that "loose morals and intemperate habits" or profanity constituted a high crime and misdemeanor. Upon the contrary, the accusation was strictly limited to acts done "upon the bench of the said court" while "administering justice in a state of total intoxication." There was no attempt in Pickering's case to claim that personal misconduct, which might have been the ground of removal by address, was an impeachable offense.

The articles of impeachment presented against Judge Samuel Chase contain equally pointed illustrations. In Article I he is charged with delivering an opinion in writing on the question of law, on the construction of which the defense of the accused materially depended, tending to prejudice the minds of the jury against the said John Fries, the prisoner, before the counsel had been heard in his defense; in Article II the charge is that "the said Samuel Chase, with intent to oppress and procure the conviction of the said Callender, did overrule the objection of John Bassett, one of the jury, who wished to be excused from serving on said trial;" in Article III the charge is that on the trial the judge refused to permit a witness to testify; in Article IV the charge is of various acts of judicial misconduct during a trial; and in the remaining articles the charges are of various acts of judicial misconduct on the bench in charging and refusing to discharge grand juries.

The accusation against Judge James H. Peck was contained in a single article, based upon the judicial conduct of the judge while sitting upon the bench in a case of contempt against Luke E. Lawless, who had published a newspaper article criticising a judgment rendered by Judge Peck in a case in which Lawless was plaintiff's counsel. The gravamen of the charge was this: "The said James H. Peck, judge as aforesaid, did afterwards, on the same day, under the color and pretenses aforesaid, and with intent aforesaid, in the said court, then and there unjustly, oppressively, and arbitrarily order and adjudge that the said Luke Edward Lawless, for the cause aforesaid, should be committed to prison for the period of twenty-four hours, and that he should be suspended from practicing as an attorney or counsellor at law in the said district court for the period of eighteen calendar months from that day; and did then and there further cause the said unjust and oppressive sentence to be carried into execution."

The impeachment of Judge West H. Humphreys was begun and concluded during the civil war. He was tried and condemned in his absence and without a hearing. While such an anomalous proceeding can have but little weight as a precedent, what it does contain of matter relevant to a judicial impeachment supports the contention made herein. The first charge contained in the articles presented against Judge Humphreys was that he was guilty of treason, in that he "then being district judge of the United States, as aforesaid, did then and there, to wit, within said State, unlawfully and in conjunction with other persons, organize armed rebellion against the United States and levy war against them." When the allegations incident to the accusation of treason are subtracted from the articles, all that remains is a charge of judicial misconduct upon the part of Judge Humphreys while sitting in a court of the Confederate States.

The words of the accusation are that the said Humphreys "did unlawfully act as judge of an illegally constituted tribunal within said State, called the district court of the Confederate States of America, and as judge of said tribunal last

named, said West H. Humphreys, with the intent aforesaid, then and there assumed and exercised powers unlawful and unjust, to wit, in causing one Perez Dickinson, a citizen of said State, to be unlawfully arrested and brought before him, as judge of said alleged court of said Confederate States of America, and required him to swear allegiance to the pretended government of said Confederate States of America; * * * In decreeing within said State, and as judge of said illegal tribunal, the confiscation to the use of said Confederate States of America of property of citizens of the United States, and especially of property of one Andrew Johnson and one John Catron." Thus in this anomalous proceeding, carried on amid the passions of a great civil war, the idea was not for one moment lost sight of that the misconduct upon the part of a judge, which constitutes an impeachable high crime and misdemeanor, must occur while he is actually presiding in a judicial tribunal and abusing its powers.

2018. Review of the deliberation of the Constitutional Convention as bearing on the use of the words "high crimes and misdemeanors."—On February 22, 1905,[52] in the Senate sitting for the impeachment trial of Judge Charles Swayne, Messrs. Anthony Higgins and John M. Thurston, of counsel for the respondent, offered a brief in support of their plea of jurisdiction as to the first seven articles. This brief which was signed by them as counsel but which as they said had been prepared by another, covered many questions relating to impeachments, the following being among them.

After reviewing the accepted meaning of the words "high crimes and misdemeanors," as used in England and the colonies, the argument proceeds:

Before the Federal Convention of 1787 met the original State constitutions had been in operation for at least ten years. As a general rule the framers looked to that source of light when the adoption of a principle of English constitutional law was concerned.

The questions that constantly arose were: In what form has such a principle reappeared in the several States? Is its operation an effect satisfactory therein? Such examples were sometimes taken, however, not as guides but as warnings. It did not always follow that a principle adapted to the wants of a single State was to be ingrafted without modification upon the constitution of a Federal State. The debates touching the adoption of impeachment and address pointedly illustrate that fact, as the Convention resolved to adopt the one without the other. The record is specially clear and direct upon that point. In the Madison papers (pp. 481–482) the following appears:

"Article XI being taken up, Doctor Johnson suggested that the judicial power ought to extend to equity as well as law, and moved to insert the words 'both in law and equity' after the words 'United States' in the first line of the first section."

Mr. Read objected to vesting these powers in the same court.

On the question, New Hampshire, Connecticut, Pennsylvania, Virginia, South Carolina, Georgia, aye—6; Delaware, Maryland, no—2; Massachusetts, New Jersey, North Carolina, absent.

On the question to agree to Article XI, section 1, as amended, the States were the same as on the preceding question.

Mr. Dickinson moved, as an amendment to Article XI, section 2, after the words "good behavior," the words "Provided that they may be removed by the Executive on the application by the Senate and House of Representatives." (The words of the act of settlement are, "but upon the address of both Houses of Parliament it may be lawful to remove them.") Mr. Gerry seconded the motion. Mr. Gouverneur Morris thought it a contradiction, in terms, to say that the judges should hold their offices during good behavior, and yet be removable without a trial. Besides, it was fundamently wrong to subject judges to so arbitrary an authority.

Mr. Sherman saw no contradiction or impropriety if this were made a part of the constitutional legislation of the judiciary establishment. He observed that a like provision was contained in the British statutes.

Mr. RUTLEDGE. If the Supreme Court is to judge between the United States and particular States, this alone is an insuperable objection to the motion.

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[52] Third session Fifty-eighth Congress, Record, pp. 3031, 3032.

Mr. Wilson considers such a provision in the British Government as less dangerous than here; the House of Lords and House of Commons being less likely to concur on the same occasions. Chief Justice Holt, he remarked, had successively offended, by his independent conduct, both House of Parliament. Had this happened at the same time, he would have been ousted. The judges would be in a bad situation if made to depend on any gust of faction which might prevail in the two branches of our Government. Mr. Randolph opposed the motion as weakening too much the independence of the judges.

Mr. Dickinson was not apprehensive that the legislature, composed of different branches, constructed on such different principles, would improperly unite for the purpose of displacing a judge.

On the question for agreeing to Mr. Dickinson's motion, it was negatived.

Connecticut, aye; all the other States present, no.

Thus the proposition to ingraft upon our Federal Constitution that provision of the act of settlement, specially referred to in the debate by Mr. Sherman, was rejected with only one dissenting voice. When, at another time, Mr. Dickinson attempted to provide that the President should be removed by address, his proposal was rejected by the same majority. As Mr. William Lawrence (Impeachment of Andrew Johnson, Vol. I, p. 135) has stated it: "Removal on the address of both Houses of Parliament is provided for in the act of settlement (3 Hallam, 262). In the convention which framed our Constitution, June 2, 1787, Mr. John Dickinson, of Delaware, moved 'that the Executive be made removable by the National Legislature on the request of a majority of the legislatures of individual States.' Delaware alone voted for this and it was rejected. Impeachment was deemed sufficiently comprehensive to cover every proper case for removal." The last sentence states the essence of the whole matter. The Convention resolved that neither the executive nor judicial officers of the United States should be removed from office except "on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors."

As a well-known authority has expressed it: "The first proposition was to use the words, 'to be removable on impeachment and conviction of malpractice and neglect of duty.' It was agreed that these expressions were too general. They were therefore stricken out. It was voted that the clause should be simply 'removable on impeachment.' The debate shows that the Members did not wish the Senate to be able to remove a civil officer whenever he acted in a way detrimental to the public service, for such a power was expressly refused. (Citing Madison Papers, p. 481, heretofore quoted.) A general debate took place on a clause in one draft which made the President triable only for treason and bribery. It was urged that the jurisdiction was too limited. The following are extracts from the debate which ensued: Colonel Mason said: 'Treason, as defined in the Constitution, will not reach many great and dangerous offenses. Hastings is not guilty of treason. Attempts to subvert the Constitution may not be treason as above defined.' He moved to insert after 'bribery' the words 'or maladministration.' Madison: 'So vague a term will be equivalent to a tenure during the pleasure of the Senate.' Mason withdrew 'maladministration' and substituted 'other high crimes and misdemeanors against the State.' In the final draft the words 'against the State' were omitted, doubtless as surplusage, and the expressions finally adopted, 'crimes' and 'misdemeanors,' were words which had a well-defined signification in the courts of England and in her colonies as meaning criminal offenses at common (parliamentary) law." (American Law Review, vol. 16, p. 804, article on "Impeachable offenses under the Constitution of the United States.") The term "common" instead of "parliamentary" law is carelessly used in that excellent statement, as it often is elsewhere. After quoting Rawle on Constitution (200, Lawrence (Johnson's Imp., Vol. I, p. 125)) remarks: "This author says in reference to impeachments, 'we must have recourse to the common law of England for the definition of them;' that is, to the common parliamentary law. (3 Wheaton, 610; 1 Wood and Minot, 448.)"

2019. Abandonment of the theory that impeachment may be only for indictable offenses.

Discussion of the theory that an impeachable offense is one in its nature or consequence subversive of some fundamental or essential principle of government or highly prejudicial to the public interest.

On February 22, 1905,[53] in the Senate sitting for the impeachment trial of Judge Charles Swayne, Messrs. Anthony Higgins and John M. Thurston, of counsel for the respondent, offered a brief in support to their plea of jurisdiction as to the first seven of the articles. This brief, which was signed by them as counsel, but which, as they said, had been prepared by another, covered many questions relating to impeachments, the following being among them:

When sitting as a high court of impeachment the Senate is the sole and final judge of the meaning of the phrase "high crimes and misdemeanors." It has been well said that "'Treason, bribery, and other high crimes and misdemeanors' are of course impeachable. Treason and bribery are specifically named. But 'other high crimes and misdemeanous' are just as fully comprehended as though each was specified. The Senate is made the sole judge of what they are. There is no revising court. The Senate determines in the light of parliamentary law. Congress can not define or limit by law that which the Constitution defines in two cases by enumeration and in others by classification, and of which the Senate is sole judge." (Lawrence, Johnson's Imp., Vol. I, p. 136.) And yet the Senate sitting as a court of impeachment has in no one of the seven cases tried before it ever attempted to define the momentous phrase in question, and probably never will. When a new case arises nothing can be learned except what may be gleaned from the individual utterances of Senators, and from the arguments of counsel made in preceding cases, too often under the temptation to bend the precedents to the necessities of the particular occasion. One good result has, however, been the outcome of such discussions, and that is the elimination of two propositions which have perished through their own inherent weakness. One the one hand, a grotesque attempt has been made to narrow unreasonably the jurisdiction of the Senate sitting as a court of impeachment by the claim that the power of impeachment is limited to offenses positively defined by the statutes of the United States as impeachable crimes and misdemeanors.

Apart from its other infirmities, this contention loses sight of the fact that Congress has no power whatever to define a high crime and misdemeanor. On the other hand, an equally untenable attempt has been made to widen unreasonably the jurisdiction of the Senate sitting as a court of impeachment by the claim that, under the general principles of right, it can declare that an impeachable high crime or misdemeanor is one in its nature or consequence subversive of some fundamental or essential principle of government or highly prejudiced to the public interest, and this may consist of a violation of the Constitution, of law, of an official oath, or of duty, by an act committed or omitted, or, without violating a positive law, by the abuse of discretionary powers for improper motives or for an improper purpose. This expansive and nebulous definition embodies an attempt to clothe the Senate sitting as a court with such a jurisdiction as it would have possessed had the Federal Convention seen fit to extend impeachment "to malpractice and neglect of duty," or to "maladministration," a proposition rejected with a single dissent because, as Madison expressed it, "So vague a term will be equivalent to a tenure during the pleasure of the Senate."

Even that school which gives the widest possible interpretation to the Federal Constitution will hardly be willing to go so far, even under the general-welfare clause, as to write into the Constitution phrases and meanings which the framers expressly rejected, in order to accomplish what may be considered by some a convenient end. Certainly that school which still respects the canons of strict construction can not listen to such an argument. Between the two extremes, those who have made a careful study of the subject find no difficulty in reaching the obvious conclusion that the term "high crimes and misdemeanors" embraces simply those offenses impeachable under the parliamentary law of England in 1787, subject to such modifications as that law suffered in the process of reproduction. When the objection is made that the phrase thus construed covers too narrow an area, the answer is that it was the expressly declared purpose of the framers so to restrict it within narrow limits perfectly understood at the time. In the first place, the proposition to adopt removal by address was rejected with only one dissent; in the second, the proposal to adopt such a comprehensive term

[53] Third session Fifty-eighth Congress, Record, pp. 3031, 3032.

as "maladministration" was rejected and the limited phrase in question substituted. The declaration was clearly made at the time that there must be no undue weakening of the independence of the Federal judiciary. The necessity for such a precaution was soon justified by events.

A leading authority upon the subject tells us that upon the destruction of the Federalist party on the election of Jefferson "An assault upon the judiciary, State and Federal, was made all along the lines. In some States, as New Hampshire, old courts were abolished and new ones, with similar jurisdiction, created for the sole purpose of obtaining new judges. In Pennsylvania an obnoxious Federal judge was removed from the common pleas by impeachment; and an impeachment of all the Federal judges of the highest court was made, but failed through the uprising of the entire bar, irrespective of party lines, in defense of their official chiefs. A similar attack was made upon the Federal judiciary." (Foster on the Constitution, Vol. I. p. 531.) With the possibility of such an assault impending it is not strange that the makers of our Federal Constitution should have confined the power of removing judges by impeachment within the well-known limits which the English constitution had defined.

2020. Mr. Manager Olmsted's argument that impeachment is not restricted to offenses indictable under Federal law and that judges may be impeached for breaches of "good behavior."

Discussion of English and American precedents as bearing on the meaning of the phrase "high crimes and misdemeanors."

On February 23, 1905,[54] in the Senate sitting for the impeachment trial of Judge Charles Swayne, Mr. Manager Marlin E. Olmsted, of Pennsylvania, in final argument, said:

Although it would seem that the question must now be considered settled, nevertheless in nearly every impeachment trial the question is raised as to the character of and offenses for which impeachment will lie. In times past men of great learning and authority have contended that no officer can be impeached except for indictable offenses, and that as there are no common-law offenses against the United States, it follows that there can be no impeachment except for an offense expressly declared and made indictable by act of Congress. This view of the matter fades away in the bright light of reason and of precedent.

Such a construction would render the constitutional provision practically a nullity. Congress has defined and made indictable by statute comparatively few offenses. It would be impossible in any statute to define or describe all the various ways in which a judge or other civil officer might so notably and conspicuously misbehave himself as to justify and require his removal. Even murder is not defined in any act of Congress. When it so appears, reference to some other source must be had to ascertain the meaning of the term. Murder is not made indictable by any act of Congress, nor has any Federal court jurisdiction of that crime unless committed upon the high seas.

Suppose a judge to commit murder upon the dry land within the confines of a State. That would not be a high crime or misdemeanor within the provision of any act of Congress. Could it successfully be maintained that it was not a high crime and misdemeanor within the meaning of Article II, section 4, of the Constitution, or that it was not such a breach of good behavior as would justify removal from office? If that be the proper construction, then it is possible to imagine that as the respondent transacted official business at and dated his communications from "United States district court, northern district of Florida, judge's chambers, Guyencourt, Del.," so a more violent and vicious man might conduct business at "Judge's chambers, State penitentiary," and still be free from all danger of impeachment or removal from the judicial office.

I have shown, Mr. President, that men have formerly argued that only indictable offenses are subjects for impeachment; that as there were no common-law offenses against the United States there can be no impeachment except for crimes declared and defined by act of Congress. But now, in the 48-page brief served upon us last evening, bearing the names of the honorable counsel for respondent, but the authorship of which they distinctly disavowed—and I now know the reason why—we find the astounding doctrine that no can can be impeached for any offense declared by Congress. Therefore no officer can be impeached, no

[54] Third session Fifty-eighth Congress, Record, pp. 3034, 3035.

matter what he does, unless we can find that in England some judge had been impeached for the same specific offense prior to the adoption of our Constitution, which borrowed something from the other country in this matter.

Now, we admit, Mr. President, that the term "impeachment" is imported from the English law, and so is the constitutional phrase "high crimes and misdemeanors" used in relation thereto. They are both without definition, either in the Constitution or in any act of Congress. Where, then, shall their definition and construction be found? Our Supreme Court has declared that—

"Where English statutes—such, for instance, as the statute of frauds and the statute of limitations—have been adopted into our legislation, the known and settled construction of those statutes by courts of law has been considered as silently incorporated into the acts or has been received with all the weight of authority." (Pennock *v.* Dialogue, 2 Peters, 2–18.)

That was an unanimous decision in which Chief Justice John Marshall participated and concurred, and the opinion was written by Mr. Justice Story.

To the same effect is the case of United States *v.* Jones (3 Wash. C. C. R., 209), and many other authorities that might be cited.

We may therefore look to the law of England for the meaning of the term "impeachment" and of the phrase "high crimes and misdemeanors," as used in connection therewith—not so much to the statute law, nor to the common law, as generally understood, but to the common parliamentary law of England, as found in the precedents and reports of impeachment cases.

The Senate has always been governed in impeachment cases by the lex et consuetudo parliamenti. It requires but a brief investigation to show that according to the English parliamentary practice in vogue at and prior to the adoption of the Constitution, the greatest possible variety of offenses, not indictable, were nevertheless held proper causes for impeachment.

In II Wooddeson's Law Lectures, an acknowledged authority, the learned author, in his lecture upon "Parliamentary Impeachment," says (p. 596):

"It is certain that magistrates and officers intrusted with the administration of public affairs may abuse their delegated powers to the extensive detriment of the community and at the same time in a manner not properly cognizable before the ordinary tribunals. The influence of such delinquents and the nature of such offenses may not unsuitably engage the authority of the highest court and the wisdom of the sagest assembly. The Commons, therefore, as the grand inquest of the nation, become suitors for penal justice, and they can not consistently, either with their own dignity or with safety to the accused, sue elsewhere but to those who share with them in the legislature.

"On this policy is founded the origin of impeachments, which began soon after the constitution assumed its present form."

And again (p. 601):

"Such kind of misdeeds, however, as peculiarly injure the commonwealth by the abuse of high offices of trust, are most proper, and have been the most usual grounds for this kind of prosecution. Thus, if a lord chancellor be guilty of bribery, or of acting grossly contrary to the duty of his office; if the judges mislead their sovereign by unconstitutional opinions; if any other magistrate attempt to subvert the fundamental laws or introduce arbitrary power, these have been deemed cases adapted to parliamentary inquiry and decision. So where a lord chancellor has been thought to have put the seal to an ignominous treaty, a lord admiral to neglect the safeguard of the sea, an ambassador to betray his trust, a privy counselor to propound or support pernicious and dishonorable measures, or a confidential adviser of his sovereign to obtain exorbitant grants or incompatible employments, these imputations have properly occasioned impeachments, because it is apparent how little the ordinary tribunals are calculated to take cognizance of such offenses or to investigate and reform the general polity of the state."

In several cases English judges were impeached for giving extrajudicial opinions and misinterpreting the law. (4 Hatsell, 76.)

Such is the undoubted parliamentary law of England, from which our process and practice of impeachment and the very term itself are derived. That it has been adopted and followed here is equally certain.

Judge Curtis, in his History of the Constitution (pp. 260–261), says:

"The purposes of an impeachment lie wholly beyond the penalties of the statute or the customary law. The object of the proceeding is to ascertain whether cause exists for removing a public officer from office. * * * Such a cause may be found in the fact that either in the discharge of his office or aside from

its functions he has violated a law or committed what is technically denominated a crime, but a cause for removal from office may exist where no offense against positive law is committed, as where the individual has from immorality, imbecility, or maladministration become unfit to exercise the office."

And Judge Story says, in section 799 of his work on the Constitution:

"Congress has unhesitatingly adopted the conclusion that no previous statute is necessary to authorize an impeachment for any official misconduct. * * * In the few cases of impeachment which have hitherto been tried no one of the charges has rested upon any statutable misdemeanor." (1 Story on Con., sec. 799).

Such writers as Cooley and Wharton and Rawle maintain the same position and support is not only by reason, but by authority and precedent. For a very able discussion of this subject I refer to the brief of Mr. Lawrence, adopted by the managers and published among the proceedings in the impeachment of Andrew Johnson and also in 6 American Law Register, new series, page 641.

Every impeachment case ever presented to the United States Senate has been founded upon articles, some or all of which charged offenses not indictable; and Judge West, of Tennessee, as well as Judge Pickering, was convicted and removed for offense not subject to indictment under either State or Federal laws.

We agree with respondent's brief, the authorship of which his counsel disavow, that the general character of offenses impeachable may be studied to advantage by a consideration of the English precedent, but I can never agree that in order to convict an American judge we must first show that some English judge has been convicted of the same specific offense.

No English judge has been impeached for murder, or perjury, or forgery, or larceny; and yet they were undoubtedly impeachable offenses in English as they are here to-day. They, or any of them, would certainly constitute a breach of that "good behavior" during which Federal judges hold their commissions. Surely an offense which would have been impeachable without a statute is none the less so because Congress has declared it a misdemeanor. Taking money out of the Treasury on a false certificate would have been impeachable in England before our Constitution. It is none the less so here, statute or no statute.

JURISDICTION OF FIRST SEVEN ARTICLES

Respondent denies that the offenses charged in the first seven articles are proper subjects of impeachment on the ground, as we understand it, that they were committed by him in his private and not in his official capacity; or, in other words, that the articles do not charge misbehaviors or misdemeanors in office. We labor under the impression that the respondent is "in office," and that any misdemeanor committed by him, either in his private or official capacity, since he accepted the Presidents commission was a misdemeanor "in office." He may have been out of his court room and out of his district, but he has never been out of office.

The Constitution and his commission each defines his terms as "during good behavior," and provides for his removal from office for "treason, bribery, and other high crimes and misdemeanors," meaning thereby misbehavior, for misbehavior is misdemeanor, and misdemeanor is misbehavior. There is no limitation to offenses actually committed upon the bench, nor to those committed while in the performance of any judicial or official function, or in any way under color of office.

The Century Dictionary gives this definition:

"During good behavior: As long as one remains blameless in the discharge of one's duties or the conduct of one's life; as, an office held during good behavior."

Judge Curtis, in his History of the Constitution (pp. 260–261), says:

"The purposes of an impeachment lie wholly beyond the penalties of the statute or the customary law. The object of the proceeding is to ascertain whether cause exists for removing a public officer from office. * * * Such a cause may be found in the fact that either in the discharge of his office or aside from its functions he has violated a law or committed what is technically denominated a crime, but a cause for removal from office may exist where no offense against positive law is committed, as where the individual has from immorality, imbecility, or maladministration become unfit to exercise the office."

Such is manifestly the intention of the Constitution. That instrument says "during good behavior." It does not, as some of the State constitutions do, add the words "in office." It says "high crimes and misdemeanors," but it does not add "in office." In the brief of respondent's honorable counsel the authorship of which they disavow, they tell us, and it is entirely true, that at one stage of

its formation the provision read "misdemeanors against the State." But as the words "against the State" were stricken out they argue that it must be construed as if they had been left in.

JUDGE HUMPHREY'S CASE

Mr. President, there are plenty of authorities, both English and American, that in order to be the subject of impeachment it is not necessary that an offense shall be committed even under color of office, and just here I take issue in the most emphatic manner with the statements of that 48-page brief as to the causes for which convictions have been had in impeachment. It is full of historical inaccuracies. It declares, for instance, that Judge West H. Humphreys, of Tennessee, was convicted only for offenses committed in his judicial capacity.

I say that he was convicted upon each one of the seven articles, only one of which—the fifth—had any relation at all to his duties as a Federal judge. The very first article charged him with advocating secession. Where? Upon the bench? No. In the court room? No. In a written opinion? No; but in a public speech in the city of Nashville. Five other of those counts were of the same character. How could a judge commit that offense upon the bench? He did not speak as a judge, but as a citizen at a public meeting.

Mr. President, Andrew Johnson came within one vote of being impeached upon the eleventh article in his case, a portion of which I will read:

"That said Andrew Johnson, President of the United States, unmindful of the high duties of his office, and of his oath of office, and in disregard of the Constitution and laws of the United States, did, heretofore, to wit, on the 18th day of August, A.D. 1866, at the city of Washington and the District of Columbia, by public speech, declare and affirm, in substance, that the Thirty-ninth Congress of the United States was not a Congress of the United States."

Upon that article the vote against him was 35 to 19. A change of one vote would have expelled him from the Presidency.

Treason, removal for which is made compulsory, is specifically defined by the Constitution in these words:

"Treason against the United States shall consist only of levying war against them or adhering to their enemies, giving them aid and comfort."

It would hardly be possible for a judge, sitting upon the bench, or in any other way except entirely aside from any function of his office, to be guilty of this offense. But suppose that, disassociating himself as far as possible from his judicial position, he should in his individual capacity participate in "levying war against them or in adhering to their enemies, giving them aid and comfort."

That would surely be treason, as constitutionally defined, and yet, upon the argument of the honorable counsel for respondent, he could not be impeached and removed from office for that offense. Think of that. A traitor to his country, sitting securely upon the bench, secure from removal by any power on earth, for in no way can he be removed except by the Senate, upon impeachment by the House of Representatives. A Federal judge, upon that reasoning might commit murder upon the public highway, or be convicted of housebreaking, or forgery, or perjury, or in any other way bring into contempt his high office, and yet we are told that if the offense be not committed upon the bench, nor in the court room, nor in any way relating to his judicial duties, he can not be impeached and removed.

It is hardly necessary to prolong this branch of the discussion, in view of the fact that the question has already been determined by the Senate itself.

BLOUNT'S CASE

In 1797 William Blount was expelled from the Senate for attempting to seduce a United States Indian interpreter from his duty and to alienate the affections and conduct of the Indians from the public officers residing among them. That was not a statutory offense, nor committed in the Senate Chamber, nor in the exercise or omission of any Senatorial function, nor under color of office; but the Senate, nevertheless, resolved that he "having been guilty of a high misdemeanor entirely inconsistent with his public trust and duty as a Senator, be, and he is hereby, expelled from the United States Senate."

That was not upon an impeachment proceeding, but the principle involved was precisely the same, and later it was sustained in the impeachment case of Judge Humphreys, as I have shown.

It is difficult in any event to see any force in respondent's plea to the jurisdiction. The offenses charged in the first seven as well as in all other articles do relate entirely to his judicial office and not to his private conduct.

2021. Argument of Mr. Manager De Armond that Congress may make nonresidence of a judge a high misdemeanor. Argument that a judge may be impeached for misbehavior generally.

On February 25, 1905,[55] in the Senate, sitting for the impeachment trial of Judge Charles Swayne, Mr. Manager David A. De Armond, of Missouri, in final argument, said:

Thirty years before Judge Swayne was born the Congress of the United States enacted a law, now embodied in section 551, Revised Statutes, requiring a district judge to reside in his district. The question of the enactment of such a law arose years earlier. The discussion was participated in by makers of the Constitution as well as by contemporaries of those illustrious men. In the body which passed the law were those who had gathered in the spirit of the Constitution, not merely from the lips of those who had made it, but through participation in the making of it. The law was passed in the full belief, unchallenged by anybody, that the power rested in the Congress to pass such a law, and it was declared that a violation or disregard of that law should constitute a high misdemeanor, employing the very language of the Constitution itself.

And yet we find, thanks to the facile pen of some modern essayist whose product is embodied in the record in this case, some unknown great man, that it is impossible for Congress to add to or take from the category of "high crimes and misdemeanors" as embodied in the Constitution in the clause relating to impeachments.

Those who lived in that early day, those who participated in the discussions that led up to that early legislation, and those who enacted that law did not think just as this modern writer and essayist does think. This graceful writer, but, as he has demonstrated, evidently poor lawyer, confess that he can not define, and he says nobody can define, just what was meant by "high crimes and misdemeanors;" but he insists that there was such a fixed, settled, immovable, unchangeable, ever-enduring meaning and limitation attached to and embodied in it that nothing can be added to it or taken from it; and yet he does not know what it is; he does not tell us, and he says nobody else can tell, what it is.

The doctrine, aside from this authority which the respondent's counsel quoted with so much approval and indorsed so fully, the doctrine of other essayists and other commentators upon the Constitution, the doctrine of men whose names have gone into our history as illustrating in its best phases and as demonstrating the greatest capacity and the highest achievements of the human mind, was and is that Congress could add to what might be embraced in the term, and that the Senate of the United States, on the trial of an impeachment, was made by the Constitution itself, and ever must be, the final authorized judge of the meaning.

Suppose that this Republic were to endure, as all of us most sincerely hope it will, for centuries and multiplied centuries, and suppose that a thousand years hence, or five thousand years hence, after agencies and forces undreamed of to-day, as those playing important parts in the drama of to-day were undreamed of a short time ago, were brought into requisition, and out of their use and development new and strange conditions, unthought of and unthinkable to-day, should arise, and that the Congress, in its enlightened wisdom, should conclude to declare this, that, or the other thing arising out of the development of these new conditions high crimes and misdemeanors. These wise commentators of the school of this essayist and their successors, if they are to have succession in a more enlightened age of the world and of the country, would say: "You can not impeach for that. You must go back into the English parliamentary law for the chart of your powers. At the adoption of the Constitution you were confined within the Englishman's definition of high crimes and misdemeanors, and confined to his category of them; but what his definition was or is and what was or is embraced within his catalogue we do not know, and nobody knows.

[55] Third session Fifty-eighth Congress, Record, pp. 3376, 3377.

Those who framed the Constitution meant to deny and did deny to the Congress all power whatsoever to declare anything a high crime or misdemeanor which was not such when the Constitution was made."

Then if you or your successors should modestly say to these gentlemen, "Pray tell us, then, what are the things for which an impeachment will lie? What is comprehended within the term 'high crimes and misdemeanors?' What, within the meaning of the Constitution, made by those short-sighted men, so long, long ago in their graves, is embodied in these words?" They would answer then, I suppose, as this wise commentator of to-day answers, "I do not know; nobody ever has said, and nobody will ever be able to say."

Drifting back to English history, counsel claim to have discovered—and it is a discovery of something which does not exist, I think; but I pass that by—that no judge in English history ever was impeached or tried on impeachment except for an offense committed in the actual discharge of the duties of a judge, sitting on the bench itself. Well now, if that were true, what does it prove? It proves nothing—absolutely nothing.

Reflect upon it for a moment. Suppose all these trials had been with reference to some particular offense. It would be just as logical to contend that for no other offense committed upon the bench in the discharge of judicial duty would impeachment lie. How many cases must there be before this is settled? They say there have been but few, and that is true. How many are necessary to fix it that there can not be a trial by impeachment for any other offense? There again they can not answer.

The truth of the matter is that this question of impeachment and the right and power to impeach, and the things for which people could be impeached in Great Britain, shifted and changed with the shifting and changing judgment and legislation of the times. At one time it was supposed to be legitimate and proper, and the supposed power was exercised, to impeach and convict and remove from office and imprison for the advocacy of religious views and the propagation of religious doctrines which, at another time, were held to be the correct views and the sound doctrines relating to the subject of religion in that great realm. So it has been and so it is and so it will be.

These gentlemen ignore entirely the question as to good conduct—"during good behavior." They say that the provision for removing judges by address is not embodied in the Constitution. What do they say then? They say there is no way of removing them except in a few cases to which, they say, the constitutional provision respecting impeachment implies.

As was said by Mr. Morris, when that matter was under discussion in the Constitutional Convention, the judges ought not to be removed on the ground of lacking in good behavior except upon a trial. What trial is provided? The kind of trial you have here now. The trial before the Senate of the United States, on impeachment by the House of Representatives. There has been embodied in that one method all the power that resides in the Government in all its branches—all the power of the people of this vast country, this great and mighty Republic—to remove from office an offending civil officer. And precisely the same provision that applies to the judges applies to all other civil officers.

The gentlemen discriminate respecting the judges. Where do they get the ground for the discrimination? It is not in the Constitution. There is nothing in the Constitution suggesting that a judge can be removed from office only for offending on the bench, and that as to other civil officers they may be removed for offenses off duty, or not so narrowly official.

The learned counsel for the respondents who closed the case on the other side seemed to take lightly the suggestion of Mr. Manager Palmer in the brief which he filed, and of my other colleagues who argued this case, that according to the commentators upon the Constitution, according to the spirit of the Constitution, according to the just principles of law governing impeachment, it is within the power of the House of Representatives to vote impeachment, and it is within the just and constitutional powers of the Senate to convict, for conduct in a judge off the bench and away even from his judicial transactions. The logical conclusion from the contention of respondents' counsel is that no matter how vile any civil officer of the Government may be, no matter how great the sum total of the individual items of his offending, so long as the offending is not on the bench or in the active technical conduct of his office the whole power of the Government is too weak, the arm of the House of Representatives too short, and the judgment of the Senate too puny to reach the

offender and protect the public from the vile contamination of his continued presence in office. We do not take that view of the matter.

2022. Opinion of Attorney-General Felix Grundy that Territorial judges are not civil officers of the United States within the meaning of the impeachment clause of the Constitution.—On February 4, 1839,[55] as pertinent to the consideration of a pending bill to amend the law establishing the Territorial government of Wisconsin, Mr. Isaac H. Bronson, of New York, chairman of the Committee on Territories, presented to the House a letter of the Attorney-General of the United States, Hon. Felix Grundy, giving an opinion on the subject of the removal of Territorial judges by impeachment:

The provision of the Constitution which relates most directly to this subject is contained in the first section of the third article, which declares that "the judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may, from time to time, ordain and establish. The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation which shall not be diminished during their continuance in office."

The construction of this part of the Constitution has been settled, it seems to me, by the opinion of Congress, expressed by various acts, and also by the Supreme Court of the United States.

By the article of the Constitution referred to the judges are to hold their offices during good behavior. Congress can not consistently with this provision provide any other or different tenure of office within the States.

Congress has in most cases limited the tenure of office of Territorial judges to four years. This could not be done were they judges under or provided for by the Constitution, because by that instrument the tenure is during good behavior. It should be noticed that Congress has imposed this limitation of four years, not in a single instance only, but in many. It has been imposed in the Territories embraced within the limits of the original States, where the Territory has been ceded to the General Government, and Territorial governments have been created therein. It has also been done in the Territories purchased by the United States from foreign nations. I think these acts clearly prove the sense of Congress to be that Territorial judges are not judges under the Constitution, but are mere creatures of legislation.

I have said that the Supreme Court of the United States have also decided upon this point. In the case of the American Insurance Company and others v. Canter, reported in first Peters, the court very distinctly recognized the opinion above expressed, and convey their views in the following strong language: "These courts (meaning Territorial courts), then, are not constitutional courts, in which the judicial power conferred by the Constitution on the General Government can be deposited; they are incapable of receiving it; they are legislative courts, created in virtue of the general rights of sovereignty."

The only remaining inquiry is as to the liability of Territorial judges to impeachment under the Constitution. The fourth section of the second article of the Constitution is in these words: "The President, Vice-President, and all civil

[55] Third session Twenty-fifth Congress, Journal, p. 452, House Ex. Doc. No. 154.

officers of the United States shall be removed from office on impeachment and conviction of treason, bribery, or other high crimes and misdemeanors."

If the construction of the Constitution be correct, as I suppose it is, that these judges are not constitutional but legislative judges, I can see nothing in the Constitution which would warrant their being embraced by the expression, "and all civil officers of the United States." They are not civil officers of the United States in the constitutional meaning of the phrase. They are merely Territorial officers, and therefore, in my opinion, not subject to impeachment and trial before the Senate of the United States.

2023. Reference to a summary of provisions of State constitutions relating to impeachment and removal by address.—On February 22, 1905,[57] in the Senate, sitting for the impeachment trial of Judge Charles Swayne, Messrs. John M. Thurston and Anthony Higgins, of counsel for respondent, filed as part of an argument on a plea as to jurisdiction a summary of provisions in the constitutions of the various States at various periods of their existence. It appears in full in the Congressional Record of that date.

2024. The question of reimbursement of respondent for his expenses in an impeachment trial.—On February 28, 1905,[58] in the Senate, the President pro tempore laid before the Senate the following communication from the counsel of Judge Charles Swayne; which was referred to the Committee on the Judiciary:

To the President pro tempore of the United States Senate:

The undersigned have the honor to request that, inasmuch as Judge Charles Swayne has been declared not guilty by the Senate of the impeachment charges preferred against him by the House of Representatives, an allowance may be made as a part of the expenses of the Senate in connection with the impeachment which shall enable him to defray the expenses of his counsel and the other expenses incurred by him in making his defense.

The undersigned will submit a statement of such expenses whenever requested to do so by the Senate.

ANTHONY HIGGINS.
JOHN M. THURSTON.

WASHINGTON, *February 27, 1905.*

The joint resolution,[59] appropriating for the expenses of the Senate in the trial made no provision for granting this request.

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[57] Third session Fifty-eighth Congress, Record, pp. 3035–3041.
[58] Third session Fifty-eighth Congress, Record, p. 3601.
[59] 33 Stat. L., p. 1280.

Functions of the House in Impeachment*

1. Provision of the Constitution. Section 2025.[1]
2. English precedents as to function of the Commons. Sections 2026–2027.[2]
3. Attendance at trial. Section 2028.[3]
4. Continuation of proceedings from Congress to Congress. Section 2029.
5. Charges preferred by petition. Section 2030.
6. The managers. Sections 2031–2037.[4]
7. Early forms of subpenas, etc. Sections 2038–2040.
8. Form of signing testimony by witnesses. Section 2041.
9. Consideration of matters relating to trial. Sections 2042–2044.
10. High privilege of questions relating to impeachment. Sections 2045–2054.

2025. The sole power of impeachment is conferred on the House of Representatives by the Constitution.—The Constitution, in Article I, section 2, provides:

> The House of Representatives * * * shall have the sole power of impeachment.

2026. Under the parliamentary law of impeachment the Commons, as grand inquest of the nation and as accusers, become suitors for penal justice at the bar of the Lords.

The Commons, in impeaching, usually pass a resolution containing a criminal charge against the accused and direct a Member to impeach him by oral accusation before the Lords.

The person impeaching on behalf of the Commons signifies that articles will be exhibited.

In impeaching, the spokesman of the Commons asks that the delinquent be sequestered from his seat, or committed, or that the Peers take order for his appearance.

In Chapter LIII of Jefferson's Manual the following is given in the "sketch of some of the principles and practices of England" on the subject of impeachment:

*Hinds' Precedents, vol. 3, p. 361 (1907).

[1] Nature of inquiry preliminary to impeachment. Section 2366 of this volume.

[2] Parliamentary law forbids Lords to join in. Section 2056.

[3] House did not attend in Blount's case (sec. 2318) and in the Peck trial only in the preliminary proceedings (sec. 2373). Attended in Committee of Whole in Chase trial (sec. 2350, 2354) and also in Johnson trial (sec. 2420, 2427, 2435). Also see section 2392 for Humphrey's trial, sections 2449, 2467 for Belknap's, and section 2483 for Swayne's.

[4] See also other sections relating to the managers: Choice on appointment of. Sections 2300, 2306, 2323, 2345, 2350, 2368, 2388, 2417, 2448, 2475. Held not to be a committee. Section 2420. Sometimes endowed with power to compel testimony and even make investigations. Sections 1685, 2419, 2423. Conduct and privileges of, during a trial. Sections 2144–2154. Announced on entering Senate Chamber to attend trial. Section 2427. Required to rise and address the Chair before speaking. Section 2146. As to making of motions by. Sections 2136, 2144, 2147, 2189. Rule as to questions and colloquies. Section 2154. May object to witnesses answering questions asked by Senators. Sections 2182–2186. May argue on questions put on propositions offered by Senators. Sections 2148, 2188. May not move to amend a proposition offered by a Senator. Section 2147. The claim that they should have the closing of all arguments. Section 2136. They protest against delays during the trial of the President. Section 2150. Are admonished not to delay. Section 2151. Decline in the Pickering case to discuss a matter from a third party. Section 2334. As to reports in relation to trial. Sections 2338, 2423, 2468.

Accusation. The Commons, as the grand inquest of the nation, become suitors for penal justice. (2 Wood., 597; 6 Grey, 356.) The general course is to pass a resolution containing a criminal charge against the supposed delinquent, and then to direct some member to impeach him by oral accusation at the bar of the House of Lords, in the name of the Commons. The person signifies that the articles will be exhibited, and desires that the delinquent may be sequestered from his seat, or be committed, or that the Peers will take order for his appearance. (Sachev. Trial, 325; 2 Wood., 602, 605; Lords' Journ., 3 June, 1701; 1 Wms., 616; 6 Grey, 324.)

2027. The Commons attend generally in impeachment trials, but not when the Lords consider the answer on proofs or determine judgment.

The Commons attend impeachment trials in committee of the whole, or otherwise, at discretion, and appoint managers to conduct proof.

The presence of the Commons is considered necessary at the answer and the judgment in impeachment cases.

Method of taking the vote in judgment in English impeachment trials.

In Chapter LIII of Jefferson's Manual, the following is given in the "sketch of some of the principles and practices of England" on the subject of impeachments:

Presence of Commons. The Commons are to be present at the examination of witnesses. (Seld. Jud., 124.) Indeed, they are to attend throughout, either as a committee of the whole House, or otherwise, at discretion, appoint managers to conduct the proofs. (Rushw. Tr. of Straff., 37; Com. Journ., 4 Feb., 1709–10; 2 Wood., 614.) And judgment is not to be given till they demand it. (Seld. Jud., 124.) But they are not to be present on impeachment when the Lords consider of the answer or proofs and determine of their judgment. Their presence, however, is necessary at the answer and judgment in cases capital (id., 58, 158) as well as not capital. (Id., 162.) The Lords debate the judgment among themselves. Then the vote is first taken on the question of guilty or not guilty; and if they convict, the question or particular sentence is out of that which seemeth to be most generally agreed on. (Seld. Jud., 167; 2 Wood., 612.)

2028. In 1830, during the impeachment trial of Judge Peck, the House reconsidered its decision to attend the trial daily.

Instance of the reconsideration of an order which had been partly executed.

On December 23, 1830,[5] this resolution was agreed to by the House:

Resolved, That, during the trial of the impeachment now pending before the Senate, this House will meet daily at the hour of 11 o'clock in the forenoon, and that from day to day it will resolve itself into a Committee of the Whole and attend said trial during the continuance thereof and until the conclusion of the same.

On the same day the House attended the trial in accordance with the order, and continued to do so as long as it remained in effect.

On December 24[6] Mr. Kensey Johns, jr., of Delaware, moved to reconsider the vote whereby the resolution was agreed to, and the consideration of this motion was postponed to December 27.

On December 27,[7] after consideration, the motion to reconsider was laid on the table.

[5] Second session Twenty-first Congress, Journal, pp. 97, 99.
[6] Journal, p. 101.
[7] Journal, p. 105.

On January 3, 1831,[8] Mr. Johns moved that the House proceed to the consideration of the motion to reconsider,[9] and Mr. Johns's motion was agreed to, yeas 117, nays 58.

A motion to lay the motion to reconsider on the table was disagreed to, yeas 55, nays 111.

And the question being put, "Will the House reconsider the same vote?" it was decided in the affirmative.

The question recurring on agreeing to the original resolution of December 23, after debate, on January 4 [10] the question was put "that the House do, on reconsideration, agree to pass the same," and it was decided in the negative, yeas 69, nays 118.

The House up to this time had daily attended the impeachment trial. Thereafter it ceased to do so until a new order was adopted.

2029. The House sometimes continues an investigation begun in a preceding Congress with view to an impeachment, making use of the former report and the testimony already taken.

The House may empower a subcommittee to send for persons and papers and conduct an investigation.

On January 30, 1892,[11] Mr. William C. Oate, of Alabama, from the Committee on the Judiciary, reported the following preamble and resolution, which were agreed to:

Whereas, Aleck Boarman, judge of the United States district court for the western district of the State of Louisiana, was charged in the House of Representatives of the Fifty-first Congress with high crimes and misdemeanors alleged to have been committed by him as a judge; and

Whereas, the Committee on the Judiciary, under the authority of said House, investigated the alleged official misconduct in office of the said judge and took a considerable volume of testimony thereon both against said judge and for him, he being present in person or by his counsel whenever and wherever the said testimony was taken; and

Whereas, upon due consideration thereof the said committee reported a resolution to the said House of Representatives declaring that Judge Boarman should be impeached of high crimes and misdemeanors in office, and accompanying the said resolution was the evidence upon which the same was based, which was duly printed under the direction of said committee and by order of the House; and

Whereas, the said resolution never came to a vote, and hence never was adopted by said House for the lack of time to duly consider the same; Therefore,

Be it resolved, That the said report, charges, and evidence be referred to the Commitee on the Judiciary, with instructions to thoroughly investigate the same and to report to the House the findings and recommendations in regard thereto at any time.

And for the purpose of making the investigation hereby ordered the said Committee on the Judiciary may adopt and use as legal evidence the testimony taken as aforesaid during the Fifty-first Congress in the case of Judge Boarman, and may take and consider any additional and explanatory evidence of a legal character which may be offered either for or against the said judge; and in respect to this investigation the said committee is hereby authorized and empowered to send for persons and papers, administer oaths, take testimony, and to employ a clerk and stenographer, if necessary; to send a subcommittee whenever and wherever deemed necessary to take testimony for the use of said committee, and the said subcommittee while so employed shall have the same powers in respect

[8] Journal, pp. 131–133.

[9] Under the present practice of the House a motion to lay on the table a motion to reconsider disposes of it finally. But in 1831 that practice was not established. About 1842 it was recognized that the tabling of a motion to reconsider was a final disposition of it.

[10] Journal, pp. 139, 140.

[11] First session Fifty-second Congress, Journal, p. 49; Record, p. 689.

to obtaining testimony as are herein given to said Committee on the Judiciary; that the Sergeant-at-Arms by himself or deputy shall serve the process of said committee and subcommittee and execute its orders and shall attend the sittings of the same as ordered and directed thereby, and the expenses of said investigation shall be paid out of the contingent fund of the House.

On June 1 [12] the committee reported in favor of the impeachment of Judge Boarman.

2030. Instance wherein the Speaker presented a petition in which were preferred charges against a Federal judge.

A petitioner who preferred charges against a Federal judge, funished the certificate of a notary to his signature. (Footnote.)

On June 25, 1906,[13] the Speaker under the rule presented a petition, as follows, which was referred to the Committee on the Judiciary:

Petition of Francis C. Mahon, of New Orleans, La., preferring charges against Charles Parlance, district judge of the eastern district of the United States court of Louisiana.[14]

2031. When managers of an impeachment are elected by ballot, a majority is required for the choice of each.—On December 5, 1804,[15] the House having decided that seven managers should be appointed by ballot to conduct the impeachment of Judge Samuel Chase, the ballot was taken, and the following Members appeared to be duly elected by a majority of the votes of the whole House, as six of the said managers, to wit: Mr. John Randolph, Mr. Rodney, Mr. Nicholson, Mr. Early, Mr. Boyle, and Mr. Nelson.

The House proceeded to a second ballot for another manager, when the ballots being examined it appeared that no Member had a majority of the votes of the whole House, but that the highest number of votes was given in favor of Mr. George Washington Campbell.

The Speaker [16] decided that it being provided by a standing rule and order of the House that in case of any second ballot of the House in which the number required to compose a committee should not be elected by a majority of the votes given on the second ballot, a plurality of votes shall prevail, and therefore that in his opinion the said George Washington Campbell was duly elected the seventh manager.

On an appeal this decision was reversed, and a further ballot being taken Mr. Campbell received a majority of votes and was elected.

The Annals show that the Speaker based his decision on the supposition that the rules of the House for choice of committees by ballot was applicable to the choice of managers.

But debate arising the concensus of opinion was that on former occasions a majority of votes had been given for each manager, although in the case of Judge Pickering this appeared rather from the recollection of gentlemen than from the Journals. The Speaker invited the appeal, which was taken by Mr. John Randolph, of Virginia, with expressions of respect.

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[12] Journal, p. 207; Record, p. 4908.
[13] First session Fifty-ninth Congress. Record, p. 9244.
[14] This petition was signed by the petitioner, and as the signature was not certified in any way it was returned with the statement that it should be certified. It was then returned with the certificate and seal of a notary, and thereupon was presented by the Speaker.
[15] Second session Eighth Congress, Journal, pp. 101, 102 (old edition), 44 (Gales and Seaton) Annals, pp. 762, 763.
[16] Nathaniel Macon, of North Carolina, Speaker.

2032. A Member appointed one of the managers of an impeachment may be excused by the House.—On January 25, 1805,[17] the House excused Mr. Roger Nelson, of Maryland, from serving as one of the managers appointed to conduct the impeachment against Judge Samuel Chase.

2033. The House gives leave to its managers to examine Members as witnesses in an impeachment trial, and leave to its Members to attend for that purpose.—On April 28, 1876,[18] Mr. Scott Lord, of New York, offered this resolution, which was agreed to:

Resolved, That the managers have leave to examine any member of the Committee on Expenditures in the War Department and any Member of the House whom they deem necessary as a witness on the trial of the articles of impeachment against William W. Belknap, and that leave is hereby given to Members to attend the trial for that purpose if they see fit to do so.

2034. A resolution empowering managers of an impeachment to take the testimony of Members was presented as a question of privilege.—On April 28, 1876,[19] Mr. Scott Lord, of New York, presented as a question of privilege, and as required by the rule of parliamentary law, the following resolution, which was agreed to without debate:

Resolved, That the managers have leave to examine any member of the Committee on Expenditures in the War Department and any Member of the House whom they deem necessary as a witness on the trial of the articles of impeachment against William W. Belknap, and that leave is hereby given to Members to attend the trial for that purpose if they see fit to do so.

2035. The inability of a manager to attend a session of an impeachment trial is announced by his associates.

No question was made on an occasion during the Swayne trial when less than a quorum of the managers were in attendance.

On February 17, 1905,[20] in the Senate sitting for the impeachment trial of Judge Swayne, the managers attended, with the exception of Mr. Manager David H. Smith, of Kentucky.

Before proceedings began, Mr. Manager Henry D. Clayton, of Alabama, announced:

Mr. President, Mr. Manager Smith, of Kentucky, has requested me to say to the court that he is unable to attend to-day's session on account of sickness.

2036. On February 20, 1905,[21] the Senate, sitting for the impeachment trial of Judge Charles Swayne, Mr. Manager Marlin E. Olmsted, of Pennsylvania, said:

Mr. President, I desire to announce the unavoidable absence to-day of Managers Palmer, Powers, of Massachusetts; Perkins and Smith, of Kentucky. We shall proceed as best we may in their absence.

No question was made as to the fact that only three of the seven managers—less than a quorum—were in attendance.

2037. The House thanked its managers for their services in the Swayne impeachment trial.— On March 3, 1905,[22] Mr. Swager

[17] Second session Eighth Congress, Journal, p. 105 (Gales and Seaton, ed.).
[18] First session Forty-fourth Congress, Journal, p. 880.
[19] First session Forty-fourth Congress, Record, p. 2818.
[20] Third session Fifty-eighth Congress, Record, p. 2776.
[21] Third session Fifty-eighth Congress, Record, p. 2899.
[22] Third session Fifty-eighth Congress, Record, p. 3988.

Sherley, of Kentucky, by unanimous consent, offered this resolution, which was agreed to by the House:

Resolved, That the thanks of the House be, and are hereby, extended to the managers on behalf of the House in the impeachment proceedings of Judge Charles Swayne before the Senate of the United States, to wit, Henry W. Palmer, Samuel L. Powers, Marlin E. Olmsted, James B. Perkins, David A. De Armond, Henry D. Clayton, and David H. Smith, for the able and efficient manner in which they discharged the onerous and responsible duties imposed upon them.

2038. Forms of subpoena and compulsory process issued by House committee to produce persons and papers for Blount impeachment.—In the proceedings for the impeachment of William Blount in 1797–8, the managers of the House of Representatives issued a subpoena in the following form: [23]

To John Rogers, resident in the Cherokee Nation:

Whereas the House of Representatives of the United States did, on the 8th day of July, in the year of our Lord one thousand seven hundred and ninety-seven, resolve as follows, to wit:

"*Resolved*, That a committee be appointed to prepare and report articles of impeachment against William Blount, a Senator of the United States, impeached by this House, of high crimes and misdemeanors, and that the said committee have power to send for persons, papers, and records.

"*Ordered*, That Mr. Sitgreaves, Mr. Baldwin, Mr. Dana, Mr. Dawson, and Mr. Harper be a committee, pursuant to the said resolution."

And whereas the House of Representatives of the United States did, on the 10th day of July, in the year aforesaid, further resolve and order, as follows, to wit:

"*Resolved*, That the committee appointed to prepare and report articles of impeachment against William Blount, a Senator of the United States, impeached by this House, of high crimes and misdemeanors, be authorized to sit during the recess of Congress.

"*Ordered*, That Mr. Dana be excused from serving on the committee appointed to prepare and report articles of impeachment against William Blount, a Senator of the United States, and that Mr. Bayard be of the said committee in his stead."

You are hereby required, in pursuance of the powers vested in us, the said committee, by the resolutions and orders aforesaid, that, laying aside all manner of business and excuses whatsoever, you be and appear forthwith, in your proper person, before us, the said committee, at the statehouse, in the city of Philadelphia, to be examined touching the premises, and to testify your knowledge therein: And that you bring with you all such papers and documents touching the same as may be in your hands and possession; and herein fail not, at your peril.

Given under our hands and seals at the city of Philadelphia, in committee aforesaid, the 10th day of July, in the year aforesaid.

S. SITGREAVES.
ABR. BALDWIN.
J. DAWSON.
ROBT. G. HARPER.
J. A. BAYARD.

2039. In the proceedings for the impeachment of William Blount, in 1797–8, the managers for the House of Representatives issued orders of arrest in form as follows: [24]

UNITED STATES, to wit:

To Capt. William Eaton.

Whereas the House of Representatives of the United States did, on the eighth day of July, in the year one thousand seven hundred and ninety-seven, come to the following resolution, viz:

[23] Fifth Congress, Annals, p. 2330.
[24] Fifth Congress, Annals, p. 2324.

"*Resolved*, That a committee be appointed to prepare and report articles of impeachment against William Blount, a Senator of the United States, impeached by this House of high crimes and misdemeanors; and that the said committee have power to send for persons, papers, and records."

"*Ordered*, That Mr. Sitgreaves, Mr. Baldwin, Mr. Dana, Mr. Dawson, and Mr. Harper be a committee pursuant to the said resolution."

You are hereby authorized and required, in pursuance of the said authority vested in us as aforesaid, taking to your assistance such person or persons as you may deem necessary, to make strict and diligent search for Nicholas Romayne, now or late of the State of New York, practitioner of medicine; and him having found, to seize and apprehend, and to bring, together with his papers, in safe custody, before us, the committee aforesaid, at the city of Philadelphia, to be examined touching the premises. And all officers, civil and military, and all faithful citizens of the United States are required to be aiding and assisting to you, as there shall be occasion.

Given under our hands and seals, in committee aforesaid, at Philadelphia, the ninth day of July, in the year aforesaid.

S. SITGREAVES.
ABR. BALDWIN.
SAML. W. DANA.
J. DAWSON.
ROBT. G. HARPER.

UNITED STATES, to wit:

To Major Thomas Lewis.

Whereas the House of Representatives of the United States did, on the eighth day of July, in the year of our Lord, one thousand seven hundred and ninety-seven, resolve as follows, to wit:

"*Resolved*, That a committee be appointed to prepare and report articles of impeachment against William Blount, a Senator of the United States, impeached by this House of high crimes and misdemeanors, and that the said committee have power to send for persons, papers, and records.

"*Ordered*, That Mr. Sitgreaves, Mr. Baldwin, Mr. Dana, Mr. Dawson, and Mr. Harper be a committee pursuant to the said resolution."

And whereas the House of Representatives of the United States did, on the tenth day of July, in the same year, resolve as follows, viz:

"*Resolved*, That the committee appointed to prepare and report articles of impeachment against William Blount, a Senator of the United States, impeached by this House of high crimes and misdemeanors, be authorized to sit during the recess of Congress.

"*Resolved*, That the said committee be instructed to inquire, and, by all lawful means, to discover the whole nature and extent of the offense whereof the said William Blount stands impeached, and who are the parties and associates therein."

"*Ordered*, That Mr. Dana be excused from serving on the committee appointed to prepare and report articles of impeachment against William Blount, a Senator of the United States, and that Mr. Bayard be of the said committee in his stead."

You are hereby authorized and required, in pursuance of the said authority vested in us as aforesaid, taking to your assistance such person or persons as you may deem necessary to make strict and diligent search for Maj. James Grant, now or late of the State of Tennessee, and him having found, to seize and apprehend, and to bring, together with his papers, in safe custody, forthwith before us, the committee aforesaid, at the city of Philadelphia, to be examined touching the premises. And all officers, civil and military, and all faithful citizens of the United States, are required to be aiding and assisting to you as there shall be occasion.

Given under our hands and seals, in committee aforesaid, at Philadelphia, the tenth day of July in the year aforesaid.

S. SITGREAVES.
ABR. BALDWIN.
J. DAWSON.
R. G. HARPER.
J. A. BAYARD.

The chairman of the managers also, in connection with the first process; issued instructions as follows:

To Capt. William Eaton.

SIR: You will proceed with the utmost expedition to New York, and, immediately on your arrival, see Mr. Harrison, or such other person as, in case of his absence, you are addressed to. Having advised with such person as to the proper mode of executing your commission, you will proceed, with such assistance as may be deemed necessary, to arrest the person expressed in your warrant, in the most secret manner, and to secure all his papers. Him and his papers you will then convey safely and expeditiously to this place.

When you see the person to be arrested, it will be proper to inform him that the committee is desirous of avoiding all unnecessary publicity, and that, by attending quietly with his papers, it may be prevented. You may let him understand at the same time that hesitation or resistance can have no other effect than to render the affair more disagreeable to him by making it public. On the road he will be treated by you as a fellow-passenger, but carefully attended to, and above all, the papers are to be most carefully guarded and kept in your own possession.

The same treatment may be observed toward any other person whom, with his papers, it may be resolved to arrest.

Whatever papers are seized you will immediately seal up in the presence of the person to whom they belong, if on the spot, or, if not, the presence of some other person, and will deliver them sealed to the committee.

It is scarcely necessary to add that the papers most likely to be important will be letters from William Blount, and copies of letters sent to him. Such must be diligently sought and carefully secured.

I am, sir, your most obedient servant.

S. SITGREAVES, *Chairman of the Committee.*

PHILADELPHIA, *July 9, 1797.*

2040. Form of discharge issued to a witness before the House committee which investigated the impeachment charges against William Blount.—In the proceedings for the impeachment of William Blount, in 1797–8, the managers of the House of Representatives issued a discharge to a witness in form as follows:[25]

These are to certify whom it may concern, that Dr. Nicholas Romayne, of the city of New York, having attended the committee of the House of Representatives of the United States, charged with the impeachment of William Blount, in pursuance of the process by them issued for that purpose, and having undergone such examination, and answered such interrogatories as were required and exhibited by the said committee; and having further entered into bonds for his appearance before the Senate of the United States as a witness on a trial of the said impeachment, has been, and hereby is, discharged by the said committee from any further attendance upon them.

Given in the committee aforesaid at the city of Philadelphia, on the twenty-second day of July, in the year of our Lord, one thousand seven hundred and ninety-seven.

By order of the committee.

S. SITGREAVES, *Chairman.*

2041. Form of subscription of witness to testimony and attestation thereof in examination preliminary to the Peck trial.—The Journal[26] of the Judiciary Committee, which in 1830 examined the charges against James H. Peck, judge of the United States court for the district of Missouri, shows that each witness subscribed to his testimony, which bore this further indorsement:

Sworn and subscribed before the Judiciary Committee on the — March, 1830.
Attest: JAMES BUCHANAN, *Chairman.*

The same form is found in later investigations.

2042. The House hearing attended when respondent's answer was read, it was held that the answer might not as of right be read again in the House during consideration of the replication.

[25] Fifth Congress, Annals, p. 2328.
[26] First session Twenty-first Congress, House Report, No. 325.

The House may take official cognizance of a paper listened to by the Committee of the Whole in attendance on an impeachment trial.

On March 23, 1868,[27] the House was considering the proposed replication to the answer of President Johnson to the articles of impeachment presented against him in the Senate by the House. This answer had been transmitted to the House from the Senate by message.

Mr. John W. Chanler, of New York, rising to a parliamentary inquiry, asked if the answer of the President might be read.

The Speaker [28] said:

The Chair rules that the message from the Senate can be read, but the answer of the President can not be read upon the demand of any Member. * * * When the answer was read in the Senate, the House, in accordance with its own resolution, was in attendance there for the specific purpose of hearing the proceedings. It is therefore to be presumed that every Member of the House was present and heard the answer read.

Mr. Chanler having called attention to the fact that the House attended in Committee of the Whole, the Speaker said:

The Chair overrules the point made by the gentleman on the grounds that the House takes official cognizance of all proceedings in the Committee of the Whole as well as in the House; whether the Speaker or the chairman of the Committee of the Whole presides does not affect the question.

2043. During the Johnson trial the House considered matters pertinent thereto under suspension of the rules.—On March 16, 1868,[29] while proceedings for the impeachment of President Johnson were going on, the House, by suspension of the rules, considered and agreed to the following:

Resolved, That except during the morning hour on Monday the rules may be suspended during the pendency of the impeachment of the President to proceed to the consideration of any matter which may be reported by the managers on the part of the House of Representatives.

2044. Instance wherein the managers consulted the House as to a proposition that an impeachment trial be postponed.

The House having taken no action when consulted as to postponement of an impeachment trial, the managers left the decision to the court.

Instance wherein the managers of an impeachment made a verbal report to the House on a matter arising during the trial.

On June 17, 1876,[30] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, Mr. Jeremiah S. Black, of counsel for the respondent, moved "that this cause be now continued until some convenient day in the month of November."

Mr. Manager Scott Lord said:

Mr. President and Senators, under circumstances which I need not now here detail, surrounding this case, the managers have concluded to ask leave on this motion to consult with the House. I will say now that whatever the conference with the House may result in and whatever the determination of the Senate may be we desire that the question of filing this paper shall be disposed of when there is a quorum; but on the question of postponement under all the

[27] Second session Fortieth Congress, Globe, pp. 2073, 2079, 2080.
[28] Schuyler Colfax, of Indiana, Speaker.
[29] Second session Fortieth Congress, Journal, pp. 530–532; Globe, pp. 1905, 1906.
[30] First session Forty-fourth Congress, Senate Journal, p. 953; Record of Trial, pp. 171, 172.

circumstances in which we find ourselves placed and the case placed we desire leave to confer with the House.

The Senate evidently in order to permit this consultation at once adjourned.

On the same day [31] Mr. Manager Lord made a verbal report to the House of Representatives, and then, on behalf of the managers, proposed this resolution:

Whereas in the impeachment of William W. Belknap the defendant has moved for a continuance now on account of the lateness of the session, with the difficulty which will probably attend the retaining of a full organization of the court and the urgency of other business.

Resolved, That the managers be authorized to consent to a continuance until the — day of November next.

Considerable debate arose over this proposition, there being a manifest feeling that the Senate should assume the responsibility of the decision. Mr. Manager Lord, in response to an inquiry by Mr. Fernando Wood, of New York, said that undoubtedly the Senate, like any other court, had the absolute right to postpone the trial without the assent of the managers for the House, and Mr. Samuel J. Randall, of Pennsylvania, thereupon urged that as they had that power they should exercise it.

Mr. John H. Reagan, of Texas, proposed the following substitute for the proposition of the managers:

Resolved, That upon the information communicated by the managers with reference to the impeachment of W. W. Belknap, the House of Representatives, with renewed assurances of confidence in the managers to whom the conduct of the trial has been committed, authorize them to act upon the subject of their communication as to them shall under all the circumstances of the case seem proper.

A motion for the previous question showed an equal division of the House, the Speaker pro tempore casting the deciding vote on a vote by tellers. A disposition to resort to dilatory proceedings being manifested the House dropped the matter and proceeded to other business.

On the next day, in the Senate sitting for the trial, Mr. Manager Lord said:

Mr. President, in regard to the application of the defendant to adjourn the trial to November next, the managers have reported to the House the proceedings in the court of impeachment on Saturday last; the House has taken no action in the premises, and the managers therefore leave the question of such postponement with the court.

The Senate denied the application for a postponement.

2045. A proposition to impeach a civil officer of the United States is presented as a question of constitutional privilege.—On January 10, 1843,[32] Mr. John M. Botts, of Virginia, as a privileged subject, submitted the following:

I do impeach John Tyler, Vice-President, acting as President of the United States, of the following high crimes and misdemeanors:

First. I charge him with gross usurpation of power and violation of law in attempting to exercise a controlling influence over the accounting officers of the Treasury Department by ordering the payment of accounts of long standing that had been rejected for want of legal authority to pay, etc.

[31] House Journal, pp. 1116, 1117; Record, pp. 3871–3874.
[32] Third session Twenty-seventh Congress, Journal, p. 159; Globe, p. 145.

[The arraignment continues at considerable length, there being nine charges in all.]

Mr. Horace Everett, of Vermont, submitted that the proposition of Mr. Botts did not take precedence on the ground of privilege, and therefore was not in order according to the routine of business as established by the rule.

The Speaker [33] decided that as by the Constitution it was a privilege of the House of Representatives to institute proceedings against the President, he considered that the present was a privileged proceeding and should take precedence of all other proceedings.

The record of debates gives the Speaker's explanation for his ruling. He said that since the present Speaker had been in the chair there had been no case of this kind before the House, and only two cases since the beginning of the Government. The first was that of Chief Justice Chase,[34] in which no question like the one now raised was presented. That case was then considered and acted upon by the House as a privileged question. Mr. Randolph rose in his seat, and, without any resolution or specific charges, after some remarks on the conduct of Judge Chase, moved for a committee to take into consideration the propriety of impeaching him. The matter went on day after day, and by the universal acquiescence of the House took preference of all other business as a privileged question. In addition to this the Chair considered this a high constitutional question, paramount to all others, without reference to the rules of the House.[35]

2046. On January 7, 1867,[36] Mr. James M. Ashley, of Ohio, as a question of privilege, submitted the following:

I do impeach Andrew Johnson, Vice-President and Acting President of the United States, of high crimes and misdemeanors.

I charge him with a usurpation of power and violation of law—

In that he has corruptly used the appointing power;

In that he has corruptly used the pardoning power;

In that he has corruptly used the veto power;

In that he has corruptly disposed of public property of the United States;

In that he has corruptly interfered in elections, and committed acts which, in contemplation of the Constitution, are high crimes and misdemeanors: Therefore,

Be it resolved, That the Committee on the Judiciary be, and they are hereby, authorized to inquire into the official conduct of Andrew Johnson, Vice-President of the United States, discharging the powers and duties of the office of President of the United States, and to report to the House whether, in their opinion, the said Andrew Johnson, while in said office, has been guilty of acts which were designed or calculated to overthrow, subvert, or corrupt the Government of the United States, or any Department or officer thereof; and whether the said Andrew Johnson has been guilty of any act, or has conspired with others to do acts, which, in contemplation of the Constitution, are high crimes or misdemeanors, requiring the interposition of the constitutional powers of this House; and that said committee have power to send for persons and papers and to administer the customary oaths to witnesses.

Mr. William E. Finck, of Ohio, made a point of order, questioning whether the matter was privileged.

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[33] John White, of Kentucky, Speaker.

[34] See section 2342 of this volume.

[35] The Constitution provides: "The House of Representatives shall have the sole power of impeachment." (Art. I, section 2.)

"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." (Art. II, section 4.)

[36] Second session, Thirty-ninth Congress, Journal, p. 121; Globe, p. 320.

The Speaker[37] ruled that it was privileged, saying that in the Twenty-seventh Congress, by the then Speaker, it was decided, on the point raised by Horace Everett, of Vermont, that it was a question of privilege.[38]

2047. On December 2, 1884.[39] Mr. John F. Follett, of Ohio, submitted as a matter of privilege the following:

I do impeach Lot Wright, United States marshal of the southern district of Ohio, of high crimes and misdemeanors.

I charge him with usurpation of power and violation of law—

In that he appointed a large number of general and special deputy marshals to serve at the several voting precincts in the city of Cincinnati, in the State of Ohio, at an election of Members of Congress held in said city on the 14th day of October, A.D. 1884, and armed said deputy marshals with pistols and other deadly weapons, said to have been furnished by the War Department of the United States Government, etc., * * * Therefore,

Resolved, That the Committee on Expenditures in the Department of Justice be required and directed, as soon as the same can reasonably be done, to investigate such charges and report to this House—

First. How many deputy marshals, general and special, were appointed and authorized by said United States marshal for the southern district of Ohio, etc. * * *

Resolved, That in making such investigation the said committee be empowered to appoint a subcommittee of three, consisting of the chairman of said committee and such other two members thereof as he may select, which subcommittee shall have full power to meet and hold its sessions at such times and places as may seem proper, to send for persons and papers, to compel the attendance of witnesses and to require them to testify, to employ a stenographer, and to incur any and all such necessary and reasonable expenditures as may be deemed requisite for the purposes of such investigation, such expenditures to be paid out of the contingent fund of the House.

Mr. J. Warren Keifer, of Ohio, made the point of order that the resolutions were not in order.

After debate the Speaker[40] said:

The present occupant of the chair decided during the last session of Congress that a mere proposition to investigate the conduct of a public officer, without proposing to impeach him, was not a matter of privilege under the rules of the House or under the Constitution of the United States; and the Chair has seen no reason to change that opinion. But the gentleman from Ohio (Mr. Keifer) is mistaken in his statement that the resolution now offered does not contain a proposition for impeachment. The resolution begins with an impeachment of this officer; and all that follows is a mere specification under the general charge made, together with a direction to a committee to make the investigation usual in such cases. The proceeding corresponds precisely with that adopted in the Twenty-seventh Congress, when an attempt was made to impeach the then President, John Tyler, and adopted afterwards in the Thirty-ninth Congress, when Mr. Ashley, then a Member from Ohio, rose in his place on the floor, made charges against the then President, Andrew Johnson, and asked for an investigation. * * * It is admitted that the resolution now offered does contain a proposition to impeach a public officer who is impeachable under the Constitution; but it is insisted that it does not present a matter of privilege under the Constitution or rules of the House, because, in the first place, it contains other matter; that is to say, it directs the committee to take certain evidence in the case which it is claimed is not pertinent to the charges made.

It may be, or it may not be, that the resolution does direct the committee to take what the House might afterwards decide to be incompetent evidence upon a charge of this character. But that, of course, is not a question for the Chair to determine. It is the province of the House to decide, when the resolution comes before it, how far it shall direct the committee to proceed in the investigation or as to what charges it shall investigate.

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[37] Schuyler Colfax, of Indiana, Speaker.

[38] Other resolutions were presented on the same subject, but not as questions of privilege. Journal, second session Thirty-ninth Congress, pp. 118, 119.

[39] Second session Forty-eighth Congress. Journal, pp. 27, 28; Record, pp. 17–19.

[40] John G. Carlisle, of Kentucky, Speaker.

Again, it is objected that this inquiry should be made by the Committee on the Judiciary, and not by the Committee on Expenditures in the Department of Justice. Of course, if a proposition to impeach a public officer should be submitted to the Chair for reference, the Chair, under the rules of the House, would send it to the Committee on the Judiciary; but it is always in the power of the House itself to determine what committee shall conduct an investigation or consider and report upon any matter. So it seems to the Chair that under all of the rulings heretofore made this presents a matter of privilege, and the House can determine for itself how far the committee shall proceed in the investigation, what committee shall have charge of it, and what matters shall be investigated.

2048. On December 10, 1895,[41] Mr. William E. Barrett, of Massachusetts, presented as a question of privilege the following:

I do impeach Thomas F. Bayard, United States ambassador to Great Britain, of high crimes and misdemeanors on the following grounds:

Whereas the following report of a speech, delivered before the Edinburgh Philosophic Institution, by Hon. Thomas F. Bayard, ambassador of the United States of America at the Court of Great Britain, is published in the London News under date of November 8, 1895:

"The opening address of the Edinburgh Philosophic Institution was delivered last night by Mr. Bayard, the ambassador of the United States of America, who selected for the subject 'Individual freedom the germ of national progress and permanence.' In his own country, he said, he had witnessed the insatiable growth of that form of State socialism styled 'protection' which he believed had done more to foster class legislation and create inequality of fortune, to corrupt public life, to banish men of independent mind and character from the public councils, to lower the tone of national representation, blunt public conscience, create false standards in the popular mind, to familiarize it with reliance upon State aid and guardianship in private affairs, divorce ethics from politics, and place politics upon the low level of a mercenary scramble than any other single cause," etc. [The extract is quoted at length.]

And whereas such reflections on the Government's policy and people of the United States by an ambassador of the United States to a foreign country and before a foreign audience is manifestly in serious disregard of the proprieties and obligations which should be observed by an official representative of the United States abroad, and calculated to injure our national reputation.

Be it resolved by the House of Representatives, That the Committee on Foreign Relations be directed to ascertain whether such statements have been publicly made; and, if so, to report to the House such action, by impeachment or otherwise, as shall be proper in the premises. For the purpose of this inquiry the committee is authorized to send for persons and papers.

Mr. Charles F. Crisp, of Georgia, made the point of order that this did not constitute a question of privilege.

During the debate the precedents of February 4 and December 2, 1884,[42] were cited. The Speaker,[43] in ruling, said:

It seems to the Chair that there is a great distinction between the two cases. The Chair has examined the decision of the Speaker of the House made on the 2d day of December, 1884, and sees no reason why he should not adopt that opinion. The Chair therefore overrules the point of order.[44]

2049. Although a report as to an impeachment be laid on the table, the right to move again an impeachment in the same case is not precluded.—On December 6, 1867,[45] the House was considering the report of the Judiciary Committee recommending the impeachment of Andrew Johnson.

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[41] First session Fifty-fourth Congress, Journal, p. 37; Record, p. 115.
[42] See sections 2047 and 2050.
[43] Thomas B. Reed, of Maine, Speaker.
[44] For a similar instance wherein Mr. Speaker Colfax held that a proposition to impeach Charles Francis Adams, minister to England, was privileged, see Globe, first session Fortieth Congress, pp. 778, 779.
[45] Second session Fortieth Congress, Globe, p. 65.

Mr. John F. Farnsworth, of Illinois, rising to a parliamentary inquiry, asked whether, if the subject be laid on the table, it would prevent any gentleman from calling it up as a question of privilege and moving the impeachment of the President.

The Speaker [46] said:

If this subject be laid on the table, no gentleman can call up this report. He can propose to impeach the President or any other officer of the Government on any day during the session, and that could be done even though the President should have been impeached and acquitted by the Senate.

2050. A mere proposition to investigate the conduct of a civil officer is not presented as a matter of constitutional privilege, even though impeachment may be contemplated as a possibility.—On February 4, 1884,[47] Mr. William M. Springer, of Illinois, presented the following resolution, claiming it to be a question of privilege:

Resolved, That the petition of Richard W. Webb, and accompanying statement of charges against Samuel B. Axtell, chief justice of the supreme court of the Territory of New Mexico and judge of the first judicial district thereof, be referred to the Committee on the Judiciary and printed, and that the Committee on the Judiciary be directed to inquire and ascertain whether the allegations * * * be true, * * * and report thereon to the House such action, to be taken by impeachment or otherwise, as they may advise; and in making such examination and investigation the said committee have power to send for persons and papers.

Mr. John A. Kasson, of Iowa, made the point that this was not such a question as enabled the memorial to have present consideration. If it were entitled to consideration, one person who might or might not be responsible might spread before the country charges which had not been examined by any committee.

In sustaining the point of order the Speaker [48] said:

The Chair will state that, having looked at the memorial, he finds that it does contain charges against a judge of the United States court in the Territory of New Mexico. Upon that the gentleman from Illinois offers a resolution that the memorial and charges be referred to the Committee on the Judiciary for investigation. The question is made that this is not a matter of privilege. * * * If a Member on the floor should prefer articles of impeachment against a public officer the Chair has no doubt that it would be a privileged matter under the Constitution, because the House possesses the power of impeachment. But this is not a resolution proposing to impeach anyone. It simply instructs the Committee on the Judiciary to inquire into the truth or falsity of certain charges made against a public officer in a memorial which has been presented. The inquiry may result in an impeachment or it may not.

2051. A resolution directly proposing impeachment is privileged; but the same is not true of one proposing investigation with a view to impeachment.—On December 2, 1867,[49] Mr. William E. Robinson, of New York, claiming the floor for a question of privilege, offered the following resolution:

Resolved, That the Committee on Foreign Affairs be instructed to inquire into the conduct of William B. West, American consul at Dublin, in Ireland, regarding American prisoners in that city and to report thereon forthwith, to the end that if he has been guilty of conduct which would be liable to impeachment this House may take measures to have articles of impeachment presented to the Senate.

Mr. John F. Farnsworth, of Illinois, made the point of order that this did not involve a question of privilege.

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[46] Schuyler Colfax, of Indiana, Speaker.
[47] First session Forty-eighth Congress, Journal, p. 495; Record, p. 871.
[48] John G. Carlisle, of Kentucky, Speaker.
[49] Second session Fortieth Congress, Journal, p. 9; Globe, p. 4.

The Speaker [50] said:

The gentleman from Illinois rises to a question of order, that as the resolution does not positively propose impeachment of this consul it is not a question of privilege. The Chair sustains the point of order.

Thereupon Mr. Robinson modified his resolution to read as follows:

Resolved, That William B. West, consul of the United States at Dublin, Ireland, be impeached before the Senate.

The Speaker said:

That is a question of privilege, and can be introduced for reference or action.

The resolution was referred to the Committee on Foreign Affairs.

2052. On November 21, 1867,[51] Mr. William E. Robinson, of New York, as a question of privilege, submitted the following resolution:

Whereas Charles Francis Adams, United States minister to Great Britain, has been charged with neglect of duty toward American citizens in England and Ireland by failing to secure their rights as such citizens: Therefore,

Be it resolved, That the Committee on Foreign Affairs be instructed to inquire into the foregoing charge and to report thereon forthwith, to the end that, if the charge be true, articles of impeachment against said Charles Francis Adams may be presented by this House to the Senate of the United States; that the President of the United States be requested to telegraph to the said Charles Francis Adams immediately to demand his passports and to return home; that the Secretary of State be instructed to communicate to this House all correspondence to and from the Department for the two years last past on the arrest, imprisonment, trial, or conviction of any American citizen, or any person claiming to be such, in Great Britain and Ireland, without reference to its public effect to be considered, if need be, in secret session of this House.

The resolution having been read, the Speaker [52] said:

The Chair rules that this resolution is a question of privilege, as it proposes an impeachment of an officer of the Government.

2053. Impeachment is a question of constitutional privilege which may be presented at any time irrespective of previous action of the House.—On March 3, 1879,[53] the regular order of business was the report of the Committee on Expenditures in the State Department proposing articles of impeachment against George F. Seward, late consul-general at Shanghai, China, and now minister plenipotentiary to China.

Mr. Omar D. Conger, of Michigan, made the point of order that the House having referred the subject-matter of the investigation of charges against Mr. Seward to the Committee on the Judiciary it was not in order for the Committee on Expenditures in the State Department to take further action on the case.

The Speaker [54] overruled the point of order on the ground that the subject referred to the Committee on the Judiciary was the answer of the said Seward in response to the order of the House requiring him to show cause why he should not be declared in contempt of the House, and also on the further ground that the question of impeachment was one of constitutional privilege which could be raised or presented at any time by any Member of the House.

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[50] Schuyler Colfax, of Indiana, Speaker.
[51] First session Fortieth Congress, Journal, p. 256; Globe, p. 778.
[52] Schuyler Colfax, of Indiana, Speaker.
[53] Third session Forty-fifth Congress, Journal, p. 621; Record, pp. 2347, 2348.
[54] Samuel J. Randall, of Pennsylvania, Speaker.

2054. A resolution for discontinuing impeachment proceedings, but not respectful to the House, was ruled not to be privileged.—On May 18, 1868,[55] Mr. Alexander H. Jones, of North Carolina, offered as involving a question of privilege, the following:

Whereas this House did in bad judgment and hot haste pass a resolution and articles of impeachment against Andrew Johnson, President of the United States, and appointed managers to conduct the suit before the high court of the Senate; and whereas it has been abundantly proven that there was no cause or plausible pretext for the same; and whereas the Senate and the country labor under great excitement and embarrassment: Therefore,

Be it resolved, That said managers be instructed forthwith to withdraw said suit, that the House may be redeemed, the Senate relieved, and the country given repose.

Mr. Elihu Washburne, of Illinois, having objected, the Speaker[56] held:

The Chair will rule on the question. He thinks this is not a question of privilege. The preamble contains a reflection on the House. It is unparliamentary on the part of any Member to reflect upon the action of the House in the language used in the preamble. * * * It is not a parliamentary preamble and resolution for the consideration of the House, not being respectful in its terms to the House.

[55] Second session Fortieth Congress, Globe, p. 2259.
[56] Schuyler Colfax, of Indiana, Speaker.

Function of the Senate in Impeachment*

1. Provision of the Constitution. Section 2055.[1]
2. English precedents as to function of House of Lords. Section 2056.[2]
3. Does the Senate sit as a court. Sections 2057, 2058.[3]
4. Assumes jurisdiction by a major vote. Section 2059.
5. Competency as related to vacant seats. Section 2060.
6. Challenge for disqualifying personal interest. Sections 2061, 2062.
7. The quorum. Section 2063.
8. Relations to the House. Section 2064.
9. The presiding officer. Sections 2065, 2067.[4]
10. Duration of trial. Section 2068.

2055. The sole power of trying impeachments is conferred on the Senate by the Constitution.

Senators sitting for an impeachment trial are required by the Constitution to be on oath or affirmation.

The Constitution requires the Chief Justice to preside when the President of the United States is tried before the Senate.

"Two-thirds of the Members present" are required by the Constitution for conviction on impeachment.

The Constitution limits judgment in impeachment cases to removal from office and disqualification to hold office.

A person convicted in an impeachment trial is still liable, under the Constitution, to the punishment of the courts of law.

The Constitution, in Article I, section 3, provides:

The Senate shall have the sole power to try all impeachments. When sitting for that purpose, they shall be on oath or affirmation. When the President of the United States is tried, the Chief Justice shall preside: and no person shall be convicted without the concurrence of two-thirds of the Members present.

Judgment in cases of impeachment shall not extend further than to removal from office and disqualification to hold and enjoy any office of honor, trust, or profit under the United States. But the party convicted shall, nevertheless, be liable and subject to indictment, trial, judgment, and punishment according to law.

2056. Under the parliamentary law the Lords are the judges and may not impeach or join in the accusation.

The Lords may not, under the parliamentary law, proceed by

*Hinds' Precedents, vol. 3, p. 377.

[1] Senate asserts that it has the sole power to regulate the forms and procedure of the trial. Section 2324 of this volume.
Discussion of the Senate's power to enforce final judgment. Section 2158.

[2] In England the judgment of the Lords is given in accordance with the law of the land. Section 2155.

[3] Does the Senate sit as a court? Sections 2079, 2082, 2126, 2270, 2307.
Objections of Senators to evidence. Section 2268.

[4] See also, on subject of the presiding officer, subjects as follows: Functions and powers, sections 2082–2089; His decisions, sections 2084, 2193–2195, 2222; Directs preparation of Senate Chamber for a trial, section 2084; Chief Justice presides at trial of President, section 2082; Introduction of the Chief Justice, sections, 2421, 2422; Chief Justice not required to be sworn, section 2080; As to the vote of the Chief Justice, section 2098.

impeachment against a Commoner, except on complaint of the Commons.

Provisions of parliamentary law as to trial by impeachment of a Commoner for a capital offense.

In Chapter LIII, of Jefferson's Manual, the following is given in the "sketch of some of the principles and practices of England" on the subject of impeachments:

Jurisdiction. The Lords can not impeach any to themselves, nor join in the accusation, because they are the judges. (Seld. Judic. in Parl., 12, 63.) Nor can they proceed against a Commoner but on complaint of the Commons. (Ib., 84.) The Lords may not, by the law, try a Commoner for a capital offense, on the information of the King or a private person, because the accused is entitled to a trial by his peers generally; but on accusation by the House of Commons they may proceed against the delinquent, of whatsoever degree and whatsoever be the nature of the offense; for there they do not assume to themselves trial at common law. The Commons are then instead of a jury, and the judgment is given on their demand, which is instead of a verdict. So the Lords do only judge, but not try the delinquent. (Ib., 6, 7.) But Wooddeson denies that a Commoner can now be charged capitally before the Lords, even by the Commons, and cites Fitzharris's case, 1681, impeached for high treason, where the lords remitted the prosecution to the inferior court. (8 Grey's Deb., 325–327; 2 Wooddeson, 576, 601; 3 Seld., 1604, 1610, 1618, 1619, 1641; 4 Blackst., 25; 9 Seld., 1656; 73 Seld., 1604–1618.)

2057. In 1868, after mature consideration, the Senate decided that it sat for impeachment trials as the Senate and not as a court.

An anxiety lest the Chief Justice might have a vote seems to have led the Senate to drop the words "high court of impeachment" from its rules.

The Senate, as a Senate and not as a court, adopted rules for the Johnson trial; but on the insistence of the Chief Justice adopted them when organized for the trial.

In the Johnson trial the articles of impeachment were presented before the Chief Justice had taken his seat, although he had filed his written dissent from such procedure.

Written dissent of the Chief Justice from views taken by the Senate as to its constitutional functions in an impeachment trial.

Enunciation of Mr. Senator Summer's theory that the Senate was not a court and the Senators were not constrained by the obligations of judges in an impeachment trial.

On February 29, 1868,[5] the Senate, in its legislative capacity and before its organization for impeachment proceedings, began the consideration of a series of rules reported [6] by a select committee composed of Messrs. Jacob M. Howard, of Michigan; Lyman Trumbull, of Illinois; Roscoe Conkling, of New York; George F. Edmunds, of Vermont; Oliver P. Morton, of Indiana; Stephen C. Pomeroy, of Kansas, and Reverdy Johnson, of Maryland. The caption of this report was "Rules of Procedure and Practice in the Senate when Sitting as a High Court of Impeachment." At the outset of the discussion [7] Mr. Thomas A. Hendricks, of Indiana, made the objection that the rules not only proposed the method for organizing the Senate into a court, but also proposed regulations for the court itself. He conceived that it was not

[5] Second session Fortieth Congress, Senate Journal, p. 236; Globe, p. 1515.
[6] Senate Report No. 59.
[7] Globe, pp. 1520, 1521.

proper for the Senate as such to adopt rules to control the action of the court upon any question whatever that might become material during the trial.

During the discussion of the rules themselves, Mr. Oliver P. Morton, of Indiana, acting upon suggestions received since he had concurred in the report, called attention [8] to the use of the words "high court of impeachment" in Rules III and IV as submitted:

They both used language which may, perhaps, lead to trouble, and give rise to a different theory in regard to the character of the body that is to try this impeachment. It is provided that the Senate shall resolve itself into a high court of impeachment. Is there any authority in the Constitution for that, or is there any propriety in it? Is not this impeachment to be tried simply by the Senate of the United States? While the Senate is engaged in the trial, does it lose the character of the Senate and become a court? If we shall allow ourselves to contemplate that idea, may it not lead to consequences that we do not desire, and to difficulties? The Constitution seems to contemplate that this impeachment shall be tried by the Senate. It says: "The Senate shall have the sole power to try all impeachments," and "when sitting"—that is, the Senate, when sitting—"for that purpose they shall be on oath or affirmation." That is all that is required, that the Senate, when sitting for that purpose, shall be on oath or affirmation. But we are here proposing to resolve ourselves into another character, we are to cease to be a Senate and become a court. If we follow out that theory, there may be many little consequences attaching to it before we get done with it that we do not anticipate. Why not preserve the simple idea that this impeachment is to be tried by the Senate of the United States as the Senate and nothing else? What use have we got for the phraseology "resolving itself into a high court of impeachment?" I object to the use of the word "high," in that connection, anyhow. But the argument made by my colleague suggests that the theory which we thus seem to recognize may involve other consequences that we do not now contemplate; and although I assented to these rules, and would regret now to find fault, yet it occurs to me, from the suggestion made and from looking at the Constitution itself, that this impeachment, after all, is to be tried simply by the Senate of the United States.

Debate at once arose [9] and there was a citation of precedents to show that in former impeachment trials the words "high court of impeachment" had been used, although Mr. Conkling argued that these words had been used rather by the Secretary in recording the proceedings than by the Senate itself.

Mr. Orris S. Ferry, of Connecticut, moved to strike out the word "high," and announced that if that should be agreed to, he would propose further amendments with the object of removing the idea that the Senate was in such proceedings a distinct court.

Mr. Ferry's motion was disagreed to,[10] yeas 16, nays 21.

The question was not settled by this vote, however, but recurred again and again. On March 2,[11] Mr. Hendricks proposed an additional rule, as follows:

When the Senate sits as a high court of impeachment in a case in which the Chief Justice must preside, such of the foregoing rules as apply to the trial shall be considered and adopted by the court before they shall have force.

In support of his motion Mr. Hendricks argued:

I am not able to see that there ought to be a doubt on this question. If the Chief Justice must preside when the Senate shall try the case, he sought to preside when the Senate decides how it will try the case, what forms of proceeding shall be observed, what rights shall be secured to counsel, what rights shall be reserved to Senators. Many of these rules are exceedingly important.

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[8] Globe, p. 1521.
[9] Globe, pp. 1521–1526.
[10] Senate Journal, p. 237; Globe, p. 1526.
[11] Senate Journal, p. 244; Globe, pp. 1589, 1590.

* * * If the Constitution provides that the Chief Justice must preside here, and that this must be a court with the Chief Justice as the presiding officer when the trial takes place, ought we not to decide how the case shall be tried when he is in his seat? In a case where the Chief Justice must preside, is it proper that the Senate, in his absence, when the Vice-President or President pro tempore is occupying the chair, who may succeed in case the impeachment is successful—is it right with that organization of the Senate to prescribe the rules which shall govern the court which the Constitution itself provides for?

* * * These rules, among other things, confer upon the Chief Justice presiding the power to decide certain questions, questions of the admissibility of evidence. These may be very important. It is conferring upon him a power which he would not possess in the absence of the rule. Now, that is a power which he is to exercise in the court, which we confer upon him when not organized into the court and not under oath.

In reply Mr. Timothy O. Howe, of Wisconsin, suggested that the Chief Justice would have no vote in adopting the rules, and as to his decisions on the admissibility of evidence, he said:

We confer that power upon him in pursuance of the authority of the Senate to make rules for its government in any particular in which the Senate may be called upon to act, as the Constitution says we may. Now, in any possible contingency, if we have the authority at any time to confer the power mentioned in the seventh rule upon the presiding officer, does it make any possible difference whether we do it to-day or to-morrow, whether we do it when the Chief Justice is here or when he is absent. If I could see that it did, I might hesitate upon the point; but as the same identical individuals are to do the thing whenever it is done, I can not for my life see what difference it can make whether it is done on one day or another.

The amendment proposed by Mr. Hendricks was disagreed to without division.

Immediately thereafter [12] Rule XXIV was read, prescribing forms for subpoenas of witnesses and of the summons to the person impeached. In these forms occurred the words "Senate of the United States, sitting as a high court of impeachment." Mr. Conkling moved to strike out the words "sitting as a high court of impeachment" wherever they occurred.

This motion was agreed to without very extended debate, Mr. Cronkling stating that if his amendment should be adopted it would restore the forms to what they were in the trials of 1804, 1830, and 1862. Mr. Edmunds explained that the words objected to had been introduced to get a form applicable to all conditions, whether the Chief Justice, a Vice-President, or a President pro tempore should preside.

Mr. Conkling's motion was agreed to yeas 23, nays 12. This was not, however, regarded as very significant on the question as to the nature of the court. Mr. John Sherman, of Ohio, who voted for the motion, but championed the idea that the words high court should be retained as descriptive of the body, said that he did not consider it necessary, in summoning a witness, to inform him that the Senate was sitting as a high court of impeachment.

But on Rule XXV Mr. Conkling brought the question to issue [13] by moving an amendment which struck out the word "court."

Mr. Sherman said:

That this Senate is a court when it proceeds to try a case I think it does not need any very long speech to prove. We examine witnesses; we convict or acquit;

[12] Senate Journal, p. 246; Globe, pp. 1591, 1592.

[13] Senate Journal, p. 246; Globe, pp. 1593–1594. There is a discrepancy between the Journal and Globe, but the debate shows that the Globe must be correct.

we try a case; we are sworn; and if there is any element of a trial or any idea of a court that does not enter into our organization I do not know what it can be.

Mr. Conkling said:

The Constitution says that the Senate shall have the sole power to try all impeachments. It does not say that the Senate shall become a court ex officio; it does not say that there shall be a high court for the trial of impeachment, to be composed of the Senate and of the Chief Justice sitting ex officio. It says nothing of that kind, but simply that the Senate shall try all impeachments. Why not leave it there? If it is a court we do not destroy that character by omitting these superfluities from our rules. If it is not a court we do not clothe it with the ermine or the attributes of a court by putting in the rules that it is so.

Then why not take the thing precisely as we find it?

Mr. Edmunds said:

It is a matter of some regret to me and to those of us who differed from my friend from New York in committee, where we thought we had settled the matter, that he is not willing to take the decision of the Senate on Saturday, when we were pretty full, upon this very question, instead of bringing it up again now, after we have gone through with this whole thing. Of course he is perfectly justified in doing so if he thinks the importance of it demands that course on his part; but I am a little afraid that his fear of the canal board in his State being turned into a court has led him to be a little touchy on this subject.

On Saturday, it will be remembered, this very question was debated at great length, not an unnecessary length, but every gentleman expressed his views who chose to do so, and gave his reasons for them, and the precedents were referred to; and then upon the yeas and nays on the question of striking out the word "high" (in connection with which it was expressly stated by the Senator from Connecticut that if he succeeded in that he should follow it by the other motions which would leave the description of the body to be simply "the Senate," because it would be easier to get an affirmative vote upon striking out a word, which was, of course, a mere matter of form, than it would upon the whole) the proposition was voted down, and voted down upon a reference to the precedents.

I hold in my hand the Globe, showing those proceedings; and the first was the trial of Blount, in 1798, in which—I ask the attention of the Senator from New York to it—the formal resolution—not the entry of the Secretary, but the resolution of the Senate as offered and adopted—was "resolved, that at the next opening of the court of impeachment the president" shall do so and so. Then, when we come to the trial of Chase, which was referred to also in some parts of the proceedings, the expression "court of impeachment" appears only to be the entry of the Secretary, but in other parts of the proceedings it appears to be the judgment of the Senate itself. Then, when we come to the trial of Peck, on the question of the Senate's taking upon itself a judicial capacity, the formal resolution offered on the part of the committee appointed by the Senate to report rules in that case was:

"*Resolved*, That at 12 o'clock to-morrow the Senate will resolve itself into a court of impeachment."

So that we find ourselves from the beginning, in 1798, down to this time—and the case of Humphreys in 1862 is just the same—having adopted this phraseology as describing the Senate, when it was exercising this function, as sitting as a court, saying nothing now about the word "high." Then where is the use, after all the discussion we have had on this point and one decision of it in the face of these uniform precedents from the beginning to this time, of turning our faces back and oversetting the whole theory upon which these rules go?

Mr. Ferry said:

Whether the Senate, sitting for the trial of impeachments, be a court or not in ordinary language, whether that term as ordinarily used may properly enough be applied to it is one thing. Whether the Constitution calls it a court and designates it as a court is another thing. If that tribunal be a court according to the Constitution, I would like to have Senators who desire to retain this phraseology point out to me a statute on the face of the earth designating the presiding officer of the court in which a presiding officer has not somewhat more functions than Senators seems to be willing to attribute to the presiding

officer of this court of impeachment. And I feel thus because I wish to preserve simply to the Senate—not in relation to this particular case; I care nothing about it in this particular case one way or the other—but to preserve to the Senate, and the Members of the Senate only, their constitutional functions without interference from outside. As I suggested before, it is not worth while for me to go over the argument again, because, using this language in the rules which we are prescribing, we ourselves prejudge the question and estop ourselves. As it seems to me, by declaring that the Constitution makes this tribunal a court in the legal, constitutional signification of the term, we estop ourselves from claiming that none other than a Senator is a member of that court.[14]

To this Mr. Edmunds retorted:

I ask him if he does not know that the House of Lords in England from time immemorial has always been called the high court of Parliament; and if he does not know that in proceedings in impeachment in that court the lord chancellor or lord high steward, the president of the court, has no vote unless he be a member of that court by being a peer, by the constant practice and frequent decision of that body?

Mr. Conkling's motion was then agreed to—yeas 16, nays 13.

Then the rules were generally amended, on motion of Mr. Ferry, in such a way as to remove the word "court" or "high court of impeachment" wherever occurring,[15] and were agreed to.

On March 4 [16] the Senate met, and the President pro tempore laid before them the following communication:

To the Senate of the United States:

Inasmuch as the sole power to try impeachments is vested by the Constitution in the Senate, and it is made the duty of the Chief Justice to preside when the President is on trial, I take the liberty of submitting, very respectfully, some observations in respect to the proper mode of proceeding from the impeachment which has been preferred by the House of Representatives against the President now in office.

That when the Senate sits for the trial of an impeachment it sits as a court seems unquestionable.

That for the trial of an impeachment of the President, this court must be constituted of the Members of the Senate, with the Chief Justice presiding, seems equally unquestionable.

The Federalist is regarded as the highest contemporary authority on the construction of the Constitution; and in the sixty-fourth number the functions of the Senate "sitting in their judicial capacity as a court for the trial of impeachments" are examined.

In a paragraph explaining the reasons for not uniting "the Supreme Court with the Senate in the formation of the court of impeachments" it is observed that "to a certain extent the benefits of that union will be obtained from making the Chief Justice of the Supreme Court the president of the court of impeachments, as is proposed in the plan of the convention, while the inconveniences of an entire incorporation of the former into the latter will be substantially avoided. This was, perhaps, the prudent mean."

This authority seems to leave no doubt upon either of the propositions just stated. And the statement of them will serve to introduce the question upon which I think it my duty to state the result of my reflections to the Senate, namely, at what period, in the case of an impeachment of the President, should the court of impeachment be organized under oath as directed by the Constitution?

It will readily suggest itself to anyone who reflects upon the abilities and the learning in the law which distinguish so many Senators that besides the reason assigned in the Federalist there must have been still another for the provision requiring the Chief Justice to preside in the court of impeachment. Under the Constitution, in case of a vacancy in the office of President, the Vice President

[14] The discussion as to whether the Chief Justice would have a vote in the proceedings had already taken place (Globe, pp. 1585–1588) and had suggested the allied question of the nature of the Senate in this function.
[15] Senate Journal, p. 248; Globe, p. 1602.
[16] Senate Journal, pp. 798–800; Globe, p. 1644.

succeeds; and it was doubtless thought prudent and befitting that the next in succession should not preside in a proceeding through which a vacancy might be created.

It is not doubted that the Senate, while sitting in its ordinary capacity, must necessarily receive from the House of Representatives some notice of its intention to impeach the President at its bar; but it does not seem to me an unwarranted opinion, in view of this constitutional provision, that the organization of the Senate as a court of impeachment, under the Constitution, should precede the actual announcement of the impeachment on the part of the House.

And it may perhaps be thought a still less unwarranted opinion that articles of impeachment should only be presented to a court of impeachment; that no summons or other process should issue except from the organized court, and that rules for the government of the proceedings of such a court should be framed only by the court itself.

I have found myself unable to come to any other conclusions than these. I can assign no reason for requiring the Senate to organize as a court under any other than its ordinary presiding officer for the later proceedings upon an impeachment of the President which does not seem to me to apply equally to the earlier.

I am informed that the Senate has proceeded upon other views; and it is not my purpose to contest what its superior wisdom may have directed.

All good citizens will fervently pray that no occasion may ever arise when the grave proceedings now in progress will be cited as a precedent; but it is not impossible that such an occasion may come.

Inasmuch, therefore, as the Constitution has charged the Chief Justice with an important function in the trial of an impeachment of the President, it has seemed to me fitting and obligatory, where he is unable to concur in the views of the Senate concerning matters essential to the trial, that his respectful dissent should appear.

S. P. CHASE,
Chief Justice of the United States.

WASHINGTON, *March 4, 1868.*

This letter was referred to the select committee of which Mr. Howard was chairman.

Soon thereafter the managers presented themselves with the articles of impeachment, and delivered them to the Senate, the President pro tempore presiding.[17]

Then,[18] after the intervention of legislative business, the Senate agreed to the necessary resolutions for notifying the House of Representatives and the Chief Justice that on the following day "the Senate will proceed to consider the impeachment of Andrew Johnson, President of the United States," etc.

A resolution providing that a printed copy of the rules be furnished to the House of Representatives was agreed to, although Mr. Charles R. Buckalew, of Pennsylvania, objected that this should not be done until the court had been organized and had determined on rules.

On March 6,[19] after the organization for the trial of the articles of impeachment, the Chief Justice said, before putting the question on a resolution notifying the House of Representatives of the organization:

The Chair feels it his duty to submit a question to the Senate relative to the rules of proceeding. In the judgment of the Chief Justice the Senate is now organized as a distinct body from the Senate sitting in its legislative capacity. It performs a distinct function; the members are under a different oath; and the presiding officer is not the President pro tempore of the Senate, but the Chief Justice of the United States. Under these circumstances, the Chair conceives

[17] Senate Journal, pp. 800–807; Globe, pp. 1647–1649.
[18] Globe, pp. 1657–1658; Senate Journal, pp. 807, 808.
[19] Senate Journal, p. 811; Globe, p. 1701.

that rules adopted by the Senate in its legislative capacity are not rules for the government of the Senate sitting for the trial of an impeachment unless they be also adopted by that body. In this judgment of the Chair, if it be an erroneous one, he desires to be corrected by the judgment of the court, or of the Senate sitting for the trial of the impeachment of the President, which in his judgment are synonymous terms, and therefore, if he may be permitted to do so, he will take the sense of the Senate upon this question, whether the rules adopted on the 2d of March, a copy of which is now lying before him, shall be considered the rules of proceeding in this body. ["Question!"] Senators, you who think that the rules of proceeding adopted on the 2d of March should be considered as the rules of proceeding of this body will say "ay;" contrary opinion, "no." [The Senators having answered.] The ayes have it by the sound. The rules will be considered as the rules of proceeding in this body.

The journal of the Senate, in referring to proceedings in the trial, also refrains from the use of the words "high court of impeachment." [20]

The Chief Justice, however, in opening the daily sittings, directed the Sergeant-at-Arms to "open the court by proclamation." [21]

The answer of the President was also addressed to the "Senate of the United States, sitting as a court of impeachment." [22]

On June 3, 1868,[23] after the trial of the President had been concluded, Mr. Charles Sumner, of Massachusetts, presented to the Senate the following resolutions declaring the constitutional responsibility of Senators for their votes on impeachment:

Whereas a pretension has been put forth to the effect that the vote of a Senator on an impeachment is so far different in character from his vote on any other question that the people have no right to criticise or consider it; and whereas such pretension, if not discountenanced, is calculated to impair that freedom of judgment which belongs to the people on all that is done by their Representatives: Therefore, in order to remove all doubts on this question and to declare the constitutional right of the people in cases of impeachment—

1. *Resolved*, That, even assuming that the Senate is a court in the exercise of judicial power, Senators can not claim that their votes are exempt from the judgment of the people; that the Supreme Court, when it has undertaken to act on questions essentially political in character, has not escaped this judgment; that the decisions of this high tribunal in support of slavery have been openly condemned; that the memorable utterance known as the Dred Scott decision was indignantly denounced and repudiated, while the Chief Justice who pronounced it became a mark for censure and rebuke; and that plainly the votes of Senators on an impeachment can not enjoy an immunity from popular judgment which has been denied to the Supreme Court, with Taney as Chief Justice.

2. *Resolved*, That the Senate is not at any time a court invested with judicial power, but that it is always a Senate with specific functions, declared by the Constitution; that according to express words, "the judicial power of the United States is vested in one Supreme Court and such inferior courts as Congress may from time to time ordain and establish," while it is further provided that "the Senate shall have the sole power to try all impeachments," thus positively making a distinction between the judicial power and the power to try impeachments; that the Senate on an impeachment does not exercise any portion of the judicial power, but another and different power, exclusively delegated to the Senate, having for its sole object removal from office and disqualification therefor; that, by the terms of the Constitution, there may be, after conviction on impeachment, a further trial and punishment "according to law," thus making a discrimination between a proceeding by impeachment and a proceeding "according to law;" that the proceeding by impeachment is not "according to law," and is not attended by legal punishment, but is of an opposite character, and from beginning to end political, being instituted by a political body, an account of political offenses, being conducted before another political body having political power only, and ending in a judgment which is political only; and therefore the vote of a Senator

[20] Senate Journal, pp. 272, 276, etc.
[21] Globe Supplement, pp. 11, 28.
[22] Senate Journal, p. 829; Globe Supplement, p. 12.
[23] Senate Journal, p. 448; Globe, p. 2790.

on impeachment, though different in form, is not different in responsibility from his vote on any other political question; nor can any Senator on such an occasion claim immunity from that just accountability which the Representative at all times owes to his constituents.

3. *Resolved*. That Senators in all that they do are under the constant obligation of an oath, binding them to the strictest rectitude; that on an impeachment they take a further oath, according to the requirement of the Constitution, which says, "Senators, when sitting to try impeachment, shall be on oath or affirmation;" that this simple requirement was never intended to change the character of the Senate as a political body and can not have any such operation; and therefore, Senators, whether before or after the supplementary oath, are equally responsible to the people for their votes, it being the constitutional right of the people at all times to sit in judgment on their Representatives.

It does not appear that this resolution was ever acted on.

2058. During the Johnson trial the functions of the Senate sitting for an impeachment trial were discussed by managers and counsel for respondent.—In the course of the arguments during the impeachment trial of Andrew Johnson, President of the United States, the question as to whether or not the Senate sitting for the trial had the attributes of a court was discussed at length. Mr. Manager Benjamin F. Butler, of Massachusetts, argued [24] that it did not. Of the Senators who filed written opinions, Mr. Charles Sumner of Massachusetts, sustained at length the view that impeachment was a political and not a judicial proceeding.[25]

Mr. Benjamin R. Curtis, of Massachusetts, of counsel for the President, argued that the Senate was a court,[26] and Mr. Thomas A. R. Nelson, of Tennessee, also of counsel for the President, took the same view, arguing at length,[27] as did Mr. William S. Groesbeck, of Ohio, also of counsel for the President.[28] Mr. William M. Evarts, of counsel for the President, argued from both English and American precedents, that the Senate sat as a court.[29] Of the Senators who filed written opinions in the case, this view was sustained by Mr. Garrett Davis, of Kentucky.[30]

2059. The Senate, by majority vote, assumed jurisdiction to try the Belknap impeachment, although protest was made that a two-thirds vote was required.—On June 6, 1876,[31] in the Senate, sitting for the impeachment trial of William W. Belknap, late Secretary of War, Mr. Jeremiah S. Black, of counsel for the respondent, presented the following:

Senate of the United States sitting as a court of impeachment.

THE UNITED STATES OF AMERICA *v.* WILLIAM W. BELKNAP

Here in court comes the said William W. Belknap and moves the court now here to vacate the order entered of record in this cause setting aside and holding as naught the plea of him, said Belknap, by him first above in this cause pleaded, for the reason that said order was not passed with the concurrence of two-thirds

[24] Second session Fortieth Congress, Globe Supplement, p. 30.
[25] Pages 463, 464.
[26] Page 134.
[27] Pages 290, 291.
[28] Pages 310, 311.
[29] Pages 340, 341.
[30] Pages 438, 439.
[31] First session Forty-fourth Congress, Senate Journal, p. 948; Record of trial, pp. 162–164.

of the Senators present and voting upon the question of adopting and passing said order, as appears by the record in this cause.

WILLIAM W. BELKNAP.
J. S. BLACK,
MONTGOMERY BLAIR,
MATT H. CARPENTER.
Of Counsel.

The plea referred to was that the Senate had no jurisdiction to try the case, since Mr. Belknap had resigned before the impeachment was made.

At the previous sitting, on June 1, Mr. Carpenter had said: [32]

Speaking for myself only (not having consulted with my colleagues), I maintain that upon the whole record the order is void, for the reason that it was not concurred in by two-thirds of the Senators present and voting. Suppose a case in the Supreme Court, where only a majority of the judges need concur in the judgment; and suppose the record to show that only four judges concurred in the judgment while five dissented, but the minority directed the clerk to enter the judgment or order as the act of the court, and he should do so and certify it as such under the seal of the court. It is manifest, I think, that such judgment, if the dissent of the majority appeared of record, would be absolutely void, and would be so declared by any court where the judgment should come in question collaterally. I think this judgment is in the same category.

* * * * * * *

That we can raise these questions on a final hearing, is clear, because it can not be maintained that any question upon which conviction depends can be eliminated from such final determination by the action of less than the constitutional majority of two-thirds. Otherwise a mere majority of the Senate might defeat the constitutional provision.

In these cases of impeachment, if a mere majority can settle the question of jurisdiction, so a mere majority, by overruling a demurrer to the articles, can determine that the acts alleged to have been done or omitted by the respondent constitute in law a high crime or misdemeanor within the meaning of the Constitution; leaving the final judgment to rest only upon questions of fact or at the final hearing, none of these questions having been disposed of, some master tactician might first move a resolution declaring that the respondent had done or omitted the acts charged, and if sustained by a mere majority, might claim that the facts were settled, and that judgment must rest upon the question of law whether such facts amounted to a high crime or misdemanor.

In briefer and plainer terms, no conviction can take place under this provision of the Constitution, unless two-thirds of the Senators concur in regard to every element necessary to conviction, and first and conspicuous among these, must be the question of jurisdiction.

Mr. Manager Scott Lord had said. [32a]

On the point which the counsel has suggested, practically that a two-thirds vote is necessary on the question of jurisdiction, that Senators who voted that this court had not jurisdiction must therefore on the final vote, when the question is put, "Did this defendant take $1,500 on a given occasion and for such a purpose?" say "Not guilty," because of their views in regard to jurisdiction—on this point I say we shall be prepared to show that there is nothing whatever in the suggestion; in fact, that the whole practice of courts of impeachment has been in contravention of it; that the Constitution itself prevents any such possibility. Therefore when this question is raised in some proper form we shall desire to be heard upon it.

Mr. Allen G. Thurman, a Senator from Ohio, said: [33]

That question can be argued on the motion submitted by the counsel for the respondent. I suppose it can be argued at almost any time or in any way. In my judgment it never can be decided until we come to the final decision, but it can be argued on the motion submitted; although I think it is pretty clear, for rea-

[32] Record of trial, pp. 159, 161.
[32a] Pages 159, 160.
[33] Page 163.

sons that I am not at liberty to state now, that it can not be decided on any such motion as that submitted by the counsel.

And Mr. Black, of counsel for the respondent, concurred:

I will say now that, so far as I can see, the statement of the law upon this point as made by the Senator from Ohio [Mr. Thurman] is what meets with my view. I have not had time to consult with the other counsel in the case and do not know how they feel about it; but I think, whatever may be done with this motion or whenever it may be argued, it can not really be directly decided until the final determination of the case, and what we ought to have, threfore, the privilege of arguing the point at any time. It is a question that arises and will arise at every step of this case as we go on.

Mr. William Pinkney Whyte, a Senator from Maryland, proposed this order:

Ordered, That the Senate sitting as a court of impeachment adjourn until to-morrow at one o'clock p. m., when argument shall be heard upon the motion offered by the counsel for the respondent.

The order was disagreed to, yeas 18, nays 23.

On June 16 [84] Mr. Black, of counsel for the respondent, presented the following paper:

In the Senate of the United States sitting as a court of impeachment.

THE UNITED STATES OF AMERICA *v.* WILLIAM W. BELKNAP

And now, to wit, this 16th day of June, 1876, the said William W. Belknap comes into court, and being called upon to plead further to the said articles of impeachment, doth most humbly and with profoundest respect represent and show to this honorable court that on the 17th day of April last past he did plead to the said articles of impeachment, and in his said plea did allege that at the time when the House of Representatives of the United States ordered the said impeachment, and at the time when the said articles of impeachment were exhibited at the bar of the Senate against him, the said Belknap, he, the said Belknap, was and ever thereafter had been not a public officer of the United States, but a private citizen of the United States and of the State of Iowa; and that the plea aforesaid and all the matters and things therein contained were by him, said Belknap, fully verified by proofs, namely, by admissions of the said House of Representatives before said court; and the said Belknap further represents and shows to the court here that the truth and sufficiency of the plea pleaded by him as aforesaid were thereupon debated by the managers of the said House of Representatives and the counsel of this respondent, and thereupon submitted to this court for its determination and judgment thereon; and that such proceedings were thereupon had in this court on that behalf in this cause; that afterwards, to wit, on the 29th day of May last past, the members of this court, to wit, the Senators of the United States sitting as a court of impeachmen as aforesaid, did severally deliver their several judgments, opinions, and votes on the truth and sufficiency in law of the said plea, when and whereby it was made duly to appear that only thirty-seven Senators concurred in pronouncing said plea insufficient or untrue; whereas twenty-nine Senators sitting in said court, by their opinions and votes, affirmed and declared their opinion to be that said plea was sufficient in law and true in point of law; so that the said Belknap in fact saith that, on the day and year last aforesaid, twenty-nine Senators sitting in said court declared therein that the said Belknap having ceased to be a public officer of the United States by reason of his resignation of the office of Secretary of War of the United States before proceedings in impeachment were commenced against him by the House of Representatives of the United States, the Senate cannot take jurisdiction of this cause; and that seven Senators did not vote upon said question, and only thirty-seven Senators, by their votes, declared their opinion to be that the Senate could take jurisdiction of said cause. And afterwards thirty-seven Senators sitting in said court, and no more, concurred in a resolution declaring that "in the opinion of the Senate William W. Belknap is amenable to trial on impeachment for acts done as Secretary of War, notwithstanding his

[84] Senate Journal, pp. 952, 955, 959; Record of Trial, pp. 169–173.

resignation of said office," and that twenty-nine of said Senators sitting in said court, by their votes, affirmed and declared their opinion to be to the contrary thereof. And afterwards, on the day and year last aforesaid, it was proposed in said court that the President pro tempore of the said Senate should declare the judgment of the said Senate, sitting as aforesaid, to be that said plea of said respondent should be held for naught, and a vote was taken upon said proposition; and, as said vote showed, two-thirds of the said Senators present did not concur therein; but, on the contrary thereof, only thirty-six Senators did concur therein, and twenty-seven Senators then and there present, and voting on said proposition, did by their votes dissent from and vote against said proposition. All of which appears more fully and at large upon the record of this court in this cause, to which record he, said Belknap, prays leave to refer.

Therefore the said Belknap, referring to the Constitution of the United States, article 1, section 3, clause 6, which provides that "no person shall be convicted without the concurrence of two-thirds of the members present," (meaning on trial on impeachment,) avers that his said plea has not been overruled or held for naught by the Senate sitting as aforesaid, no such judgment having been concurred in by two-thirds of the Senators sitting in said court and voting thereon; but, on the contrary thereof, as the vote aforesaid fully shows, the said plea of the said respondent was sustained, and its truth in fact and sufficiency in law duly affirmed by the said Senate sitting as aforesaid, more than one-third of the Senators of said Senate, sitting as aforesaid, having by their votes so declared, to wit, twenty-seven Senators as aforesaid, and said twenty-seven Senators having by their votes declared and affirmed their opinion to be that said plea of said respondent was true in fact and was sufficient in law to prevent the Senate sitting as aforesaid from taking further cognizance of said articles of impeachment.

Wherefore the respondent avers that he has already been substantially acquitted by the Senate sitting as aforesaid; and that he, the said respondent, is not bound further to answer said articles of impeachment; the said order requiring this respondent to answer over not having been made with the concurrence of two-thirds of the said Senators sitting as aforesaid and voting upon the question of the passage of said order; and said order having been passed with the concurrence only of less than two-thirds of the said Senators sitting as aforesaid, and voting on the question of making and passing said order, the said order ought not to have been entered of record as an order of said court of impeachment in this cause; and said order appearing upon the whole record of said cause to be null and void as an order of said court.

And the said respondent prays the court now here, as he has before formally moved said court, to vacate said order, and the said respondent hereby prays said court that he may be hence dismissed.

WILLIAM W. BELKNAP,
MATT H. CARPENTER,
J. S. BLACK,
MONTGOMERY BLAIR.
Of Counsel for said Respondent.

The Senate thereupon adopted the following order, the first clause being agreed to by a vote of yeas 26, nays 24, and the second by a vote of yeas 21, and nays 16.

Ordered, That the paper presented by the defendant on the 16th instant be filed in this cause; and the defendant having failed to answer to the merits within ten days allowed by the order of the Senate of the 6th instant, the trial shall proceed on the 6th of July next as upon a plea of not guilty.

This question was discussed somewhat at length during the final arguments in this case, Messrs, Montgomery Blair,[35] J. S. Black,[36] and Matt. H. Carpenter,[37] sustaining the contention already made by them, and Messrs, Managers William P. Lynde[38] and Scott Lord[39] taking the opposing view.

[35] Record of Trial, p. 287.
[36] Page 315.
[37] Pages 333, 334.
[38] Pages 295, 296.
[39] Pages 335, 336.

The question had also been discussed briefly on July 6,[40] when the managers began to introduce testimony, Mr. Black having proposed the following:

The counsel for the accused object to the evidence now offered and to all evidence to support the opening of the managers, on the ground that there can be no legal conviction, the Senate having already determined the material and necessary fact that the defendant is not, and was not when impeached, a civil officer of the United States.

The question being submitted:

Shall the objection of counsel for the respondent be sustained?

it was decided in the negative without division.

2060. The Senate, in 1868, when certain States were without representation, declined to question its competency to try an impeachment case.—On February 29, 1868,[41] the Senate was proceeding to the consideration of rules of procedure for impeachments, the occasion being the proposed impeachment of Andrew Johnson, President of the United States, when Mr. Garrett Davis, of Kentucky, moved to recommit the rules with instructions as follows:

That the committee report as a substitute for the rules just read the following:

"That the Constitution of the United States having appointed the Senate to be the court to try all impeachments, and having provided that the Senate shall be composed of two Senators from each State, and the States of Virginia, North Carolina, South Carolina, Georgia, Alabama, Mississippi, Arkansas, Texas, Louisiana, and Florida having each chosen two Senators, and those Senators not having been admitted to their seats in the Senate, while they continue to be excluded the Senate can not be formed into a constitutional and valid court of impeachment for the trial of articles of impeachment preferred against Andrew Johnson, President of the United States."

Mr. Davis argued elaborately in favor of his motion, saying in the course of his remarks:

The motion that I make is based upon the idea that while the present Members of the Senate exclude ten States from representation in the body the Senators representing the remaining States, which are not excluded, have no right to form a court of impeachment, and can not do so until the ten States whose Senators have been excluded are admitted as Senators. I think myself that the motion is properly made at this time to the Senate, not to the court of impeachment. Whether the Senate will form itself into a court of impeachment or not is a Senatorial question. It is not a question for the court of impeachment to decide. It does not come before the court of impeachment at all, according to my judgment of the matter. The Senate must be in such condition as to numbers and representation from all the States that it has the constitutional power to resolve itself into a court of impeachment. Whether it be in that condition or not is a question not for the court to decide, but for the Senate, before it resolves itself into a court of impeachment to decide. It seems to me that that is the correct position in relation to that point. Being of that opinion, I will proceed at on great length with my remarks.

If the ten excluded States had never been in the rebellion, if they were now represented upon the floor of the Senate, could the Senate or could the two Houses of Congress exclude from representation in both Houses ten other States; and having excluded ten other States, could the remaining Senators from twenty-seven instead of thirty-seven States resolve themselves into a court of impeachment for the trial of the President? I presume that no Senator will answer that question in the affirmative. If that is conceded, to my mind it concedes the whole principle and the whole proposition, and I will proceed to assign one or two reasons why I believe so.

[40] Senate Journal, p. 261; Record of Trial, pp. 180, 181.
[41] Second session Fortieth Congress, Senate Journal, pp. 236, 237; Globe, pp. 1516–1520.

Any State that was in rebellion, after the rebellion was suppressed and after the State submitted itself to the Constitution and laws and authorities of the United States, which fact was admitted by her representation in the Senate or in the House, was as much in the Union as though that State had never been in the rebellion. I will take the State of Virginia. The State of Virginia has had a representative in the Senate since the suppression of the rebellion and since the time when there was a single arm raised against the authority of the United States; that Senator has served two sessions here since the rebellion was entirely suppressed; he was recognized by the Senate as a representative of the State of Virginia, and the Senate in taking that course toward him admitted that State to be in the Union as a State with all the rights and privileges which she would be entitled to under the Constitution as if she had never been in the rebellion at all. In the case of Luther *v.* Borden that principle is decided, and I will read a passage from it. The honorable Senator from Indiana [Mr. Morton] and the honorable Senator from Oregon [Mr. Williams] and all the Senators who support the Congressional policy of reconstruction seem to rely upon that case as their principal authority, at least the principal experiment of their authority. I will read one paragraph from that decision:

"Under this article of the Constitution it rests with Congress to decide what government is the established one in a State. For, as the United States guarantee to each State a republican government, Congress must necessarily decide what government is established in the State before it can determine whether it is republican or not. And when the Senators and Representatives of a State are admitted into the councils of the Union the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority."

There is the plain principle. It is in conformity to the principle of the law of post limine, too; it is in conformity to our Constitution. It is a declaration of the principle of the Constitution in these few and simple words, that when Congress has admitted Senators and Representatives from a State both the existence and authority of the government under which they were appointed and its republican form have been recognized by the proper constitutional authority.

Sir, it seems to me that this decision settles the question as to Virginia and as to Tennessee. The Senators, or at least a Senator from Tennessee and Senators from Virginia, and Representatives from both States, have been admitted by Congress to their seats in both Houses. That, this decision says, is a recognition by the proper constitutional authority of the governments under which those Senators and Representatives were appointed and of the republican form of the governments under which they were appointed.

Mr. Oliver P. Morton, of Indiana, replied, saying, in the course of his remarks:

The Constitution requires no other Senate for the trial of an impeachment than what is required for any other purpose. The same Senate that can pass a bill can sit in the trial of an impeachment. The Senator can find no difference in the Constitution. There is nothing in the Constitution that says there shall be two Senators here from every State; it says that to convict on impeachment shall require the votes of two-thirds of the Members present—that is what it says.

But, Mr. President, the Senator from Kentucky ignores one fact in his argument, which I think is of some importance in the consideration of this question: that is to say, he ignores the fact that there has been a rebellion. He treats the ten States which now have no representatives on this floor as being illegally and improperly excluded without cause. He omits any recognition of the fact that there has been a rebellion, that the people of those States have been in arms against the Government of the United States. He omits to mention the fact that they withdrew their Senators from this Chamber for a treasonable purpose, and that they engaged in hostility against the Government of the United States. These facts are material in the consideration of this question.

He says that every State in this Union is entitled to two Senators upon this floor. I controvert that proposition entirely. If the people of a State have destroyed their State government, if they have no legal State government that is authorized to elect Senators, I ask how they can have Senators upon this floor? If we regard these ten States as States in this Union, still the fact remains that they destroyed their loyal State governments, and they have no State governments that are legal and are recognized by the Government of the United States, and therefore they have no means under the Constitution of putting Senators upon this floor.

But, Mr. President, I do not think it worth while to undertake to follow the Senator in his argument. As I remarked before, I regard his presence here as a protest against his whole argument.

Mr. James A. Bayard, of Delaware, opposed the motion of Mr. Davis, but solely on the ground that the subject was not one for the decision of the Senate, but was for the court of impeachment to decide.

The motion to recommit was decided in the negative, yeas 2, nays 39.

On March 23, 1868,[42] after the Senate had organized for the trial of the President, after the articles of impeachment had been presented but before the reply had been made, Mr. Davis presented the following:

Mr. Davis, a Member of the Senate and of the Court of Impeachment, from the State of Kentucky, moves the court to make this order:

The Constitution having vested the Senate with the sole power to try the articles of impeachment of the President of the United States preferred by the House of Representatives, and having also declared that "the Senate of the United States shall be composed of two Senators from each State chosen by the legislatures thereof," and the States of Virginia, North Carolina, South Carolina, Georgia, Alabama, Mississippi, Arkansas, Louisiana, and Texas having, each by its legislature, chosen two Senators who have been and continue to be excluded by the Senate from their seats, respectively, without any judgment by the Senate against them personally and individually on the points of their elections, returns, and qualifications, it is

Ordered, That a court of impeachment for the trial of the President can not be legally and constitutionally formed while the Senators from the States aforesaid are thus excluded from the Senate; and this case is continued until the Senators from these States are permitted to take their seats in the Senate, subject to all constitutional exceptions to their elections, returns, and qualifications severally.

The question on agreeing to the order was taken without debate, and there appeared, yeas 2, nays 29. So the order was not agreed to.

2061. The doctrine of disqualifying personal interest as applied to a Senator sitting in an impeachment trial.

In 1868 the President pro tempore of the Senate voted on the final question at the Johnson trial, although a conviction would have made him the successor.

A Senator related to President Johnson by family ties voted on the final question of the impeachment without challenge.

A question as to the time when the competency of a Senator to sit in an impeachment trial should be challenged for disqualifying personal interest.

On March 5, 1868,[43] while the Senate was organizing for the trial of Andrew Johnson, President of the United States, and after the Chief Justice had taken the chair, the administration of the oath to Senators proceeded until the name of Mr. Benjamin F. Wade, of Ohio, was called. As Mr. Wade arose from his seat and advanced to take the oath Mr. Thomas A. Hendricks, of Indiana, a Senator, entered an objection:

The Senator just called is the Presiding Officer of this body, and under the Constitution and laws will become the President of the United States should the proceeding of impeachment, now to be tried, be sustained. The Constitution providing that in such a case the possible successor cannot even preside in the body during the trial, I submit for the consideration of the Presiding Officer and of the Senate the question whether, being a Senator, representing a State, it is

[42] Senate Journal, pp. 828, 1829; Globe Supplement, p. 12.
[43] Second session Fortieth Congress, Senate Journal, p. 809; Globe, pp. 1671–1680, 1699, 1700.

competent for him, notwithstanding that, to take the oath and become thereby a part of the court? I submit that upon two grounds, first, the ground that the Constitution does not allow him to preside during these deliberations because of his possible succession, and, second, the parliamentary or legal ground that he is interested, in view of his possible connection with the office, in the result of the proceedings, he is not competent to sit as a member of the court.

An extended debate at once arose. Mr. John Sherman, of Ohio, urged that this tribunal was not to be tested by the ordinary rules of civil law. The State of Ohio had a right to send two Senators, and the Constitution gave them each a vote. Mr. Jacob M. Howard, of Michigan, made the point that Mr. Wade might not necessarily be President pro tempore at the end of the trial, and hence was not necessarily personally interested. Messrs. Lot M. Morrill, of Maine, and George H. Williams, of Oregon, urged that the question was premature, since the party interested to make the objection was not present, and no Senator should make it, and that the Senate should be organized before the question should be raised.

In the course of the debate Mr. Oliver P. Morton, of Indiana, said:

Mr. President, if it should now be determined that the Senator from Ohio shall not be sworn it would be an error, a blunder of which the accused would have just right to complain when he should come here. If a judge is interested in a case before him, or if a juror is interested in the result of the issue which he is called upon to try, it is an objection that the parties to the case have the right to waive; and they have always had that right under any system of practice that I have known anything about.

As was suggested by the Senator from Maine [Mr. Morrill] and the Senator from Oregon [Mr. Williams], it is not an objection to be made by a fellow juror, by another member of the court, or by anybody except the parties to that case; and if we now, in the absence of the accused, say that the Senator from Ohio shall not be sworn, the President when he comes here to stand his trial will have a right to say "A Senator has been excluded that I would willingly accept; I have confidence in his integrity; I have confidence in his character and in his judgment, and I am willing to waive the question of interest; who had the right to make it in my absence?" The Senator from Indiana, my colleague, and the Senator from Kentucky have no right to make the question unless they should do it in the character of counsel for the accused, a character they do not maintain.

Mr. President, I desire to say one thing further, that this objection made here, in my judgment, proceeds upon a wrong theory. It is that we are now about putting off the character of the Senate of the United States and taking upon ourselves a new character; that we are about ceasing to be a Senate to become a court. Sir, I reject that idea entirely. This is the Senate when sworn, this will be the Senate when sitting upon the trial, and can have no other character. The idea that we are to become a court, invested with a new character, and possibly having new constituents, I reject as being in violation of the Constitution itself. What does that say? It says that "the Senate shall have the sole power to try all impeachments." The Senate shall have the sole power to try; it is the Senate that is to try; not a high court of impeachment—a phrase that is sometimes used—that is to be organized, to be created by the process through which we are now going; but, sir, it is simply the Senate of the United States. The Senate "when sitting for that purpose shall be on oath or affirmation." That does not change our character. We do not on account of this oath or affirmation cease to be a Senate, undergo a transformation, and become a high court of impeachment; but the Constitution simply provides that the Senate, while as a Senate, trying this case shall be under oath or affirmation. It is an exceptional obligation. The duty of trying an impeachment is an exceptional duty, just as is the ratification of a treaty; but it is still simply the Senate performing that duty. "When the President of the United States is tried the Chief Justice shall preside." Preside where? In some high court of impeachment, to be created by the transformation of an oath? No, sir. He is to preside in the Senate of the United States, and over the Senate; and that is all there is of it. "And no person shall be convicted without the concurrence of two-thirds of the Members present." Two-thirds of the Members of the Senate.

Mr. President, if I am right in this view, it settles the whole question. The Senator from Ohio is a Member of the Senate. My colleague has argued this

question as if we were about now to organise a new body, a court, and that the Senator from Ohio is not competent to become a member of that court. That is his theory. The theory is false. This impeachment is to be tried by the Senate, and he is already a Member of the Senate, and he has a constitutional right to sit here, and we have no power to take it from him. As to how far he shall participate, as to what part he shall take in our proceedings, as has been correctly said, that is a question for him to decide in his own mind. But, sir, he is already a Member of this body; he is here; he has his rights already conferred upon him as a Member of this body, and he has a constitutional right to take part in the performance of this business, as of any other business, whether the ratification of a treaty or the confirmation of an appointment or the passage of a bill, which may be devolved on this body by the Constitution of the United States. Because he has been elected President pro tempore of the Senate does that take from him any of his rights as a Senator? Those rights existed before, and he can not be robbed of them by any act of this Senate.

But, sir, aside from this question, which goes to the main argument, this entire action is premature. There is nobody here to make this challenge, even if it could be made legitimately. The Senators making it do not represent anybody but themselves. The accused might not want it made. He might, perhaps, prefer the Senator from Ohio to any other Member of this body to try his case. It is always the right of the defendant in a criminal proceeding and of the parties in a civil action to waive the interest that a juror or a member of the court may have in the case.

Mr. Reverdy Johnson, of Maryland, said:

While I am up, permit me to say a few words in reply to the honorable Member from Indiana [Mr. Morton]. He tells us it is for the President of the United States—applying his remarks to the case which is to be and is before us—himself to make the objection, and that he may waive it. With all due deference to the honorable Member, that is an entire misapprehension of the question. The question involved in the inquiry is, what is the court to try the President? It is not to be such a tribunal as he chooses to try him. It is a question in which the people of the United States are interested, in which the country is interested; and by no conduct of the President, by no waiver of his, can he constitute this court in any other way than the way which the Constitution contemplates; that is to say, a court having all the qualities which the Constitution intends.

The honorable Member tells us that we are still a Senate and not a court, and that we can not be anything but a Senate and can not at any time become a court. Why, sir the honorable Member is not treading in the footsteps of his fathers. The Constitution was adopted in 1789, There have been four or five cases of impeachment, and in every case the Senate has decided to resolve itself into a court, and the proceedings have been conducted before it as a court and not as a Senate. To be sure, these component elements of which the court is composed are Senators, but that is a mere descriptio personarum. They are members of the court because they are Senators, but not the less members of a court. The Constitution contemplated their assuming both capacities. As a Senate of the United States they have no judicial authority whatever; their powers are altogether legislative; they are to constitute and do constitute only a portion of the legislative department of the Government; but the Constitution for wise purposes says that in the contingency of an impeachment of a President of the United States or any other officer falling within the clause authorizing an impeachment they are to become, as I understand, a court. So have all our predecessors ruled in every case; and who were they? In the celebrated case of the impeachment against Mr. Chase, who was one of the associate justices of the Supreme Court of the United States, there were men in the Senate at that time whose superiors have not been found since, nor at any time before, and they adopted the idea and acted upon the idea that the Senate in the trial of that impeachment acted as a court and not as a Senate.

I submit, therefore, that the honorable Member from Indiana [Mr. Morton] is altogether mistaken in supposing that we are not a court. But look at the power which we are to have. We are to pronounce judgment of guilty or not guilty; we are to answer upon our oaths whether the party impeached is guilty or not guilty of the articles of impeachment laid to his charge, and having pronounced him guilty or not guilty, we are then to award judgment. Who ever heard of the Senate of the United States in its legislative capacity awarding a judgment.

But besides that, why is it, Mr. Chief Justice, that you are called to preside over the court, or the Senate when acting as a court to try an impeachment? It is because it is a court. You have no legislative capacity; your functions are to construe the laws in cases coming before you; and the very fact that upon the trial of an impeachment of the President of the United States the Vice-President is to be laid aside, and the ordinary Presiding Officer, if the Vice-President himself does not exist, and you are to preside, shows that it is a court of the highest character, demanding the wisdom and the learning of the Chief Justice of the United States.

The honorable Member says, and other Members have said, that a question of interest or no interest is not involved in an inquiry of this description. Does the honorable Member mean to say that if the honorable Member from Ohio had a bill before the Senate awarding to him a sum of money upon the ground that it was due to him by the United States he could vote upon the question of the passage of the bill? Why not if the honorable Member from Indiana is right? He is a Senator. If he is right that the Constitution intends that each State shall have two votes upon every question coming before the body, then in the case supposed the honorable Member from Ohio would have a right to vote himself, and by his own vote to place money in his own possession. Who ever heard that that was a right that could be accorded anywhere?

Mr. President, courts have gone so far as to say that a judgment pronounced by a judge in a court of which he was the constitutional officer in a case in which he had a direct interest, was absolutely void upon general principles; and void because of any statutory regulation on this subject, but void upon the general ground that no man shall be a judge in his own case. Does it make any difference what may be the character of the interest? If the honorable Member from Ohio was the sole party under the Constitution to try this impeachment, could he try it? Would not everybody say it is a casus omissus? There can be no trial as long as he continues to be the sole Member of the court, because he has a direct and immediate interest in the result; because the judgment would be absolutely void as against the general principle founded in the nature of man, that no man should be permitted to adjudge a question in which he has a direct interest.

Mr. John Sherman, of Ohio, said:

Mr. President, I certainly do not appear here to represent my colleague on this question, but I represent the State of Ohio, which is entitled to two Senators on this floor. The Constitution declares that each Senator shall have a vote, and the Constitution further declares that each Senator shall take an oath in cases of impeachment. The right of my colleague to take the oath, his duty to take it, is as clear in my mind as any question that ever was presented to me as a Senator of the United States. The Constitution makes it plainly his duty to take the oath. He is a Senator, bound to take the oath, according to my reading of the Constitution; and every precedent that has been cited, and every precedent that has been referred to, bears out this construction. If after he has taken the oath as a Member of the Senate of the United States, for the purposes of this trial, anybody objects to his right to vote on any question that may be presented to this court or to the Senate hereafter, the objection can then be made and discussed; but his right in the preliminary stages to take the oath, and his duty to take it, is made plain by the Constitution itself. If hereafter, when the impeachment progresses, his right to vote on any question is challenged the question may be discussed and decided.

The case cited by my honorable friend from Maryland is directly in point. Mr. Stockton came here with a certificate from the State of New Jersey in due form; he presented it, and was sworn into office. Did anybody object to his being sworn? At the same time other papers were presented to the Senate challenging his right to be sworn, saying that the legislature of New Jersey had never elected Mr. Stockton; but because of that did anybody object to the oath being administered to Mr. Stockton? No one; although his right to take the oath was challenged, and a protest signed by a very large number of the members of the New Jersey legislature against his right to the seat, was presented. He was sworn in and took his seat here by our side, and voted and exercised the rights of a Senator. When the question of the legality of his own election came up, the Senate decided that he was not legally elected, and the question referred to arose upon his right to vote in that particular case. The question was whether he could vote, being interested in the subject-matter. The Senator from Massachusetts made the objection, and offered a resolution that he had not a right to vote in the particular case; and after debate that was decided in the affirmative, although by a very

close vote. My own conviction then was and is yet that Mr. Stockton, as a Senator from the State of New Jersey, had a right to vote in his own case, although it might not be a proper exercise of the right.

So, sir, this question has been decided two or three times in the House of Representatives. In the celebrated New Jersey case, where a certificate of election was presented by certain Members from the State of New Jersey and they were excluded, public history has pronounced their exclusion to have been an unjustifiable wrong upon the great seal of the State of New Jersey. I believe that action is now generally admitted and conceded to have been wrong. Those men presented their credentials in the regular form, and they had the right to be sworn. So in many other cases where the right of persons to hold office is in dispute, those who have the prima facie right are sworn into office, and then the right is examined and finally settled. I had a matter presented to me once in which I was personally interested, and where I was sworn into office. I was directly and personally interested: but I took the oath of office, and I discharged my duties as a Member of the House of Representatives; and when the question came up whether I should vote on the election of a particular officer, I being a candidate for the office, I refused to vote. But it was my refusal which prevented my vote from being received. If I had chosen to vote, I had the right as a Member from the State of Ohio, even for myself. I have no doubt whatever of that. It is the right of the State; it is the right of the people; it is the right of representation. The power of the State and the power of the people must be exercised through their Senators and trough their Representatives.

In the particular case here I do not suppose, I do not know at least, whether the question will ever arise. My colleague is required to take this oath as a Member of the Senate of the United States. You have no right to assume, nor have Senators the right to assume, that he will vote on questions which may affect his interest. That is a matter for him to decide; but the right of the State to be represented here on this trial of an impeachment is clear enough. Whether he will exercise the right, or whether he will waive it, is for him to determine. You have no right to assume that he will exercise the right or power to vote for himself where he is directly interested in the result.

It seems to me, therefore, that no Senator here has a right to challenge the voice of the State of Ohio, and the right of the State of Ohio to have two votes here is unquestionable unless when the question is raised in due form it shall be decided against my colleague. In the preliminary stages, when we are organizing this court, he ought to be sworn, and then if he is to be excluded by interest, unfitness, or any other reason, the question may be determined when raised hereafter: but no Senator has the right now to challenge his authority to appear here and be sworn as a Senator of the State of Ohio. His exclusion must come either by his own voluntary act, proceeding on what he deems to be just and right according to general principles, or it must be by the act of the Senate upon an objection made by the person accused in the trial of the impeachment. It seems to me that is clear and therefore I object to any waiver of the matter. I think my colleague has a right to present himself and be sworn precisely as I and other Senators have been sworn. Then let him decide for himself whether, in a case in which his interest is so deeply affected, he will vote on any question involved in the impeachment. If he decides to vote, when his vote is presented, then, not the Senator from Indiana, but the accused may make the objection, and we shall decide the question as a Senate or as a court, for I consider the terms convertible; we shall then decide the question of his right to vote.

Sir, several things have been introduced into this debate that I think ought not to have been introduced. The precise character of this tribunal, whether it is a court or a Senate, has nothing to do at present with this question. The only question before us is whether Benjamin F. Wade, acknowledged to be a Senator from the State of Ohio, has a right to present himself and take the oath prescribed by the Constitution and the laws in cases of impeachment. He is not the Vice-President: he is not excluded by the terms of the Constitution. He is the presiding officer of the Senate, holding that office at our will. You have no right to take away from him the power to take the oath of office and that to decide for himself as to whether, under all the circumstances, he ought to participate in this trial.

Mr. James A. Bayard, of Delaware, said:

Mr. President, I incline to the opinion that the objection made by the honorable Senator from Maine [Mr. Morrill] to the motion of the honorable Senator from Indiana [Mr. Hendricks], and also that made by the honorable Senator from

Oregon [Mr. Williams], is correct. I can not see how a Senator is to object to another Senator being sworn in, although I think there may be some doubt raised on the question for this reason: The Constitution provides that in a case where the President of the United States is tried under an impeachment the Chief Justice of the United States, not the Vice-President, shall preside; and though that was intended originally to look to the Vice-President alone, yet if another person, from the death of the Vice-President, or from his absence or his acting as President, stands in precisely the same relation to the office of President under the law and the Constitution, whether he be a Senator or not, ought not the principle equally to apply?

It certainly excludes the Vice-President from being a member of the court. Does it not equally exclude the presiding officer of the Senate? It does not make him, being a Senator, less a Senator of the United States in his legislative capacity; but the clause of the Constitution prevents and is intended to prevent the influence of the man who would profit as the necessary result of the judgment of guilty in the case. It supposes that he can not be or may not be sufficiently impartial to sit as a judge in that case or to preside in the court trying it. That is the object, as I suppose.

But, sir, there is great force in the objection that that point must come by plea or motion, if you please, from the party accused; and I should not have thought for a moment of embarking in this discussion had it not been for the renewal by the honorable Senator from Indiana [Mr. Morton] of the endeavor to disprove the idea that the Senate must be organized into a court for the purpose of a judicial trial. Now, sir, whether it is to be a high court of impeachment or a court of impeachment, or to be called by the technical name court, is, in my judgment, immaterial; but the honorable Senator's argument did not touch the Constitution. The Senate is to constitute the court; the Senate is to try. Is there nothing in the provisions of that article which gives the judicial authority—for it is not legislative, it is judicial authority conferred, a judicial authority in special cases—is there nothing in that article which, of necessity, makes the body a judicial tribunal whenever it assumes these functions, and not a legislative body? Otherwise, how comes the presiding officer who now fills the chair to be in the seat which he occupies? When the Constitution says that the Senate shall have the sole authority to try impeachments is it necessary that it should say that the Senate shall be a court for the purpose of trying impeachments if every clause of the Constitution shows that it must be a judicial tribunal and must be a court, or else the language is meaningless which is applied to its organization? The members of the body are to be sworn specially in the particular case as between the accused and the impeachers. Is not that the action of a court? They are to try an individual in a criminal prosecution. Is not that judicial action? Is not the entire judicial power of the United States vested in the Supreme Court and the inferior courts, with that exception, by the very terms of the Constitution?

But, further, the body is to give judgment, to pronounce judgment, a judgment of removal from office always as the result of conviction; and if they please to carry it still further, they may pronounce judgment of disqualification from hereafter holding any office. Do not these terms of necessity constitute a court?

Mr. Charles Sumner, of Massachusetts, dissented from the view that the Chief Justice was made the presiding officer because the Vice-President would be an interested party, and argued from the literature contemporaneous with the Constitution that the Vice-President was expected to perform the duties of the President while the trial was going on. As to the question of personal interest, Mr. Sumner said:

There were other remarks made by Senators over the way to which I might reply. There was one that fell from my learned friend, the Senator from Maryland, in which he alluded to myself. He represented me as having cited many authorities from the House of Lords tending to show in the case of Mr. Stockton that this person at the time was not entitled to vote on the question of his seat. The Senator does not remember that debate, I think, as well as I do. The point which I tried to present to the Senate, and which, I believe, was affirmed by a vote of the body, was simply this: That a man can not sit as a judge in his own case. That was all, at least so far as I recollect, and I submitted that Mr. Stockton at that time was a judge undertaking to sit in his own case. Pray, sir, what is the pertinency of this citation? Is it applicable at all to the Senator from Ohio?

Is his case under consideration? Is he impeached at the bar of the Senate? Is he in any way called in question? Is he to answer for himself? Not at all. How, then, does the principle of law, that no man shall sit as a judge in his own case, apply to him? How does the action of the Senate in the case of Mr. Stockton apply to him? Not at all. The two cases are as wide as the poles assunder. One has nothing to do with the other.

Something has been said of the "interest of the Senator from Ohio on the present occasion. "Interest." This is the word used. We are reminded that in a certain event the Senator may become President, and that on this account he is under peculiar temptations which may swerve him from justice. The Senator from Maryland went so far as to remind us of the large salary to which he might succeed, not less than $25,000 a year, and thus added a pecuniary temptation to the other disturbing forces. Is not all this very technical? Does it not forget the character of this great proceeding Sir, we are a Senate and, not a court of nisi prius. This is not a case of assault and battery, but a trial involving the destinies of this Republic. I doubt if the question of "interest" is properly raised. I speak with all respect for others; but I submit that it is inapplicable. It does not belong here. Every Senator has his vote to be given on his conscience. If there be any "interest" to sway him, it must be that of justice and the safety of the country.

On March 6,[44] Mr. Hendricks, after discussing the various questions raised, withdrew his objection, saying:

But, Mr. President, I find that some Senators, among them the Senator from Delaware [Mr. Bayard,] who agree with me upon this question on the merits, are of the opinion that the question ought more properly to be raised when the court shall be fully organized, when the party accused is here to answer. I do not believe that he can waive a question that goes to the organization of the body; I believe it is a question for the body itself. But upon that I find some difference of opinion; and when I find that difference of opinion among those who agree with me upon the merits, upon the main point, whether he shall participate in the proceedings and judgment who may be benefited by it—while I find some Senators, who agree with me upon that question, disagreeing with me upon the question whether it ought to be raised now or when the Senator from Ohio proposes to cast a material vote in the proceedings, I choose to yield my judgment—my judgment, not at all upon the merits; my judgment not at all upon the propriety and the duty of the Senate to decide upon its own organization; but I yield as to the time when the question shall be made in deference to the opinion of others; and for myself, sir, I withdraw the question which I presented for the consideration of the President of this body and of the Senate yesterday.

The oath was then administered to Mr. Wade.

It appears from the Journal of the proceedings of the trial that Mr. Wade did not vote on any record vote until at the close of the trial, on May 16,[45] when his name is recorded on a question relative to the order of passing judgment on the several articles of impeachment. Thereafter he voted both on incidental questions and on the question of guilty or not guilty.

It appeared from the debate on the qeustion as to Mr. Wade that another Senator was related to Prseident Johnson [46] but no objection was made to him on the ground of affinity, nor did any Senator urge that this should be considered an objection.[47] This Senator was Mr. David T. Patterson, of Tennessee, and he was son-in-law of the respondent. Mr. Patterson participated in the trial throughout, and on May 16 [48] voted "not guilty" on the main question.

2062. Reference to a discussion as to the right to challenge the competency of a Senator to sit in an impeachment trial.—The

[44] Senate Journal, p. 811; Globe, p. 1700.
[45] Senate Journal, p. 942.
[46] Mr. David T. Patterson, a Senator from Tennessee, was son-in-law of the respondent.
[47] Speech of Mr. Howard. Globe, p. 1671.
[48] Globe, p. 411.

right to challenge a Member of the Senate sitting for the trial of an impeachment case was discussed [49] at length by Mr. Manager Benjamin F. Butler during the impeachment of President Andrew Johnson.

2063. A quorum of the Senate sitting for an impeachment trial is a quorum of the Senate itself and not merely a quorum of the Senators sworn for the trial.—On February 23, 1905,[50] in the Senate sitting for the impeachment trial of Judge Charles Swayne, Mr. William B. Allison, of Iowa, asked for a call of the Senate and there appeared forty-two Senators, and, the Presiding Officer,[51] said:

Upon the call of the Senate, forty-two Senators have answered to their names. A quorum of the Senate sitting in the impeachment trial is not present.

Then, on motion of Mr. Knute Nelson, of Minnesota, the Sergeant-at-Arms was directed to send for absentees.

Later the Presiding Officer said:

A quorum of Senators who have been sworn in the impeachment trial is present—forty-three Senators.

The proceedings under the call were then dispensed with, and the Presiding Officer put the pending question on the admissibility of certain testimony.

There appeared yeas 10, nays 34—a total of 44 Senators responding, and the Presiding Officer announced that the evidence was not admitted.

Mr. Henry M. Teller, a Senator from Colorado, raised a question as to whether or not forty-four Senators constituted a quorum.

The Presiding Officer said:

Forty-three Senators make a quorum of the Senators who have been sworn in the impeachment trial.

Later Mr. Teller again raised the question:

Mr. President, I have been under the impression for a good many years that a majority of this body—in this instance forty-six Senators—made a quorum. I was somewhat surprised to find that a majority of the Senators sworn are held to be a quorum. I am not aware myself of any provision of the Constitution that allows this body to do business with less than a majority. You could not pass here a ten-dollar pension bill without a majority. Is it possible that less than a quorum can exercise the most important function that has been placed on the Senate by the Constitution? In my judgment, there is no court here present tonight. I raise that question.

The Presiding Officer said:

The Presiding Officer is of opinion that the point of order is well taken. He will state in this connection, however, that it has not been observed in proceedings of the Senate hitherto.

Thereupon further proceedings were taken to secure a quorum, and the Presiding Officer announced:

On the call of the Senate forty-six Senators have answered to their names. A quorum is present.

The Presiding Officer thinks it becomes the duty of the Presiding Officer again to submit to the Senate the question with regard to the admission of evidence offered by counsel for respondent, which was submitted when a quorum of the Senate was not present, but when a quorum of the Senators sworn in the impeachment trial was present.

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[49] Second session Fortieth Congress, Globe Supplement, pp. 30, 31.
[50] Third session Fifty-eighth Congress, Record, pp. 3175, 3176.
[51] Orville H. Platt, of Connecticut, Presiding Officer.

A little later the Presiding Officer said:

A short time ago the Presiding Officer stated that he thought in this trial there had been a call of the Senate and that business had been conducted when there was less than a quorum of the Senate. He finds upon examination that he was mistaken, and that on the two occasions when the roll call was had to determine the existence of a quorum there was on each occasion a quorum of the Senate present.

2064. An attempt of the House to investigate alleged corruption in connection with the votes of Senators during the Johnson trial was the subject of discussion and investigation in the Senate.—On May 21, 1868,[52] in the Senate sitting in legislative session, but at the time when the impeachment trial of Andrew Johnson, President of the United States, was pending, Mr. John B. Henderson, a Senator from Missouri, rising to a question of privilege, said:

On Saturday last after a vote had been taken in the court of impeachment on the eleventh article, and the Members of the House had retired to their own Chamber, one of the managers offered and the House adopted the following resolution:

"Whereas information has come to the managers which seems to them to furnish probable cause to believe that improper or corrupt means have been used to influence the determination of the Senate upon the articles of impeachment exhibited to the Senate by the House of Representatives against the President of the United States: Therefore,

"*Be it resolved*, That for the further and more efficient prosecution of the impeachment of the President the managers be directed and instructed to summon and examine witnesses under oath, to send for persons and papers, to employ a stenographer, and to appoint subcommittees to take testimony, the expenses thereof to be paid from the contingent fund of the House."

It was advocated by its mover, one of the managers, on the ground that base and corrupt motives had determined the judgment of the Senate; and another one of the managers being asked during a debate on Monday last in the House if he would have Senators perjure themselves, replied that "perjury would not hurt them much."

On Tuesday, the 19th instant, I received the following notice from the managers:

FORTIETH CONGRESS, UNITED STATES,
"HOUSE OF REPRESENTATIVES.
"*Washington, D.C., May 19, 1868.*

"SIR: A question has arisen in the course of our investigation wherein your testimony will tend to instruct the House of Representatives and aid its inquiry.

"Will you do the committee of managers the courtesy to attend at the earliest possible moment at the Judiciary Committee room of the House, where they are in waiting to receive you?

"By direction of the managers.

"Your obedient servant,

"B. D. WHITNEY, *Clerk.*

"Hon. J. B. HENDERSON."

To which I replied as follows—the reply not being delivered, however, till the next morning:

"WASHINGTON CITY, *May, 1868.*

"GENTLEMEN: Yours of this date is received. You say 'a question has arisen in the course of our investigations wherein your (my) testimony will tend to instruct the House of Representatives and aid its inquiry,' and thereupon you request my early attendance before the managers as a witness.

"This request, I take it, is intended to answer the purposes of a subpœna, and is issued under authority of a resolution adopted by the House on Saturday last in the following words, to wit:

"I have already read the resolution.

"A prosecution by impeachment against the President is set on foot, and now, when the evidence and arguments have been fully submitted and the Senate

[52] Second session Fortieth Congress, Senate Journal, p. 416; Globe, pp. 2548–2558.

as a court is deliberating on its judgment, a second prosecution is instituted against the Senate itself. Whatever may be the purpose of this inquisition—and I use the word in no offensive sense—it is, in my judgment, not only a direct insult to the body of which I am a member, but a proceeding of most dangerous tendency in the future. A large part of our proceedings has been conducted in secret, the managers, counsel, and reporters being excluded. If a member of the court can now, before the rendition of judgment, be withdrawn from consultation and subjected to the inquisition of the prosecutors, that inquisition may reach to all proceedings, and thus subvert the dignity and independence of the Senate. If it be to purge corruption from the Senate, the Senate is the proper body to guard and protect its own honor.

"Personally, I have no objection to appearing and testifying before you to all matters within my knowledge on the subject of impeachment. And were I to refuse, I know a new shower of calumny, base and grievous enough already, would certainly be poured upon me. But in my judgment this proceeding rises above personal considerations. It concerns public justice and effects the character, honor, and dignity of the Senate.

"I am engaged to appear before another committee of your body to-day, and on the meeting of the Senate to-morrow I shall submit this question for its consideration and be governed accordingly.

"Yours, respectfully,

"J. B. HENDERSON.

"To the managers of impeachment on the part of the House of Representatives."

Mr. Henderson urged that the resolution under which the summons had issued contained a direct insult to the Senate, and that the summons was an invasion of the privileges of the Senate.

Mr. Henderson also presented another letter received later from the managers:

WASHINGTON, D.C., *May 20, 1868.*

SIR: The managers have the honor to acknowledge your communication of 19th instant in answer to their request, which was not intended to serve the purpose of a subpœna, but as a courteous intimation to you that you could aid them in the investigation with which they have been charged.

If it had occurred to them to speculate upon the topic, they would have supposed you might do them the justice to believe that they would have asked no question indecorous or improper, certainly not as to anything which occurred in the secret sessions of the Senate. They were not aware of the time they sent their note to you that the Senate was not in session for "deliberation on the judgment" or otherwise, and they also believed that if they so far transgressed the limits of propriety as to make any inquiry which you deemed improper you would certainly have the efficient remedy of declining to answer.

Accepting the theory of your note, that you are a judge, they do not perceive on that account any objection to your answering as to matters pertinent in a further prosecution of the respondent on trial before the Senate for other and different offenses, because it is well known among lawyers that in both civil and criminal trials the presiding judge may be, and when occasion requires is, sworn as a witness in the very case then pending.

Jurors, in like manner, are called from their seats and sworn during the trial; and either, during the adjournment of the court, might legally and properly be called before a grand jury to give evidence on which to find an indictment against the prisoner at the bar for other and different offenses.

They bring these considerations to your notice in order that, seeing the theory upon which they have acted, you will acquit them of any discourtesy, either personal to yourself or to the honorable Senate. Without indicating any opinion upon the question whether a Senator is liable to examination as a witness before a committee of the House, they desire to add that they did not intend to assert such claim in their communication to you of 19th instant. They had no purpose other than to avail themselves of your knowledge of facts, if agreeable to you, to give them the benefit, of your knowledge, to aid them in pursuit of justice and right.

By direction of the managers.

Your obedient servant,

B. D. WHITNEY, *Clerk.*

Hon. J. B. HENDERSON.

In the course of the debate arising over the presentation made by Mr. Henderson, Mr. Timothy O. Howe, of Wisconsin, asked for the consideration of a resolution presented on a previous day by Mr. Garrett Davis, of Kentucky:

Whereas it is represented that some persons have been and are engaged in violating the rights and privileges of the Senate by the use of threats, intimidation, and other unlawful and improper means toward its Members to constrain them in their consideration, action, and judgment in the matter of the article of impeachment against the President of the United States now pending before the Senate as a court of impeachment; therefore be it

Resolved, That a committee of three, to be appointed by the Chair, do proceed to inquire into the facts of such imputed threats, intimidation, and other unlawful means aforesaid, and the names of the persons, if any, using, or that have used, them; and that said committee have power to send for persons and papers, to take evidence, employ a stenographer, and report the facts to the Senate.

To this Mr. Edmund G. Ross, of Kansas, proposed an amendment adding:

And that said committee be authorized to request the managers on the part of the House to furnish said committee a transcript of all the testimony that has been or may be taken by them in the case of the impeachment of the President.

After debate the further consideration of the subject was postponed.

On May 27 [53] the consideration of the resolution was resumed, when Mr. Davis was permitted to withdraw the resolution and submit it in the following modified form:

Resolved, That a committee of five be appointed by the Chair to inquire into and report the facts in relation to any threats, intimidation, or other improper influences that were used or offered to be used, directly or indirectly, to control or influence the consideration or decision of the Senate or any Senator in the manner of the impeachment of the President of the United States lately pending before the Senate as a court of impeachment. Also, to inquire into and report the facts in relation to any overture or offer of an improper character to any person by or in the name of any Senator or other person in connection with said impeachment trial, and the names of any persons connected with said transactions or any of them. Said committee to have power to send for persons and papers, to summon witnesses, to take their evidence, and employ a stenographer, and to report as early as practicable.

Mr. Ross thereupon proposed an amendment in the nature of a substitute:

That a committee be appointed by the President of the Senate, to be composed of five Senators, whose duty it shall be to inquire whether improper or corrupt means have been used, or attempted to be used, to influence the votes of the Members of the Senate in the trial of the impeachment of the President; and that the said committee be authorized and empowered to send for persons and papers, and to do all things that in their judgment may be necessary for the furtherance of the object of the resolution.

The amendment was agreed to, after debate, and then the resolution as amended was agreed to.

2065. Title by which the Chief Justice is addressed while presiding at an impeachment trial.—In the course of the impeachment trial of Andrew Johnson, the Chief Justice, who was the Presiding Officer, was variously addressed as "Mr. President" and "Mr. Chief Justice." Mr. Manager Butler, in opening the case for the House of Representatives, used the former designation, while Mr. Benjamin

[53] Senate Journal, p. 423; Globe, pp. 2598–2599.

R. Curtis, of counsel for the President, in his opening used the latter title. Mr. Thaddeus Stevens, of Pennsylvania, one of the managers, in his closing argument, addressed the Presiding Officer as "Mr. Chief Justice." This was the title used by Mr. William M. Evarts and other counsel for the President. In general the managers preferred the title "Mr. President," Messrs. Managers Benjamin F. Butler and John A. Bingham using it almost if not quite invariably. The Chief Justice in ruling usually said, "The Chief Justice thinks," etc., but sometimes said, "The Chair thinks." In the Journal and Record of Debates [54] the words "Chief Justice" are invariably used. The Senators used some one and some the other designation in addressing the Chair.

2066. Forms for addressing the Vice-President or President pro tempore while presiding at an impeachment trial.—In the impeachment trial of William W. Belknap, late Secretary of War, the President pro tempore [55] of the Senate presided. The managers and counsel for the respondent, in addressing the Senate sitting for the trial, used the form "Mr. President and Senators." [56]

In the impeachment of William Blount, the Vice-President (Thomas Jefferson, of Virginia) presided, and we find this form of address, "Mr. President." [57]

2067. During the Johnson trial Chief Justice Chase gave a casting vote on incidental questions, and the Senate declined to declare his incapacity to vote.—On March 31, 1868,[58] during the impeachment trial of Andrew Johnson, President of the United States, a motion was made that the Senate retire for consultation, and there appeared on the vote, yeas 25, nays 25.

The Chief Justice thereupon said:

The Chief Justice votes in the affirmative. The Senate will retire for conference.

The Senate having retired, Mr. Charles Sumner, of Massachusetts, offered the following proposition as an amendment to the pending question:

That the Chief Justice of the United States, presiding in the Senate on the trial of the President of the United States, is not a member of the Senate, and has no authority under the Constitution to vote on any question during the trial, and he can pronounce decision only as the organ of the Senate, with its assent.

This was disagreed to, yeas 22, nays 26.

Later Mr. Sumner proposed the following:

Resolved, That the Chief Justice of the United States, presiding in the Senate on the trial of the President of the United States, is not a member of the Senate, and has no authority under the Constitution to vote on any question during the trial.

This was objected to as not relating to the subject for consideration of which the Senate had retired, and was not considered.

On April 1 Mr. Sumner offered the following:

It appearing from the reading of the Journal of yesterday that on a question where the Senate were equally divided the Chief Justice, presiding on the trial

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[54] Second session Fortieth Congress, Globe Supplement, pp. 65, 123, 166, 168, 320, 337, 379, 410–414.
[55] T. W. Ferry, of Michigan, President pro tempore.
[56] See Record of trial, pp. 272, 287, 295, etc., First session Forty-fourth Congress.
[57] See Annals of Fifth Congress, vol. II, p. 2278.
[58] Second session Fortieth Congress, Senate Journal, p. 868; Globe Supplement, pp. 62, 63.

of the President, gave a casting vote, it is hereby declared that in the judgment of the Senate such vote was without authority under the Constitution of the United States.

This was rejected without debate, yeas 21, nays 27.

On April 2, 1868,[59] the question was taken as a motion that the Senate sitting for the impeachment trial adjourn, and there appeared yeas 22, nays 22. Thereupon the Chief Justice said "The Chief Justice votes in the affirmative," and so adjournment was voted.

2068. Discussion of the propriety of arbitrary abridgment by the Senate of the time of an impeachment trial.—On February 21, 1905,[60] in the Senate sitting in legislative session, Mr. Eugene Hale, a Senator from Maine, offered this resolution:

Resolved, That all proceedings in the impeachment trial now before the Senate sitting as a court shall be terminated on Saturday, February 25 next, and a final vote shall be taken on the afternoon of that day at 4 o'clock.

Later, on the same day, in the Senate sitting for the impeachment trial, Mr. Hale introduced the same resolution, for action at a future time.

On February 22,[61] in the Senate in legislative session, Mr. Hale withdrew the resolution and submitted the following:

Ordered, That all proceedings before the Senate sitting in the trial of the impeachment against Charles Swayne, judge of the United States in and for the northern district of Florida, shall terminate on Saturday, February 25 next, and, in pursuance of this order, all testimony upon either side shall be closed on Friday, the 24th day of February next, and the Senate shall commence its session sitting for the trial of said impeachment proceedings at 12 o'clock meridian on said Saturday, the 25th day of February next; and, without any other motion or proceeding intervening, the counsel for the defense shall have until 2 o'clock of said day to present the case of the defendant, said time to be apportioned or divided as said counsel may determine; the managers on the part of the House of Representatives shall have, to present the case against said Charles Swayne, the time from 2 o'clock until 4 o'clock of said day, said time to be apportioned or divided as the managers may determine; at 4 o'clock, without further motion or proceeding intervening, the final vote shall be taken upon said impeachment proceedings.

In support of this resolution, Mr. Hale cited the backward condition of the legislative business.

Mr. Augustus O. Bacon, of Georgia, said in reply:

Mr. President, I quite agree with the Senator from Maine that the legislative business before this Senate is of extreme importance, but I do not think that anything is of more importance than that the Senate shall give such direction to any measures which it may deem necessary for expedition of the impeachment trial as will not bring into discredit and disrepute the very high and important function which we are now performing. In trying the impeachment presented by the House we are complying with the requirements of the Constitution, through which alone the purity and integrity of the public service can be guarded and secured.

The suggestion which I desire to make in this connection, in order that a wrong impression may not go abroad, is that everything which looks to expedition of the impeachment trial should, so far as necessary and practicable, be in the nature of additional time given by the Senate to this work in the interval which now remains at our command, and that it should not be directed to the arbitrary abridgment of the necessary presentation of this case by the House of Representatives, performing, as it does, a high constitutional function in bringing

[59] Senate Journal, p. 878; Globe Supplement, p. 92.
[60] Third session Fifty-eighth Congress, Record, p. 2974.
[61] Record, pp. 3020, 3021.

and presenting to the Senate its case. If we desire that the impeachment trial shall close by Saturday, then the proper course is to give more time to it each day, so that the managers on the part of the House and the counsel for the respondent may have before them full time in which to fully present their respective cases to the Senate. We all know that this session must end at noon on the 4th of March, and that we are limited in time by law; and the objection which I make to the suggestion of the Senator is not to his effort that we may by proper expedition in the disposition of the impeachment matter have sufficient time for the proper discharge of the important duties of another kind which devolve upon us. My objection is to the method proposed. I prefer that instead of that the direction should be given to this matter which will impose upon us, if it need be, additional labor by providing for additional time to be devoted to the trial each day, and that it be not disposed of by the suggestion of an arbitrary abridgment in the opportunity of the House of Representatives to present its case here, and of the time for the proper consideration by ourselves as to how this important matter shall be determined, and what final disposition shall be given to it.

Mr. William M. Stewart, of Nevada, said:

Mr. President, I should like to make one suggestion in regard to this matter. It is suggested that the Constitution restrains the Senate, and that to comply with the provisions of the Constitution no limitation should be put upon time. We have a constitutional right to trial by jury, we have a constitutional right to have cases heard by the courts, and the courts exercise in pursuance of that a reasonable discretion as to the time to be used. The Supreme Court of the United States have rules in regard to the time to be used in cases to be argued there, and in criminal proceedings the courts put a reasonable limit to the time to be allowed for argument. They have to facilitate a trial in order to comply with the Constitution at all.

This brought from Mr. John C. Spooner, of Wisconsin, this question:

Has the Senator ever known a court before which there was a criminal case to fix a limit of time within which limit testimony for the defense should be presented?

The matter went over.

Procedure of the Senate in Impeachment*

1. Hour of meeting for trial. Sections 2069–2070.
2. Sittings and adjournments. Sections 2071–2078.
3. Administration of the oath. Sections 2079, 2081.[1]
4. Functions and powers of Presiding Officer. Sections 2082–2089.[2]
5. Duties of the Secretary. Section 2090.
6. Arguments on preliminary or interlocutory questions. Sections 2091–2093.
7. Voting and debate. Section 2094.[3]
8. Secret session. Sections 2095–2097.
9. Voting in judgment. Section 2098.[4]
10. Rules, practice, etc. Sections 2099–2115.[5]

2069. Unless otherwise ordered, the Senate, sitting for an impeachment trial, begins its proceedings at 12 m. daily.

The Presiding Officer of the Senate announces the hour for sitting in an impeachment trial and the Presiding Officer on the trial directs proclamation to be made and the trial to proceed.

An adjournment of the Senate sitting for an impeachment trial does not operate as an adjournment of the Senate.

Immediately upon the adjournment of the Senate sitting for an impeachment trial the ordinary business is resumed.

Present form and history of Rule XII of the Senate sitting for impeachment trials.

Rule XII of the "rules of procedure and practice in the Senate when sitting on impeachment trials" is as follows:

The hour of the day at which the Senate shall sit upon the trial of an impeachment shall be (unless otherwise ordered) 12 o'clock m., and when the hour for such thing [sitting?] shall arrive, the Presiding Officer of the Senate shall so announce, and thereupon the Presiding Officer upon such trial shall cause proclamation to be made, and the business of the trial shall proceed. The

*Hinds' Precedents, vol. 3, p. 405 (1907).

[1] As to administration of the oath, see, also, Blount's trial (sec. 2308 of this volume), Pack's (secs. 2369, 2375), Humphrey's (sec. 2389), Johnson's (sec. 2422), Belknap's (sec. 2450), Swayne's (sec. 2477).

[2] See, also, sections 2065–2067, 2082–2089.
The president pro tempore presides during absence of the Vice-President. Sections 2309, 2337, 2394.
Medium for putting questions to witnesses and motions to the Senate. Section 2176.
Rulings of, as to evidence. Sections 2193, 2195, 2206.
Does not decide as to attachment of witnesses. Section 2152.
Calls counsel to order for improper utterances. Sections 2140, 2169.
Calls respondent to order. Section 2349.
Admonishes managers and counsel not to delay. Section 2151.

[3] A majority vote only is required on incidental questions. Section 2059.
As to the vote of the Chief Justice when presiding. Sections 2057, 2067.
Debate as to admission of evidence. Sections 2196–2202.

[4] Parliamentary law, as to. Section 2027.
Constitution requires two-thirds vote. Section 2055.
Debate on the question. Section 2094.
Where a plea of guilty might be entered. Section 2127.
Process of judgment in various cases: Blount's (sec. 2318), Pickering's (secs. 2339, 2340), Chase's (sec. 2363), Humphrey's (sec. 2396), Johnson's (secs. 2437–2440), Belknap's (sec. 2466), Swayne's (sec. 2485).

[5] The rules continue from Congress to Congress. Section 2372. Adoption of, at various times. Sections 2389, 2314.

adjournment of the Senate sitting in said trial shall not operate as an adjournment of the Senate; but on such adjournment the Senate shall resume the consideration of its legislative and executive business.

This rule was first drafted by the committee appointed in 1868 [6] to revise the rules preparatory to the trial of President Johnson. In the House, on March 2, the original form was modified by eliminating the words "high court of impeachment" wherever found and substituting the words "the trial." The form adopted in 1868 is identical with the present form, except that the word "thing" appears instead of "sitting." [7]

2070. At 12:30 p.m. of the day appointed for an impeachment trial the Senate suspends ordinary business and the Secretary notifies the House of Representatives that the Senate is ready to proceed.

Present form and history of Rule XI of the Senate sitting for impeachments.

Rule XI of the "Rules of procedure and practice in the Senate when sitting on impeachment trials" is as follows:

At 12:30 o'clock afternoon the day appointed for the trial of an impeachment, the legislative and executive business of the Senate shall be suspended, and the Secretary shall give notice to the House of Representatives that the Senate is ready to proceed upon the impeachment of ——— ———, in the Senate Chamber, which chamber is prepared with accommodations for the reception of the House of Representatives.

This is the form reported and agreed to in the revision of 1868.[8] It was formed by uniting portions of rules 11 and 12, which had been framed in 1805 [9] at the time of the trial of Judge Chase.

2071. The hour of meeting of the Senate sitting for an impeachment trial being fixed, a motion to adjourn to a different hour is not in order.—On March 30, 1868,[10] in the Senate, sitting for the impeachment trial of Andrew Johnson, President of the United States, Mr. John Sherman moved an adjournment.

Mr. Charles Sumner, of Massachusetts, suggested that the adjournment be to 10 o'clock on the morrow.

The Chief Justice [11] said:

The hour of meeting is fixed by the rule, and the motion of the Senator from Massachusetts is not in order.

2072. In the Johnson trial the Chief Justice held that the motion to adjourn took precedence of a motion to fix the day to which the Senate should adjourn.—On April 3, 1868,[12] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, Mr. George F. Edmunds, of Vermont, moved that the Senate adjourn.

Mr. William Pitt Fessenden, of Maine, moved that when the court should adjourn, it adjourn to meet on Monday next.

Mr. Edmunds made the point of order that the motion to adjourn took precedence.

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[6] Second session Fortieth Congress, Senate Report No. 59; Senate Journal, p. 813; Globe, pp. 1534, 1602.

[7] Apparently a misprint.

[8] Second session Fortieth Congress, Senate Report No. 59; Senate Journal, p. 813; Globe, p. 1534.

[9] Second session Eighth Congress, Senate Journal, pp. 511–513; Annals, pp. 89–92.

[10] Second session Fortieth Congress, Globe Supplement, p. 53.

[11] Salmon P. Chase, of Ohio, Chief Justice.

[12] Second session Fortieth Congress, Globe Supplement, pp. 110, 111.

The Chief Justice [11] said:

The Chair is of opinion that the motion to adjourn takes precedence of every other motion if it is not withdrawn.

2073. In the Senate sitting for an impeachment trial no debate is in order pending a question of adjournment.—On Saturday, April 4, 1868,[12] in the Senate, sitting for the impeachment trial of Andrew Johnson, President of the United States, a motion was made that when the Senate, sitting as a court of impeachment, should adjourn, it should be to meet on Thursday, April 9.

Debate having arisen, the Chief Justice [11] said:

The Chief Justice is of opinion that, pending the question of adjournment, no debate is in order from any quarter. It is a question exclusively for the Senate. Senators, you who are in favor of the adjournment of the Senate sitting as a court of impeachment until Thursday next will, as your names are called, answer "yea;" those of the contrary opinion, "nay."

And there appeared yeas 37, nays 10. So the motion was agreed to.

2074. The motion to adjourn to a certain time has been admitted in the Senate sitting for an impeachment trial.—On June 1, 1876,[14] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, Mr. George G. Wright, a Senator from Iowa, proposed this inquiry:

Mr. President, I wish to inquire whether it would be in order now to move to adjourn to a day certain, or whether the order should be properly that when the Senate sitting as a court of impeachment adjourns, it be to a definite time?

The President pro tempore [15] said:

It would be in order to move to adjourn to a certain time.

2075. The Senate sits for an impeachment trial with open doors, but may deliberate on its decisions in secret.

Present form and history of Rule XIX of the Senate sitting in impeachment trials.

Rule XIX of the "Rules of procedure and practice for the Senate when sitting in impeachment trials," is as follows:

At all times while the Senate is sitting upon the trial of an impeachment the doors of the Senate shall be kept open, unless the Senate shall direct the doors to be closed while deliberating upon its decisions.

The first clause of this rule is in the form adopted in 1805,[16] for the trial of Judge Chase. The second clause, setting forth a contingency in which the doors may be closed, was added in the revision of 1868,[17] preparatory to the trial of President Johnson.

On July 31, 1876,[18] when the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, was about to proceed to judgment, Mr. Hannibal Hamlin, a Senator from Maine, proposed to amend the rule by striking off the qualifying clause, so that the proceedings should be held in open session. But the Senate by a vote of yeas 23, nays 32, declined to consider the proposition.

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[11] Second session Fortieth Congress, Globe Supplement, p. 121.
[12] First session Forty-fourth Congress, Record of trial, p. 161.
[13] T. W. Ferry, of Michigan, President pro tempore.
[14] Second session Eighth Congress, Senate Journal, pp. 511–513; Annals, pp. 89–92.
[15] Second session Fortieth Congress, Senate Report No. 59; Senate Journal, p. 814; Globe, p. 1568.
[16] First session Forty-fourth Congress, Record of trial, p. 341.

2076. If the Senate fail to sit in an impeachment trial on the day or hour fixed, it may fix a time for resuming the trial.

Present form and history of Rule XXV of the Senate sitting for impeachment trials.

Rule XXV of the "rules of procedure and practice for the Senate when sitting in impeachment trials," is as follows:

If the Senate shall at any time fail to sit for the consideration of articles of impeachment on the day or hour fixed therefor, the Senate may, by an order to be adopted without debate, fix a day and hour for resuming such consideration.

This rule was adopted in 1868,[19] preparatory to the proceedings for the trial of President Johnson.

2077. An order for postponement of an impeachment trial was held in order after the organization of the Senate for the trial.—On March 23, 1868,[20] in the Senate as organized for the trial of President Johnson, the Chief Justice of the United States presiding, Mr. Garrett Davis, a member of the Senate from Kentucky, proposed a preamble and order, reciting that the seats of Senators from several States were vacant, and declaring that the trial should be postponed until the Senators from those States should be permitted to take their seats.

Mr. Timothy O. Howe, of Wisconsin, a Senator, objected that the proposition was not in order.

The Chief Justice [21] said:

The motion comes before the Senate in the shape of an order submitted by a Member of the Senate and of the court of impeachment. The twenty-third rule requires that "all the orders and decisions shall be made and had by yeas and nays, which shall be entered on the record, and without debate, subject, however, to the operation of rule seven." The seventh rule requires the Presiding Officer of the Senate to "submit to the Senate, without a division, all questions of evidence and incidental questions; but the same shall on the demand of one-fifth of the Members present, be decided by yeas and nays." By amendment this rule has been applied to orders and decisions proposed by a Member of the Senate under the twenty-third rule. The Chair rules therefore that the motion of the Senator from Kentucky is in order.

Thereupon the proposition was entertained.

2078. When informed that managers are to present articles of impeachment, the Senate, by rule, requires its Secretary to inform the House of its readiness to receive the managers.

Present form and history of Senate Rule I as to impeachments.

Rule I, of the "Rules of procedure and practice in the Senate when sitting on impeachment trials," [22] is as follows:

Whensoever the Senate shall receive notice from the House of Representatives that managers are appointed on their part to conduct an impeachment against any person and are directed to carry articles of impeachment to the Senate, the Secretary of the Senate shall immediately inform the House of Representatives that the Senate is ready to receive the managers for the purpose of exhibiting such articles of impeachment, agreeably to such notice.

This rule, with two immaterial verbal changes, is in the form adopted for the trial of Judge Chase in 1804.[23] It merely put in form

[19] Second session Fortieth Congress, Senate Report No. 59; Senate Journal, p. 252; Globe, p. 1503.
[20] Second session Fortieth Congress, Globe supplement, p. 12.
[21] Salmon P. Chase, of Ohio, Chief Justice.
[22] See Senate Manual, p. 171.
[23] Senate Journal, pages 509, 510, second session Eighth Congress.

of a permanent rule the practice followed in the trials of Senator Blount and Judge Pickering. In 1868,[24] for the trial of Andrew Johnson, President of the United States, the rule received slight verbal changes, and was adopted in the form above, except the last two words, which read "said notice," instead of "such notice."

2079. Articles of impeachment being presented, the Senate is required by its rule to proceed to prompt consideration thereof.

Before consideration of articles of impeachment, the Presiding Officer is required by rule to administer the oath to the Senators present, and later to others as they may appear.

The Senate, in its rules, has refrained from prescribing an oath for the Chief Justice when he presides at an impeachment trial.

The Senate is required by rule to continue in session from day to day, Sundays excepted, during impeachment trials, unless otherwise ordered.

In 1868 the Senate eliminated from its rules all mention of itself as a "high court of impeachment."

Present form and history of Rule III of the Senate for impeachment cases.

Rule III, of the "Rules of procedure and practice of the Senate when sitting on impeachment trials," is as follows:

Upon such articles being presented to the Senate, the Senate shall, at 1 o'clock afternoon of the day (Sunday excepted) following such presentation or, sooner, if ordered by the Senate, proceed to the consideration of such articles, and shall continue in session from day to day (Sundays excepted) after the trial shall commence (unless otherwise ordered by the Senate) until judgment shall be rendered, and so much longer as may, in its judgment, be needed. Before proceeding to the consideration of the articles of impeachment, the Presiding Officer shall administer the oath hereinafter provided to the Members of the Senate then present and to the other Members of the Senate as they shall appear, whose duty it shall be to take the same.

This rule, which formulated the practice of previous trials, dates from 1868,[25] when a committee, of which Mr. Jacob M. Howard, of Michigan, was chairman, reported a series of rules for the proceedings incident to the impeachment of President Johnson. This rule was reported in form as follows:

III. Upon such articles being presented to the Senate shall, at 1 o'clock afternoon of the day (Sunday excepted) following such presentation, or sooner if so ordered by the Senate, resolve itself into a high court of impeachment for proceeding thereon. A quorum of the Senate shall constitute a quorum of the court, and it shall continue in session from day to day (Sundays excepted) after the trial shall commence (unless otherwise ordered by the court) until final judgment shall be rendered, and so much longer as it may, in its judgment, be needful. Immediately upon the Senate resolving itself into such high court of impeachment the Secretary of the Senate shall administer to the Presiding Officer (unless he shall be the Chief Justice) the oath required by the Constitution of the United States in such cases, and in the form hereinafter prescribed, and thereupon the Presiding Officer shall administer such oath to the Members of the Senate then present, and to the other Members of the Senate as they shall appear whose duty it shall be to take the same.

The wording of this language, with its references to the "high court of impeachment" and the quorum thereof, gave rise to a discussion [26]

[24] Second session Fortieth Congress, Journal, pp. 248, 311; Globe, p. 1521; Senate Report No. 59.
[25] Second session Fortieth Congress, Senate Report No. 59.
[26] Globe, p. 1521 et seq.

as to the constitutional status of the Senate in such procedure; and resulted in amendment [27] striking out those words, and bringing the rule in this respect to its present form. Another question arose over a proposition to strike out the words providing for administering the oath to the Presiding Officer. Mr. Charles R. Buckalew, of Pennsylvania, said:

I think the Presiding Officer of the court of impeachment should be under oath, but it should be an oath different from that taken by the Members who try the case. In the rule, as reported to us, it was contemplated that the same oath should be administered to him that was administered to the Members of the Senate. I believe in former impeachment trials the Presiding Officer was sworn. There may be some difficulty about our prescribing an oath for the Presiding Officer. I think it very clear that by an act of Congress the form of an oath to be taken by the Presiding Officer might be provided, and that it would be binding. It seems an anomaly that we should have a Presiding Officer sitting here and not under any legal obligation or any moral obligation such as an oath would impose. I agree that the amendment already made excepting him from the operation of the general form of oath provided for Members of the Senate is eminently just and proper; and his exception becomes indispensable after the decision which has been made by the Senate on several occasions, withdrawing him altogether from any interference with our proceedings except on questions of order. I suppose, Mr. President, we have the same power to prescribe an oath for the Presiding Officer of the Senate that we have to prescribe an oath for the Members of the Senate, if indeed, there be any authority to bind him by such an obligation.

Mr. Stephen C. Pomeroy, of Kansas, said:

The Chief Justice of the United States is under oath. When he entered upon the discharge of his functions as Chief Justice, he took an oath to discharge all the duties that were incumbent upon him as such officer; and this duty is placed upon him by the Constitution of the United States, and was embraced in his oath to discharge his duties as Chief Justice of the United States; and any further oath than that I think would be unnecessary.

* * * I beg leave to say to the Senator from Pennsylvania that the reason why Senators have to be sworn, in addition to their usual oath as Senators, is that it is provided for by the Constitution, which says that "When sitting for that purpose they shall be on oath or affirmation;" and goes on, "When the President of the United States is tried, the Chief Justice shall preside," but it does not say that the Chief Justice shall be sworn. In the same sentence in which the Constitution provides that the Senate shall be sworn when sitting to try an impeachment, it says that the Chief Justice shall preside, and, of course, in the absence of any requirement of a special oath, we are to understand that he is sworn to the discharge of his duties, and this duty among the rest, when he took his oath of office. I believe that is all the oath required of him.

The amendment was agreed to, bringing the latter portion of the rule into the form now existing.

2080. Form of oath to be administered to Senators sitting in impeachment trials.

The Senate declined to require that the Chief Justice be sworn when about to preside at an impeachment trial.

Present form and history of Senate Rule XXIV as to impeachments.

Rule XXIV of the "Rules of procedure and practice of the Senate when sitting in impeachment trials" provides:

FORM OF OATH TO BE ADMINISTERED TO THE MEMBERS OF THE SENATE SITTING IN THE TRIAL OF IMPEACHMENTS

"I solemnly swear (or affirm, as the case my be) that in all things appertaining to the trial of the impeachment of ——— ———, now pending, I will do impartial justice according to the Constitution and laws; So help me God."

[27] Globe, pp. 1602, 1603.

This is the form agreed to in 1868.[29]

As originally reported the form of oath for Members of the Senate has this heading:

Form of oath to be administered to the Presiding Officer and Members of the Senate.

Mr. Charles D. Drake, of Missouri, raised the point[30] that the Constitution did not require the Presiding Officer to be sworn, but only the Senators. Some discussion arose over this question. Mr. Charles R. Buckalew, of Pennsylvania, thought the Presiding Officer should be sworn.

Mr. Stephen C. Pomeroy, of Kansas, said that the Chief Justice was already sworn to perform his duties, and this was part of his duties as Chief Justice.

The Senate, without division, agreed to an amendment striking out the words "Presiding Officer and" from the heading.

2081. In 1876 the Senate doubted its authority to empower its Presiding Officer to administer to Senators the oath required for an impeachment trial.

In the Belknap trial the oath to Senators was administered by the Chief Justice until by law authority was conferred on the Presiding Officer of the Senate.

On April 5, 1876,[31] in the Senate pending proceedings for the impeachment of William W. Belknap, Secretary of War, Mr. George F. Edmunds, of Vermont, said:

I wish to ask the attention of the Senate to a matter which I, after consultation with as many Senators as I could find, think it necessary to bring to the notice of the Senate respecting the matter of the impeachment to-day. The third rule of the Senate in regard to impeachments provides that on this day at one o'clock—

"The Presiding Officer shall administer the oath hereinafter provided to the Members of the Senate then present, and to the other Members of the Senate as they shall appear, whose duty it shall be to take the same."

But on examination we are unable to find any statute of the United States which authorizes the President of the Senate or the Presiding Officer to administer this oath. It stands upon the rule alone. The language of the statute about the authority of the Presiding Officer is that, when Senators appear to take their seats upon an election to this body, the Presiding Officer shall swear them in, and any Senator may administer a similar oath to the Vice-President, the President of the Senate, when he appears; and there the statute stops except in respect of witnesses who are by law to be sworn by the President of the Senate.

In this state of difficulty and in the very grave doubt, at least, that in the minds of all the gentlemen whom I have been able to consult there is about this being a constitutional compliance with that requirement which obliges us to be under oath (which, of course, implies a legal and binding oath), we have thought it best for this occasion, until provision can be made by law, to submit to the Senate a proposition that the Chief Justice of the United States be invited to attend at one o'clock to-day to administer these oaths, there being no question about his authority to do so. Therefore, Mr. President, I ask unanimous consent that this portion of Rule 3 which I have read, respecting the administration of the oath by the Presiding Officer, shall be suspended for this day; and if that be unanimously agreed to, as of course it requires unanimous consent to suspend this rule, I shall then offer an order which will accomplish the next step in the matter.

In accordance with this suggestion the rule was suspended, and the order referred to by Mr. Edmunds was submitted and agreed to.

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[29] Second session Fortieth Congress, Senate Report No. 59, Senate Journal, pp. 244-246; Globe, pp. 1590-1593.

[30] Globe, p. 1603.

[31] First session Forty-fourth Congress, Senate Journal, p. 394; Record, p. 2212.

To remedy this difficulty a bill was prepared, passed both Houses, and was approved by the President on April 18, 1876.[32] This empowers the Presiding Officer of the Senate for the time being to administer all oaths or affirmations that are or may be required by the Constitution or by law to be taken by any Senator, officer of the Senate, witness, or other person, in respect to any matter within the jurisdiction of the Senate. Also the Secretary and Chief Clerk of the Senate are respectively empowered to administer any oath or affirmation required by law, or by the rules or orders of the Senate to be taken by any officer of the Senate, or by any witness produced before it.

In accordance with this law the President pro tempore, on April 27,[33] administered the oath required of Senators sitting for impeachment trials, to Mr. Bainbridge Wadleigh, of New Hampshire.

2082. When the President of the United States is impeached the Chief Justice of the Supreme Court presides.

When the Chief Justice is to preside at an impeachment trial the Presiding Officer of the Senate is required by rule to give him notice of time and place and request his attendance.

The Senate by rule have implied that the Chief Justice attends and presides only after the articles of impeachment have been presented.

In 1868 the Senate eliminated from its rules all mention of itself as a "high court of impeachment."

Present form and history of Rule IV of the Senate sitting for impeachment trials.

Rule IV of the "Rules of procedure and practice in the Senate when sitting on impeachment trials," provides:

When the President of the United States or the Vice-President of the United States, upon whom the powers and duties of the office of President shall have devolved, shall be impeached, the Chief Justice of the Supreme Court of the United States shall preside; and in a case requiring the said Chief Justice to preside notice shall be given to him by the Presiding Officer of the Senate of the time and place fixed for the consideration of the articles of impeachment, as aforesaid, with a request to attend; and the said Chief Justice shall preside over the Senate during the consideration of said articles and upon the trial of the person impeached therein.

The discussion of the constitutional status of the Senate in impeachment proceedings, incident to the adoption of rules in 1868, resulted in the present form of the rule. The committee having the subject of rules under consideration at that time, reported [34] it as a new rule in form as follows:

IV. The Presiding Officer of the Senate shall be presiding officer of the high court of impeachment, except when the President of the United States, or the Vice-President of the United States upon whom the powers and duties of the office of President shall have devolved, shall be impeached, in which case the Chief Justice of the Supreme Court of the United States shall preside; and in a case requiring the said Chief Justice to preside, notice shall be given to him by the Presiding Officer of the Senate of the time and place fixed for the organization of the high court of impeachment as aforesaid, with a request to attend, and he shall preside over said court until its final adjournment.

On March 2,[35] after the debate as to the use of the words "high court

[32] 19 Stat. L., p. 34.
[33] Senate Journal, p. 916; Record of trial, p. 8.
[34] Second session Fortieth Congress, Senate Reports, p. 59.
[35] Senate Journal, p. 812; Globe, pp. 1602, 1603.

of impeachment," amendments were offered by Mr. Orris S. Ferry, of Connecticut, and agreed to, which brought the rule to its present form. The debate on this rule showed the understanding to be that the Chief Justice should not be notified to attend and preside until after the articles of impeachment had been presented.

2083. In impeachments the Presiding Officer of the Senate is empowered by rule to make and issue, by himself or by the Secretary, authorized orders, writs, precepts, and regulations.

Present form and history of Rule V of the Senate sitting for impeachment trials.

Rule V of the "Rules of procedure and practice in the Senate when sitting on impeachment trials," provides:

The Presiding Officer shall have power to make and issue, by himself or by the Secretary of the Senate, all orders, mandates, writs, and precepts authorized by these rules or by the Senate, and to make and enforce such other regulations and orders in the premises as the Senate may authorize or provide.

This rule dates from 1868, when it was reported [36] in nearly its present form by the committee having in charge the rules to be adopted in view of the impeachment of President Johnson. It was changed to its present form by substituting the word "Senate" for "Court" in two places, in accordance with conclusions arrived at after discussion as to the constitutional status of the Senate.[37]

2084. The preparations in the Senate Chamber for an impeachment trial are directed by the Presiding Officer of the Senate.

During an impeachment trial the Presiding Officer on the trial directs all forms not otherwise specially provided for.

The Presiding Officer on an impeachment trial may make preliminary rulings on questions of evidence and incidental questions or may submit such questions to the Senate at once.

The preliminary rulings of the Presiding Officer on an impeachment trial stand as the judgments of the Senate, unless some Senator requires a vote.

On questions of evidence and incidental questions arising during an impeachment trial the voting is without division unless the yeas and nays are demanded by one-fifth.

Discussion of the propriety of the Presiding Officer on an impeachment making a preliminary decision on questions of evidence.

Discussions of the functions of the Chief Justice in decisions as to evidence in an impeachment trial.

In the Johnson trial Chief Justice Chase held that the managers might not appeal from a decision of the Presiding Officer as to evidence.

Present form and history of Rule VII of the Senate sitting for impeachment trials.

Rule VII of the "Rules of procedure and practice in the Senate when sitting on impeachment trials," is as follows:

The Presiding Officer of the Senate shall direct all necessary preparations in the Senate Chamber, and the Presiding Officer on the trial shall direct all the forms of proceedings while the Senate is sitting for the purpose of trying

[36] Second session Fortieth Congress, Senate Report No. 59.
[37] Senate Journal, pp. 230, 812; Globe, pp. 1526, 1602.

an impeachment, and all forms during the trial not otherwise specially provided for. And the Presiding Officer on the trial may rule all questions of evidence and incidental questions, which ruling shall stand as the judgment of the Senate, unless some Member of the Senate shall ask that a formal vote be taken thereon, in which case it shall be submitted to the Senate for decision; or he may at his option, in the first instance, submit any such question to a vote of the Members of the Senate. Upon all such questions the vote shall be without a division, unless the yeas and nays be demanded by one-fifth of the Members present, when the same shall be taken.

The first sentence of the rule is the substance of Rule VII, adopted in 1805[38] at the time of the trial of Judge Chase. In 1868, at the time of the proceedings for the impeachment of President Johnson, the committee of which Mr. Jacob M. Howard, of Michigan, was chairman, reported[39] it in substantially its present form, in the first draft the word "court" was generally used instead of "Senate;" but in accordance with a general principle established at that time that phraseology was changed.[40] Also the draft reported from the committee did not contain the last sentence of the present form.

On March 2,[41] while the report was under debate, Mr. Charles D. Drake, of Missouri, moved to strike out these words:

And the Presiding Officer of the court may rule all questions of evidence and incidental questions, which rulings shall stand as the judgment of the court, unless some member of the court shall ask that a formal vote be taken thereon, in which case it shall be submitted to the court for decision; or he may, at his option, in the first instance, submit any such question to a vote of the members of the court,

and insert in lieu thereof:

The Presiding Officer may, in the first instance, submit to the Senate, without a division, all questions of evidence and incidental questions, but the same shall, on the demand of one-fifth of the Members present, be decided by yeas and nays.

The words to be inserted were suggested by Mr. Jacob M. Howard, of Michigan.

A long debate resulted on this motion.

Mr. Drake explained his reasons:

The Constitution simply says that when the President of the United States is tried the Chief Justice shall preside. In that position he has just exactly the same powers and functions that the Vice-President would have in any other case of impeachment, and no more. Now, sir, any man in the country, whether a lawyer or not, may, in the course of events, come to fill the position of Vice-President of the United States. Suppose that a man who had never been a lawyer, never made law his study, and did not know anything at all about the complex rules of evidence in the courts of justice were to be elevated to the Vice-Presidency, and the Senate should consist, as it does now, of a large majority of those who have made the law their study during a large portion of their lives, and he should be set up in the chair as the Presiding Officer of that body to decide questions of law. I will venture to say that the Senate would regard it as quite preposterous.

Now, sir, why should we set the Chief Justice there to decide these questions? We can not do it, in my opinion, without a violation of the spirit of the Constitution, which does not entitle him to any more prerogatives as the Presiding Officer of the court than the Vice-President would have in other cases.

But, sir, there is a very grave objection to this. Even taking the distinguished Chief Justice of the United States, so justly distinguished for his great mind and his great knowledge of the law, it is not proper, it is not judicious, it is not for the purposes of justice expedient that the Senate, sitting as a court of impeach-

[38] Second session Eighth Congress, Senate Journal, pp. 511–513; Annals, pp. 89–92.
[39] Second session Fortieth Congress, Senate Report No. 59.
[40] Globe, pp. 1602, 1603; Journal, pp. 247, 248, 812.
[41] Senate Journal, pp. 247, 248; Globe, pp. 1595–1602.

ment, should ever be brought to the point of overruling a decision made by the Chief Justice of the United States sitting in the chair as the Presiding Officer of the court. It is not proper that the judgment of the Senate upon questions of law, which it must ultimately decide, if a single Senator demands its decision, should be warped, or if not warped, in any degree affected by the previous announcement of an opinion upon that question by so high a judicial officer as the Chief Justice.

Sir, it might be that, on some future occasion, when a President of the United States should be impeached again, the Chief Justice might be a very strong opponent of his, or a very strong advocate of his, and that his decisions might be influenced one way or the other by the personal considerations or the political considerations which bound him to the President or made him the President's opponent. Under these circumstances, it is not wise or judicious, in my opinion, that we should lay down a rule, not only for this trial but for all other trials, which might bring the Chief Justice, sitting as our Presiding Officer, in continual conflict with the Senate. Let the Senate decide its own questions of law. Let it not, by simple acquiescence, put the Chief Justice there to decide these questions of law. Let them come up to the work themselves and pronounce their own decision, without the necessity of appealing from his decision, and being brought into antagonism with him.

Mr. John Sherman, of Ohio, opposed this view on the ground that the trial would be unnecessarily prolonged were the preliminary decision taken from the Presiding Officer. That was the function of every presiding officer, and he considered that "a departure from the ordinary customs and courtesies extended to presiding officers, especially in a case where the Presiding Officer was made so by the Constitution of the United States," would be a very remarkable circumstance.

Mr. George H. Williams, of Oregon, argued elaborately in the same line:

I say that the Senators alone do not constitute a perfect Senate, but the Vice-President of the United States is a part of the Senate, and has certain functions to perform as a part of the Senate, and his right to vote as an officer of the Senate is recognized under certain circumstances. When the Senators are equally divided, he has a right to vote, for the language is:

"The Vice-President of the United States shall be President of the Senate, but shall have no vote unless they be equally divided."

That is, unless the Senators be equally divided he shall have no vote; but, if they are equally divided, then he is to have a vote. Certainly he could have no vote under any circumstances unless he did, for certain purposes at any rate, constitute a part of the Senate. Then the Constitution provides that—

"The Senate shall choose their other officers, and also a President pro tempore, in the absence of the Vice-President or when he shall exercise the office of President of the United States."

Then it says:

"The Senate shall have the sole power to try all impeachments."

Does that mean solely and exclusively; that the Senators shall have the sole power to try all impeachments; or does it mean that the Senate as an organized body, constituted under the provisions of the Constitution, shall try an impeachment? I say that it means that the Senate, with the Vice-President of the United States presiding, and the Constitution contemplates that he is to participate in the trial of every impeachment, except where the President of the United States is upon trial.

"When sitting for that purpose they shall be on oath or affirmation."

Does that mean that the Senators alone shall be upon oath or affirmation, or does it mean that the Senate, that all the constituent Members of the Senate who participate in the trial, shall be upon oath or affirmation?

"When the President of the United States is tried, the Chief Justice shall preside."

Now, sir, I understand the Constitution to make the Chief Justice of the United States a part of the Senate when it is engaged in trying an impeachment against the President of the United States. I do not undertake to say that he possesses the power to vote like a Senator; I will not make that declaration at this time;

but he is a part of the Senate, and I maintain that the Senate, by its rules, may confer upon him such powers as it sees proper in the proceedings of the trial. He is not to be treated, when the Constitution requires him to come here and preside over this body, as a stranger and an interloper, because, under the Constitution, he has as much right to be here as any Member of this body. It is as much his duty to be here as it is the duty of any Member of this body to be here; and if he is here under the Constitution, he is here for certain purposes and must necessarily possess the powers of a presiding officer. Why should there be evinced a kind of jealousy, as it seems to me, on the part of the Senate, lest if the Chief Justice comes in here he may assume to exercise powers which do not belong to him? Are we to assume that position, and hence refuse to give to him those rights and powers and privileges which the Constitution contemplates he should have?

It seems to me that there is a perfect propriety, when the Constitution compels him to come here and preside upon the trial of the President, in allowing him, in the first instance, to decide in that court as he would in the other court where he presides as Chief Justice.

Mr. Thomas A. Hendricks, of Indiana, while not holding that the Chief Justice might vote, considered it eminently proper that he should exercise a preliminary decision:

In the first place, he is an eminent judge, because of his position. Is he not competent, in all probability, to correctly and safely decide the questions that are likely to rise during the progress of the trial? In his office as Chief Justice he participates in the greatest decisions that are made in any court in the world, and as a judge of one of the circuits he presides over the controversies incident to life and property. Shall he not be heard to express in the first place for the Senate a judgment, and if not agreeable, the Senate shall say it is not agreeable? What harm can come of it? It brings the question directly before the body, promptly, conveniently, safely, prudently, in my opinion.

But if he is not to participate that far, to say the least of it, in the business of the body, why has the Constitution been so careful to have him here? Certainly for the purpose merely of presiding and seeing that good order is preserved in the body the Constitution would not be so careful that he should preside. Some power, it is presumed, is to be exercised by him. The Constitution presumes that and what power? To decide questions as they arise in the progress of the case, as questions ordinarily are decided, though subject, of course, to the superior will of the Senate.

Mr. Roscoe Conkling, of New York, who took the view advanced by Mr. Drake, cited precedents:

We may gain information at this point from the practice and precedents under the British constitution. "The House of Lords," called at times "the court of the King in Parliament," was, like the Senate, an entirety; an ascertained, defined body. There was a presiding officer at all times, and his existence and ministration was derived from the constitution as much as from our Constitution proceeds the existence of a presiding officer here. This presiding officer was sometimes a member of the House of Lords—taken from the body to preside in it, as our Presiding Officer for several sessions has been taken from the Members of the Senate. Sometimes the presiding officer in the Lords was made a member of the body contemporaneously with his installment as presiding officer—not having been a peer before, he was ennobled at the time and thus became a member. Sometimes not being a peer, and therefore not a member of the Lords, he presided without a peerage being conferred, and thus he was presiding officer, with all the prerogatives appurtenant to the presiding chair, but still was not a member of the body. By turning to the powers accorded to the Lord Chancellor as presiding officer, and to the duties and prerogatives of the lord high steward of England in the trial of impeachments, we may be able to measure the force of the expression, "When the President of the United States is tried, the Chief Justice shall preside." A distinction has been made between the right to vote and to decide of the lord high steward between a trial before the Lords in Parliament—that is to say before the House of Lords at large and a trial before a commission of the peers. It has been insisted that the lord steward never participated in the decision if the trial was before a chosen number of the peers, but that he did take part in judgment and decision when the trial was before the House of Lords in full.

Lord Campbell, in his Lives of the Chancellors, refers to this distinction; so does May in his Law of Parliament. But the journal of the House of Lords affords no reason to believe that such a difference of practice in the two tribunals was observed. On the contrary, the question whether the lord steward had or had not a vote or a voice in giving judgment seems to have hinged entirely upon his being merely a presiding officer or being also a member of the House of Lords itself. In virtue of his place as presiding officer he seems in no case to have participated in voting or determining the cause. His right and power and designation to preside seems never to have been supposed to carry with it any permission or obligation to join in deciding questions submitted to the tribunal. In many instances the lord high steward did vote, however, in trials of impeachment, but always in virtue of his being a member of the House, independent of the fact that he was also its presiding officer.

To substantiate this I refer, first, to the case of the Earl of Ferrers, brought to the bar in 1760. The case is reported at length by Sir Michael Foster, one of the judges of the court of king's bench. The earl having been convicted, the House propounded to the judges two questions, one of which went to the power of the presiding officer and of the House without the presiding officer. The judges answered the questions after deliberation, in writing, and the reasoning appears in Foster's Crown Law at page 138 and onward. I read from page 143. Having discussed some matters incident to a trial of a peer before a commission of peers he proceeds:

"But in a trial of a peer in full Parliament, or, to speak with legal precision, before the King in Parliament, of a capital offense, whether upon impeachment or indictment, the case is quite otherwise. Every peer present at the trial (and every temporal peer hath a right to be present in every part of the proceeding) voteth upon every question of law and fact, and the question is carried by the major vote, the high steward himself voting merely as a peer and member of that court in common with the rest of the peers, and in no other right.

"It hath indeed been usual, and very expedient it is in point of order and regularity, and for the solemnity of the proceeding, to appoint an officer for presiding during the time of the trial and until judgment, and to give him the style and title of steward of England. But this maketh no sort of alteration in the constitution of the court. It is the same court founded in immemorial usage, in the law and custom of Parliament, whether such appointment be made or not.

"It acteth in its judicial capacity in every order made touching the time and place of the trial, the postponing the trial from time to time upon petition according to the nature and circumstance of the case, the allowance or nonallowance of counsel to the prisoner, and other matters relative to the trial, and all this before an high steward hath been appointed; and so little was it apprehended in some cases which I shall mention presently, that the existence of the court depended on the appointment of an high steward, that the court itself directed in what manner and by what form of words he should be appointed. It hath likewise received and recorded the prisoner's confession, which amounteth to a conviction, before the appointment of an high steward, and hath allowed to prisoners the benefit of acts of general pardon, where they appeared entitled to it, as well without the appointment of an high steward as after his commission dissolved."

On the next page, referring to the case of the Earl of Danby, he states certain proceedings between the two Houses of Parliament, and remarks—

"That the Lords' committees said 'The High Steward is but Speaker pro tempore, and giveth his vote as well as the other Lords.'"

And upon this appears the following entry:

"In the Commons' Journal of the 15th of May it standeth thus: Their lordships farther declared to the committee that a Lord High Steward was made hac vice only, that notwithstanding the making of a Lord High Steward the court remained the same and was not thereby altered, but still remained the court of peers in Parliament; that the Lord High Steward was but as a speaker or chairman for the more orderly proceeding at the trials."

This the Commons wished entered on the Lords' Journal.

On page 147, speaking of the law as laid down by the Lords, Sir Michael says:

"The letter of the resolution, it is admitted, goeth no farther, but this is easily accounted for. A proceeding by impeachment was the subject matter of the conference, and the Commons had no pretense to interpose any other. But what

say the Lords? The High Steward is but as a speaker or chairman pro tempore for the more orderly proceeding at the trials; the appointment of him doth not alter the nature of the court, which still remaineth the court of the peers in Parliament. From these premises they draw the conclusion I have mentioned. Are not these premises equally true in the case of a proceeding upon indictment? They undoubtedly are."

This case and the authorities referred to in stating it seem to make it clear that the immemorial understanding in England has been that the officer whose duty it is to preside at trials of impeachment has definite functions, convenient and conducive to order, and the dispatch of business, and that the duty to vote or to decide is not among his duties or his powers. The fact of his presiding or of his being authorized or commissioned to preside, according to these cases, carries with it no right to act as a trier or a member. The same doctrine will be found in Sharswood's Blackstone, at pages 261 and 262 of the second volume. Lord Campbell, in the third volume of his Lives of the Chancellors, page 557, refers to the case of Lord Dellamere, tried in 1686 for complicity with Monmouth. Jeffries was Lord High Steward and seems to have conducted himself with all the brutality to have been expected of him. He began by a harangue to the culprit, urging him, in the presence of the king, to confess. Dellamere interposed to inquire if he was to be one of his judges, to which the Lord High Steward replied, "No, my Lord: I am judge of the court, but I am none of your triers." This trial was not before the House of Lords, but before a commission of peers, and in so far it is not a literal precedent. Here are other cases of antiquity and of note, more or less instructive, cases in which the presiding officer voted, not apparently sui juris, but by reason of his peerage.

In the trial of Lord Lovat, impeached by the Commons for high treason in 1746:

"The Lord High Steward, by a list, called every peer by his name, beginning with the lowest baron, and asked them, 'If Simon, Lord Lovat, was guilty of the high treason whereof he stands impeached or not guilty?'

"And thereupon every Lord, standing up uncovered, answered: 'Guilty, upon my honor,' laying his right hand upon his breast.

"Which done, the Lord High Steward, standing uncovered at the chair, as he did when he put the question to the other Lords, declared his opinion to the same effect and in the same manner." (27 Lords' Journals, p. 76.)

In the trial of the Earl of Oxford and of Earl Mortimer, impeached in 1717:

"The Lord High Steward stated the question before agreed on, and asked every Lord present severally, 'Whether content or not content?'

"And they all answering in the affirmative, as did the Lord High Steward declared his opinion also:

"The Lord High Steward declared that Robert, Earl of Oxford and Earl Mortimer, was, by the unanimous vote of all the Lords present, acquitted of the articles of impeachment exhibited against him by the House of Commons for high treason and other high crimes and misdemeanors, and of all things therein contained." * * * "And then the Lord High Steward stood up uncovered: and, declaring 'that there was nothing more to be done by virtue of the present commission,' broke the staff and pronounced the commission of Lord High Steward dissolved." (20 Lords' Journals, p. 525.)

The same form was observed in the case of Earls Derwentwater et al., impeached for high treason, in 1715.

In Viscount Melville's trial on an impeachment, in 1806, according to the Journal of the House of Lords—

"The Lord Chancellor having asked every Lord present, beginning with the junior baron, 'What says your lordship on this first article?' and the Lords having severally answered thereto, and the Lord Chancellor having declared his opinion also, the said several other questions were in like manner stated, and each Lord was severally asked in manner aforesaid touching the same. And the Lords having severally answered to the same, and the Lord Chancellor having declared his opinion also on each of the said questions, the Lord Chancellor declared that the answer of a majority of the Lords to each of the said questions, respectively, was 'not guilty.'"

Here are cases decided by the Lords without the vote or voice of the presiding officer—cases in which there was a presiding officer with every right as such, but without any participation in the decisions made.

In the case of Lord Chancellor Bacon, in 1621—

"The House (of Lords) being resumed, and the Lord Chief Justice returned to his place, it was put to the question whether the Lord Viscount St. Albans (Lord Chancellor) shall be suspended from all his titles of nobility during his life or no? and it was agreed per plures that he should not be suspended thereof." (40 Lords' Journals, p. 302.)

In Sacheverell's case, impeached in 1709—

"Then his lordship put the question, beginning at the junior baron first, as follows: 'Is Doctor Henry Sacheverell guilty of high crimes and misdemeanors, charged upon him by the impeachment of the House of Commons?'

"And having asked every Lord present, and they having declared guilty or not guilty,

"His lordship having cast up the votes, declared him guilty." (Ibid.)

In the case of the Earl of Macclesfield, in 1725—

"It was agreed that the question to be put to each Lord, severally, shall be, 'Is Thomas, Earl of Macclesfield, guilty of high crimes and misdemeanors charged on him by the impeachment of the House of Commons, or not guilty?'

"And every Lord present shall declare his opinion, 'guilty or not guilty, upon his honor', laying his right hand upon his breast.

"When the Lord Chief Justice, Speaker of this House, directed the Gentleman Usher of the Black Rod to bring thither the Earl of Macclesfield, who, after low obeisances made, kneeled until the said Lord Chief Justice acquainted him he might rise. (Judgment pronounced. Record of mode of obtaining the votes of the Lords on each resolution is, 'The question was put thereupon; and it was resolved in the affirmative.'") (Ibid.)

Mr. President, there may be arguments on this point which these precedents do not answer, but, it seems to me, they confront the view presented by the Senator from Oregon. The Lord Chancellor and the Lord High Steward of England, by the British constitution, were invested with the prerogatives and powers of presiding officers. Their attributes were more potential, their sway was greater, the examples of their supremacy were more copious, than the genius of our Constitution would tolerate. And if we ascertain the full measure in the less liberal days of British monarchy of what a presiding officer might do, surrounded by peers and commissioned by the King, we shall not fall short at least of the intention of those who adopted the language to which the Senator referred. The framers of our Constitution were profoundly learned in the practice and the meaning of British law, and the word "preside," when used by them, may well be supposed not to have been selected to convey a greater meaning than had been attached to it in the great struggle of privilege and power from which they had derived the philosophy of government.

The amendment proposed by Mr. Drake was agreed to, yeas 21, nays 7.

On March 31, 1868,[42] at the outset of the trial, on the objection of Mr. Henry Stanbery, counsel for the President, to certain testimony, the Chief Justice ruled that the testimony was competent.

Mr. Charles D. Drake, of Missouri, a Senator, at once objected that the question of the competency of evidence should be determined by the Senate and not by the Presiding Officer.

The Chief Justice [43] thereupon said:

The Chief Justice states to the Senate that in his judgment it is his duty to decide upon questions of evidence in the first instance, and if any Senator desires that the question shall then be submitted to the Senate it is his duty to submit it. So far as he is aware that has been the usual course of practice in trials of persons impeached in the House of Lords and in the Senate of the United States.

Thereupon Mr. Manager Benjamin F. Butler, seconded by Messrs. John A. Bingham and George S. Boutwell, urged on behalf of the House of Representatives, (*a*) that the Chief Justice might not make such preliminary decision, and (*b*) that such decision having been

[42] Second session Fortieth Congress, Globe Supplement, pp. 59–63: Senate Journal, pp. 867–870.

[43] Salmon P. Chase, of Ohio, Chief Justice.

made by the Chief Justice the managers as well as any Senator might call for a decision of the Senate. In presenting their views the managers quoted at length from English precedents.

The Chief Justice, stating his position more fully, said:

The Chief Justice will state the rule which he conceives to be applicable once more. In this body he is the Presiding Officer; he is so in virtue of his high office under the Constitution. He is Chief Justice of the United States, and therefore, when the President of the United States is tried by the Senate, it is his duty to preside in that body, and, as he understands, he is therefore the President of the Senate sitting as a court of impeachment. The rule of the Senate which applies to this question is the seventh rule, which declares that "the Presiding Officer may, in the first instance, submit to the Senate, without a division, all questions of evidence and incidental questions." He is not required by that rule so to submit those questions in the first instance; but for the dispatch of business, as is usual in the Supreme Court, he expresses his opinion in the first instance: If the Senate, who constitute the court, or any Member of it, desires the opinion of the Senate to be taken, it is his duty then to ask for the opinion of the court.

Mr. Manager Butler having asked whether the right to ask the opinion of the Senate would extend to a manager, the Chief Justice replied:

The Chief Justice thinks not. It must be by the action of the court or a member of it.

The Senate having retired for consultation, Mr. John B. Henderson, of Missouri, proposed an amendment to Rule VII which in effect struck out all after the first sentence of the present draft of the rule and inserted what is now the second sentence. This amendment was agreed to, yeas 31, nays 19, after the Senate had by a vote of yeas 20, nays 30, disagreed to the following declaration proposed by Mr. Drake:

It is the Judgment of the Senate that under the Constitution the Chief Justice presiding over the Senate in the pending trial has no privilege of ruling questions of law arising thereon, but that all such questions should be submitted to a decision by the Senate alone.

The last sentence of the rule relating to method of voting was not included by the above proceedings, and on April 1, 1868,[44] when a vote was about to be taken on a question of evidence, Mr. Drake insisted that, under Rule XXIII, and in the absence of a provision in Rule VII, the vote should be taken by yeas and nays.

But the Chief Justice decided:

Upon the question of order raised by the Senator from Missouri, the Chair is of opinion that he may submit this question to the Senate without having the yeas and nays taken, unless the yeas and nays are demanded by one-fifth of the Members present.

On April 2, 1868,[45] Mr. Drake proposed the following addition to the rule:

Upon all such questions the vote shall be without a division, unless the yeas and nays be demanded by one-fifth of the Members present or requested by the Presiding Officer, when the same shall be taken.

When the proposition came up for action on the next day, on motion of Mr. George F. Edmunds, of Vermont, the words "or requested by the Presiding Officer" were stricken out, and then the amendment as amended was agreed to without division.

Thus the rule attained its present form.

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[44] Globe Supplement, p. 70.
[45] Journal, pp. 874, 878; Globe Supplement, pp. 77, 92.

2085. The Presiding Officer during an impeachment trial sometimes rules preliminarily on evidence and cautions or interrogates witnesses.—In the impeachment trial of William W. Belknap, late Secretary of War, the President pro tempore [46] of the Senate presided. On questions arising over the admissibility of testimony he usually submitted the questions directly to the Senate for decision, without expressing a preliminary judgment.[47] In five instances, on questions wherein the principles had already been passed on by the Senate, he ruled.[48] In two cases he ruled on questions not already determined by the Senate, but announced that if counsel requested he would submit the matter.[49]

2086. On February 13, 1805,[50] in the high court of impeachment, during the trial of the case of the United States *v.* Samuel Chase, one of the associate justices of the Supreme Court of the United States, a witness, John Basset, was testifying, when the following occurred:

The WITNESS. The court considered me a good juror, and I was sworn accordingly. After the trial had been gone through, the jury retired to their room. I informed the jury that I thought we should have the book read through.

The President [51] here stopped the witness, and informed him that it was useless waste of time to relate what took place in the room of the jury.

The witness, however, continuing the statement he had previously begun, the President desired him to go on, if it were necessary for the purpose of connecting the testimony he had to give; but to pass over what occurred among the jury as briefly as possible.

2087. On April 1, 1868,[52] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, while Mr. Manager Butler was examining a witness, the Chief Justice,[53] who was presiding, interposed and asked a question of the witness.

Also again, on April 2,[54] the Chief Justice interrogated William E. Chandler, a witness.

2088. An instance wherein a President pro tempore presiding at an impeachment trial declined to entertain an appeal from his decision on a point of order.

Rigid enforcement of the rule that decisions of the Senate sitting for an impeachment trial shall be without debate.

On June 26, 1862,[55] in the high court of impeachment, during the trial of the cause of the United States *v.* West H. Humphreys, a question arose as to the form in which the court should pronounce judgment, and debate was going on, when Mr. Garrett Davis, of Kentucky, was called to order by Mr. Benjamin F. Wade, of Ohio, who insisted that the rule that "all decisions shall be had by ayes and noes and without debate," should be enforced.

The President pro tempore [56] said:

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[46] T. W. Ferry, of Michigan, President pro tempore.
[47] First session Forty-fourth Congress, Record of Trial, pp. 189, 192, 195, 205, 208, 219, etc.
[48] Pages 192, 211, 221, 222, 224.
[49] Pages 236, 256.
[50] Second session Eighth Congress, Annals, p. 222.
[51] Aaron Burr, of New York, Vice-President and President of the Senate.
[52] Second session Forty-first Congress, Globe Supplement, p. 72.
[53] Salmon P. Chase, of Ohio, Chief Justice.
[54] Globe Supplement, p. 89.
[55] Second session Thirty-seventh Congress, Globe, p. 2953.
[56] Solomon Foote, of Vermont, President pro tempore.

The rule is very explicit, leaves no room for doubt that these questions are to be decided without debate.[57]

Mr. Davis then proposed an appeal from the decision.

The President pro tempore declined to entertain the appeal.

The President pro tempore did not explain this decision, but when Mr. John P. Hale, of New Hampshire, questioned it, Mr. O. H. Browning, of Illinois, said:

I think an appeal can not be taken from the judgment of the presiding officer of a court.

2089. The Senate elected a presiding officer for the Swayne trial, and gave him the powers of the President of the Senate for signing orders, writs, etc.—On January 24, 1905,[58] the President pro tempore (William P. Frye, of Maine) in the Senate sitting in legislative session, requested that he be relieved of the duty of presiding at the impeachment trial of Judge Charles Swayne. Thereupon the Senate chose Mr. Orville H. Platt, of Connecticut, as presiding officer for the trial.

On the same day Mr. John C. Spooner, of Wisconsin, chairman of the Committee on Rules, made a statement as follows:

Mr. President, the rules of the Senate governing the sessions of the Senate when it is sitting in the trial of impeachments seems to draw a distinction between the Presiding Officer of the Senate and the presiding officer on the trial. Rule V provides:

"The Presiding Officer shall have power to make and issue, by himself or by the Secretary of the Senate, all orders, mandates, writs, and precepts authorized by these rules, or by the Senate, and to make and enforce such other regulations and orders in the premises as the Senate may authorize or provide."

The forms of summonses and subpoenas are all signed by the Presiding Officer of the Senate. In order to remove all possible question as to who shall sign the mandates of the Senate, including subpoenas, I offer the regulation which I send to the desk. * * *

The Constitution invests each House with the power, without limit, to make its own rules of procedure. Under the Constitution the function of trying impeachment cases devolves upon the Senate, and the provision of the Constitution must be construed as authorizing the Senate to make the rules which it may deem necessary for the proper discharge of all of the duties and functions developed upon it by the Constitution. The Senate has, I think, within its power and with perfect propriety under the circumstances, appointed a Senator to preside, using the language of the rule to be, "the presiding officer on the trial." That clearly vests in him the functions, as I think, of passing upon the admissibility of evidence and upon the various questions which may arise in the course of the trial.

This question is one which must be determined at once, for a summons is to be issued to Judge Swayne to appear, and it is important, of course, that there shall be no doubt that the officer signing the summons has the power to do so.

Mr. Spooner offered the following resolution, which was agreed to by the Senate:

Resolved, That the presiding officer on the trial of the impeachment of Charles Swayne, judge of the United States in and for the northern district of Florida, be, and is hereby, authorized to sign all orders, mandates, writs, and precepts authorized by the rules of procedure and practice in the Senate when sitting on impeachment trials and by the Senate.

2090. The Secretary of the Senate records proceedings in impeachments as he records legislative proceedings.

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[57] See Rule XIV as framed for trial of Judge Chase. The language of the entire rule suggests a question as to this interpretation. The present Rule XXIII modifies this rule materially.

[58] Third session Fifty-eighth Congress, Record, pp. 1289, 1291.

The proceedings of an impeachment trial are reported like the legislative proceedings.

Present form and history of Rule XIII of the Senate sitting for impeachments.

Rule XIII of the "Rules of procedure and practice in the Senate when sitting on impeachment trials" is as follows:

The Secretary of the Senate shall record the proceedings in cases of impeachment as in the case of legislative proceedings, and the same shall be reported in the same manner as the legislative proceedings of the Senate.

This rule was framed in 1868,[59] preparatory to the impeachment of President Johnson.

2091. In an impeachment trial all preliminary or interlocutory questions and all motions are argued not over an hour on a side.

The Senate, by order, may extend the time for the argument of motions and interlocutory questions in impeachment trials.

In arguing interlocutory questions in impeachment trials the opening and closing belong to the side making the motion or objection.

The Senate declined to sanction unlimited argument on interlocutory questions in impeachment trials.

The rule limiting the time of arguments on interlocutory questions in impeachment trials does not limit the number of persons speaking.

Present form and history of Rule XX of the Senate sitting for the trial of an impeachment.

Rule XX of the "rules of procedure and practice for the Senate when sitting in impeachment trials" is as follows:

All preliminary or interlocutory questions and all motions shall be argued for not exceeding one hour on each side, unless the Senate shall, by order, extend the time.

This rule dates from 1868, when the rules were revised preparatory to the trial of President Johnson. The committee, of which Mr. Jacob M. Howard, of Michigan, was chairman, reported[60] the rule in this form:

XX. All preliminary or interlocutory questions and all motions shall be argued by one person only on each side, and for not exceeding one hour on each side, unless the court shall, by order, extend the time.

This rule was debated at great length and amended to its present form on March 2.[61] It was first objected by Mr. Charles D. Drake, of Missouri, that there should be a provision giving the opening and closing to the one making the motion or objection, and also dividing the time. Mr. Roscoe Conkling, however, answered this satisfactorily by saying that the committee had considered the question, and concluded that the provisions would be unnecessary, since it was habitual for the counsel making the motion or raising the objection to yield after taking a portion of his time, and then conclude after his opponent. The committee conceived that this would be the practice under this rule.

[59] Second session Fortieth Congress, Senate Report No. 59; Senate Journal, p. 813; Globe, p. 1568.
[60] Second session Fortieth Congress, Senate Report No. 59.
[61] Senate Journal, pp. 241, 242, 814; Globe, pp. 1568–1580.

Mr. Frederick T. Frelinghuysen, of New Jersey, moved an amendment striking out the provision limiting the argument to one person on each side, which was agreed to without division. A motion by Mr. Frelinghuysen to change the time limit from one to two hours was disagreed to, yeas 20, nays 24, and a third amendment proposed by him, to add at the end the words "before the argument commences," was disagreed to—yeas 10, nays 33.

Mr. James W. Grimes, of Iowa, proposed to strike out the rule altogether, as contrary to the Senate's practice of unlimited debate, and as an innovation on the practice of all preceding impeachment trials. It was argued that interlocutory questions might be of the greatest importance, and that the argument thus limited might be one on which the result hinged. On the other hand, it was urged that impeachment trials, notably in England, were often prolonged, and that the Senate should provide against this at the outset. The motion to strike out was disagreed to—yeas 19, nays 23.

So the rule was left in its present form.

2092. On April 1, 1868,[62] during the trial of President Johnson, a question arose, and the Chief Justice [63] said:

Senators, the Chair will state the question to the Senate. The twentieth rule provides that—

"All preliminary or interlocutory questions and all motions shall be argued for not exceeding one hour on each side, unless the Senate shall, by order, extend the time."

The twenty-first rule provides:

"The case on each side shall be opened by one person. The final argument on the merits may be made by two persons on each side (unless otherwise ordered by the Senate upon application for that purpose), and the argument shall be opened and closed on the part of the the House of Representative."

On looking at these two rules together, the Chief Justice was under the impression that it was intended by the twentieth rule to limit the time, and not limit the persons; whereas, by the twenty-first rule, it was intended to limit the number of persons and leave the time unlimited; and he has acted upon that construction. He will now, with the leave of the Senate, submit to them the question: Does the twentieth rule limit the time without respect to the number of persons? Upon that question the Chair will take sense of the Senate.

The question being put, it was decided in the affirmative nem. con.

The Chief Justice then said:

The Senate decides that the limitation of one hour has reference to the whole number of persons to speak on each side, and not to each person, severelly; and will apply the rule as thus construed.

2093. On April 27, 1876,[64] during the proceedings in the trial of W. W. Belknap, late Secretary of War, the counsel for the respondent moved a postponement of the further hearing of the case until the first Monday of the next December, and for the discussion of this motion Mr. Matt H. Carpenter, of counsel for the respondent, asked that the Senate make an order temporarily modifying the rule, so as to admit of two hours on a side. This request was granted by the Senate by a vote of yeas 48, nays 13, an order to that effect being offered and acted on at the same sitting.

2094. In impeachment trials all orders and decisions of the Senate, with certain specified exceptions, are by the yeas and nays. During impeachment trials in the Senate the yeas and nays on adjournment are procured by one-fifth and not by rule.

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[62] Globe Supplement, p. 70

[63] Salmon P. Chase, of Ohio, Chief Justice.

[64] First session Forty-fourth Congress, Senate Journal, p. 921; Record of trial, p. 10.

The orders and decisions of the Senate in impeachment cases are without debate, unless in secret session.

Debate in secret session of the Senate sitting on impeachment trials is limited by rule.

On the decision of the final question in an impeachment case, debate in secret session of the Senate is limited to fifteen minutes to each Senator.

Present form and history of Rule XXIII of the Senate sitting for impeachment trials.

Rule XXIII of the "rules of procedure and practice for the Senate when sitting in impeachment trials" provides:

All the orders and decisions shall be made and had by yeas and nays, which shall be entered on the record, and without debate, subject, however, to the operation of Rule VII, except when the doors shall be closed for deliberation, and in that case no Member shall speak more than once on one question, and for not more than ten minutes on an interlocutory question, and for not more than fifteen minutes on the final question, unless by consent of the Senate, to be had without debate; but a motion to adjourn may be decided without the yeas and nays, unless they be demanded by one-fifth of the members present. The fifteen minutes herein allowed shall be for the whole deliberation on the final question, and not to the final question on each article of impeachment.

This rule dates from 1868,[65] when a committee reported a revision in preparation for the trial of President Johnson. The rule was debated on March 2 [66] and was amended in matters of detail, so it stood practically in its present form as far as the last sentence, which had not at that time been added.

On March 13,[67] in the Senate as organized for the trial, Mr. Roscoe Conkling, or New York, arose and said:

To correct a clerical error in the rules or a mistake of the types which has introduced a repugnance into the rules, I offer the following resolution by direction of the committee which reported the rules:

"*Ordered*, That the twenty-third rule, respecting proceedings on trial of impeachments, be amended by inserting after the word 'debate' the words 'subject, however, to the operation of rule seven.'"

If thus amended the rule will read:

"All orders and decisions shall be made and had by yeas and nays, which shall be entered on the record and without debate, subject, however, to the operation of rule seven, except when the doors shall be closed, etc."

The whole object is to commit to the Presiding Officer the option to submit a question without the call of the yeas and nays, unless they be demanded. That was the intention originally, but the qualifying words were dropped out in the print.

The order was agreed to without division.

The last sentence of the rule, "the fifteen minutes herein allowed," etc., was added on March 7, 1868, on motion of Mr. Charles Drake, of Missouri, immediately before the Senate proceeded to pronounce judgment in the case of President Johnson.[68]

On July 31, 1876,[69] when the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, was about to proceed to judgment, Mr. Hannibal Hamlin, a Senator from Maine, proposed an amendment which would have stricken out the words "except when the doors shall be closed for deliberation." This amend-

[65] Second session Fortieth Congress, Senate Report No. 59.
[66] Senate Journal, pp. 243, 244, 814; Globe, pp. 1588, 1589, 1602.
[67] Senate Journal, pp. 824, 825; Globe Supplement, p. 6.
[68] Senate Journal, p. 937; Globe Supplement, p. 408.
[69] First session Forty-fourth Congress, Record of trial, p. 341.

ment was proposed in connection with one to Rule XIX, which would have abolished secret sessions in impeachment trials. The Senate, by a vote of yeas 23, nays 32, declined to consider either amendment.

2095. In the Senate, sitting for impeachment trials, the doors may be closed for consultation on motion put and carried.—On February 16, 1905,[70] in the Senate, sitting for the impeachment trial of Judge Charles Swayne, a question arose as to the admissibility of certain evidence, and Mr. Joseph W. Bailey, a Senator from Texas, moved that the doors be closed for deliberation, or, in case the motion should be otherwise, that the Senate retire to its conference chamber.

A question arose as to the interpretation of the rule, and the Presiding Officer said:

The rule is as follows:

"All the orders and decisions shall be made and had by yeas and nays, which shall be entered on the record, and without debate, subject, however, to the operation of Rule VII, except when the doors shall be closed for deliberation, and in that case no Member shall speak more than once on one question, and for not more than ten minutes on an interlocutory question, and for not more than fifteen minutes on the final question, unless by consent of the Senate, to be had without debate."

The Presiding Officer is of the opinion that the consent of the Senate applies to the time during which a Senator may speak upon a question, and not to the question whether the Senate may proceed in the Senate Chamber as a court without closing the doors.

Mr. Bailey thereupon asked unanimous consent that the doors be closed. There being objection, he made a motion.

The Presiding Officer said:

The Presiding Officer will submit the motion to the Senate. Will the Senate order the doors to be closed for the purpose of deliberating upon the question?

There appeared yeas 53, nays 18. So the doors were closed.

2096. Secret sessions of the Senate to discuss incidental questions arising during an impeachment trial.—On May 14, 1876,[71] in the Senate, sitting for the impeachment trial of William W. Belknap, late Secretary of War, the doors were closed and the galleries cleared, while deliberation was going on as to the question of the jurisdiction of the Senate to try a civil officer who had resigned and whose resignation had been accepted. And the Senate continued to deliberate with closed doors until the decision of the question, on May 29.

2097. On July 19, 1876[72] in the Senate, sitting for the impeachment trial of William W. Belknap, late Secretary of War, it was ordered that the floor and galleries be cleared, and that the doors be closed. The session thereupon was held in secret, while determination was reached as to certain propositions relating to the time of beginning the taking of testimony, to the filing of a paper presented by counsel for respondent, and to the propriety of continuing the trial at a time when the House of Representatives was not in session.

2098. On the final question whether an impeachment is sustained, the yeas and nays are taken on each article separately.

If an impeachment is not sustained by a two-thirds vote on any article a judgment of acquittal shall be entered.

If the respondent be convicted by a two-thirds vote on any article of impeachment the Senate shall pronounce judgment.

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[70] Third session Fifty-eighth Congress, Record, p. 2720.

[71] First session Forty-fourth Congress, Senate Journal, pp. 993–947; Record of trial, pp. 72–77.

[72] First session Forty-fourth Congress, Journal of Senate, p. 954; Record of trial, p. 172.

A certified copy of the judgment in an impeachment case is deposited with the Secretary of State.

Discussion as to whether or not the Chief Justice, presiding at an impeachment trial, is entitled to vote.

The reasons for eliminating from the Senate rules for impeachment trials the words "high court."

Present form and history of Rule XXII of the Senate sitting for impeachment trials.

Rule XXII of the "rules of procedure and practice for the Senate when sitting in impeachment trials" is as follows:

On the final question whether the impeachment is sustained, the yeas and nays shall be taken on each article of impeachment separately; and if the impeachment shall not, upon any of the articles presented, be sustained by the votes of two-thirds of the Members present, a judgment of acquittal shall be entered; but if the person accused in such articles of impeachment shall be convicted upon any of said articles by the votes of two-thirds of the Members present, the Senate shall proceed to pronounce judgment, and a certified copy of such judgment shall be deposited in the office of the Secretary of State.

This rule was framed in 1868,[73] when a committee, of which Mr. Jacob M. Howard, of Michigan, was chairman, reported a revision of the rules in view of the approaching trial of President Johnson. As reported the rule was as follows:

XXII. If the impeachment shall not be sustained by the votes of two-thirds of the Members of said high court of impeachment present and voting a judgment of acquittal shall be entered; but if the person accused in such articles of impeachment shall be convicted by the votes of two-thirds of the Members of such court present the court, by its Presiding Officer, shall proceed to pronounce judgment, and a certified copy of such judgment shall be deposited in the office of the Secretary of State.

On motion of Mr. Frederick T. Frelinghuysen, of New Jersey, and without division, an amendment was inserted[74] at the beginning, in the following words:

On the final question, whether the impeachment is sustained, the yeas and nays shall be taken on each article of impeachment separately and;

Then Mr. Lot M. Morrill, of Maine, proposed an amendment[75] so changing the first clause of the rule that it would read:

On the final question, whether the impeachment is sustained, the yeas and nays shall be taken on each article of impeachment separately, and if the impeachment shall not be sustained by the votes of two-thirds of the Senators present a judgment of acquittal shall be entered.

This proposition, by substituting the words "Senators" for "high court of impeachment," brought up the question as to whether or not the Chief Justice would have a vote. Mr. John Sherman, of Ohio said:

Now, if a Presiding Officer is elected by the Senate, either on account of the sickness or absence or inability of the Vice-President to preside, he would undoubtedly have a right to vote. The Presiding Officer would undoubtedly have a right to vote, because he is not only a Senator having a personal right to his seat as a Senator, but he is a representative of a State, and that State would have a right to vote; and his mere election as Presiding Officer would not disfranchise him from voting.

Under these circumstances, when the President is to be tried, the Constitution declares, the Senate still having the sole power to try all impeachments, that the

[73] Second session Fortieth Congress, Senate Report No. 59.
[74] Senate Journal, p. 243; Globe, p. 1585.
[75] Senate Journal, p. 243; Globe, pp. 1585–1587.

Chief Justice shall preside over that tribunal. What does that mean? That he shall be here simply as a figurehead? No, sir. In every case where a man is made the presiding officer of any tribunal, of any convention, of any political body, it necessarily implies the right to vote, unless that implication is excluded by the instrument itself. There is no doubt whatever but that the Vice-President of the United States could vote every day in our proceedings but for one thing; and that is, that the Constitution carefully excludes him from the right to vote except in case of a tie. But who doubts that but for that single clause of the Constitution which declares that the Vice-President of the United States shall not vote except in case of a tie he could do it? Suppose the clause read "the Vice-President of the United States shall be President of the Senate;" suppose it stopped there; would not the Vice-President have a right to vote? The very implication drawn from the fact that he is the Presiding Officer of the Senate would give him a vote; but it goes and says, "but shall have no vote unless they be equally divided." The very fact that this language was used to exclude him from the right to vote shows that in the absence of that language he would have the right to vote.

And, sir, when the Chief Justice is substituted in the place of the Presiding Officer of this body, without any exclusion from the right to vote, without any exception made as against him, he is made a member of this court, to participate in the proceedings of this court; and it does seem to me, in the absence of all other precedents of exclusion or constitutional provision, he would have a right to vote. I do not know that the Chief Justice would take the same view of it or desire to vote, but it does seem to me that the Constitution, by substituting his high officer here as the Presiding Officer of this body, did not intend to make him a mere instrument or medium to put a question to the body, but intended to make him a part of the tribunal or court to try the case.

Mr. Howard, of Michigan, said:

The amendment of the Senator from Maine adopts, in effect, the language of the Constitution itself, as I understand it; and so far I think it entirely proper to be adopted. I must, however, now and at all times, so far as I can see my way, repel the idea that the Chief Justice is a member of the so-called court of impeachment, or has any right to vote during the deliberations of that court, or upon any question arising during the trial. I do not propose to go into it further now, although I see the gravity of the question, and have for some time been entirely sensible of it.

I will say, however, before I take my seat, that if we regard the analogies presented to us in the constitutional history of England, the same result which I claim to be the truth here will be arrived at. The House of Lords sit as a high court of impeachment. They are presided over when thus sitting either by the Lord Chancellor or the Lord High Steward; and the precedents are numerous and clear that the Lord Chancellor, although thus presiding, or the Lord Steward thus presiding, has no vote in the House of Lords in virtue of his presidency of the body; but if he be a peer he has, in right of his peerage, the right to vote; but it is put upon that ground, and that ground only. As president of the body he has no right even to decide questions where the body is equally divided.

Mr. Roscoe Conkling, of New York, referred to the important question raised and suggested that, to avoid that question, the amendment be modified so as to read "members present" instead of "Senators present." That would be the very language of the Constitution.

Mr. Morrill finally yielded to that request and the modified amendment was agreed to without division.

A little later the Senate recurred to Rule VII again, and after discussion of the powers of the Chief Justice in presiding, determined upon such amendment of that and other rules as to eliminate the words "high court of impeachment" wherever they occurred, the object evidently being to remove all idea that the Chief Justice had any other function than to preside.[78] In fact, the Chief Justice did vote on an

[78] See Proceedings on Rule VII and on functions of the Senate sitting for the trial. Section 2084 of this volume.

occasion when the vote of the Senate was a tie,[77] on March 31, but did not vote in the final judgment.[78]

Mr. Peter G. VanWinkle, of West Virginia, then proposed[79] an amendment to the second clause so it should read as follows:

> But if the person accused in such articles of impeachment shall be convicted by the votes of two-thirds of the members of such court present, the court shall proceed to ascertain what judgment shall be rendered in the case, which judgment, being rendered, shall be pronounced by the Presiding Officer, etc.

This was in view of the fact that the Constitution does not say that the punishment shall necessarily extend to disqualification to hold office. Mr. George F. Edmunds, of Vermont, suggested that the same result could be attained by striking out the words "of such court" and "by its Presiding Officer." Mr. VanWinkle accepted the amendment, which was agreed to without division.

Mr. George H. Williams, of Oregon, next proposed to insert after the words "impeachment shall not" the words "upon any of the articles be presented," and after the word "convicted" the words "upon any of said articles."[80]

The object of this amendment was to make it certain that a conviction on one article, as on one count of an indictment, should be sufficient for judgment, after the analogy of the criminal law. The amendment was agreed to without division.

So the rule received its present form.

2099. In 1804 the Senate, sitting as a high court of impeachment, considered and adopted rules for the trial.—On December 10, 1804,[81] the Senate, sitting as a high court of impeachment, took into consideration the report of the committee appointed on November 30 to prepare and report proper rules of proceedings, to be observed by the Senate in cases of impeachments.

This report consisted of a series of rules, prescribing forms and methods of procedure. On this day the high court agreed to a portion of the rules, and then postponed the consideration of the remainder.

On December 24 the high court resumed consideration of the report, and agreed to the remaining portion.

In the meanwhile, on December 14, action had been taken in accordance with the rules agreed to on December 10.

2100. Where the special rules for impeachment trials are silent, the general rules of the Senate are regarded as applicable.

At the Johnson trial the Chief Justice felt constrained to submit to the Senate for decision a question of order affecting the organization.

At the Johnson trial the Chief Justice ruled that one point of order might not be made while another was pending.

The Chief Justice ruled in the Johnson trial that debate must be confined to the pending question.

Rule XXIII, prohibiting debate in open Senate sitting for an impeachment trial, was held by the Chief Justice not to apply to a question arising during organization.

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[77] Senate Journal, pp. 868, 869.
[78] Senate Journal, pp. 939–951.
[79] Senate Journal, p. 243; Globe, p. 1587.
[80] Senate Journal, p. 243; Globe, pp. 1587, 1588.
[81] Second session, Eighth Congress, Senate Impeachment Journal, pp. 511.

Instance of an appeal from the decision of the Chief Justice on a question of order arising during the Johnson trial.

In the Johnson trial the Chief Justice ruled that a proposed rule or order should lie over for one day.

On March 6, 1868,[82] while the Senate was organizing for the trial of Andrew Johnson, President of the United States, after the Chief Justice had taken the chair as presiding officer, and while the oath was being administered to the Senators, an objection was made to the competency of Mr. Benjamin F. Wade, of Ohio, to take the oath.

Discussion having arisen, Mr. Jacob M. Howard, of Michigan submitted a question of order.

The Chief Justice [83] said:

The Senator from Connecticut is called to order. The Senator from Michigan has submitted a point of order for the consideration of the body. During the proceedings for the organization of the Senate for the trial of an impeachment of the President the Chair regards the general rules of the Senate as applicable and that the Senate must determine for itself every question which arises, unless the Chair is permitted to determine it. In a case of this sort affecting so nearly the organization of this body the Chair feels himself constrained to submit the question of order to the Senate. Will the Senator from Michigan state his point of order in writing?

While the point of order raised by Mr. Howard was being reduced to writing at the desk, Mr. James Dixon, of Connecticut, submitted as a point of order whether a question of order such as was pending could be raised.

The Chief Justice said: [83a]

A point of order is already pending, and a second point of order can not be made until that is disposed of.

Mr. Howard's question was then submitted in writing, as follows:

That the objection raised to administering the oath to Mr. Wade is out of order, and that the motion of the Senator from Maryland, to postpone the administering of the oath to Mr. Wade until other Senators are sworn, is also out of order under the rules adopted by the Senate on the 2d of March, instant, and under the Constitution of the United States.

The Chief Justice announced that this question was open to debate.

Mr. Dixon having proceeded in debate, was discussing the competency of Mr. Wade to participate in the trial, when Mr. John Sherman, of Ohio, called him to order for not confining himself to the question under consideration.

Thereupon the Chief Justice held:

The Senator from Ohio makes the point of order that the Senator from Connecticut, in discussing the pending question of order, must continue himself strictly to that question, and not discuss the main question before the Senate. In that point of order the Chair conceives that the Senator from Ohio is correct, and that the Senator from Connecticut must confine himself strictly to the discussion of the point of order before the House.

Mr. Dixon having proceeded, was again called to order by Mr. Howard, who objected that no debate was in order under Rule XXIII of "the rules of procedure and practice in the Senate when sitting on impeachment trials." This rule he quoted as follows:

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[82] Second session Fortieth Congress, Senate Journal, pp. 810, 811; Globe, pp. 1696, 1697, 1698, 1700.

[83] Salmon P. Chase, of Ohio, Chief Justice.

[83a] Globe, p. 1697.

All the orders and decisions shall be made and had by yeas and nays, which shall be entered on the record, and without debate, except when the doors be closed for deliberation, and in that case no Member shall speak, etc.

The Chief Justice overruled the point of order, saying:

The twenty-third rule is a rule for the proceedings of the Senate when organized for the trial of an impeachment. It is not yet organized; and in the opinion of the Chair the twenty-third rule does not apply at present.

Mr. Charles D. Drake, of Missouri, having appealed, the Chief Justice put the question:

As many Senators as are of opinion that the decision of the Chair shall stand as the judgment of the Senate will, when their names are called, answer "yea;" as many as are of the contrary opinion will answer "nay."

And there were yeas 24, nays 20; so the decision of the Chief Justice was sustained.

2101. On April 11, 1868,[84] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, the Chief Justice,[85] in ruling on a question of order said:

The Chief Justice in conducting the business of the court adopts for his general guidance the rules of the Senate sitting in legislative session as far as they are applicable. That is the ground of his decision.

2102. On April 14, 1868,[86] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, Mr. Charles Sumner, of Massachusetts, proposed the following:

Ordered, In answer to the motion of the managers, that under the rule limiting the argument to two on a side unless otherwise ordered, such other managers and counsel as choose may print and file arguments at any time before the argument of the closing manager.

Objection being made to the immediate consideration of the order, and Mr. Sumner having demanded its consideration, the Chief Justice [85] said:

The Chief Justice stated on Saturday that in conducting the business of the court he applied, as far as they were applicable, the general rules of the Senate. This has been done upon several occasions, and when objection has been made orders have been laid over to the next day for consideration.

2103. In the Johnson trial the Chief Justice admitted a motion to lay a pending proposition on the table.—On April 13, 1868,[87] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, an order relating to the final arguments in the trial, was under consideration.

Mr. George H. Williams, of Oregon, moved that the resolution lie on the table.

Mr. Charles D. Drake, of Missouri, said:

I raise a question of order, Mr. President, that in this Senate sitting for the trial of an impeachment there is no authority for moving to lay any proposition on the table. We must come to a direct vote, I think, one way or the other.

The Chief Justice [85] said:

The Chief Justice can not undertake to limit the Senate in respect to its mode of disposing of a question; and as the Senator from Oregon [Mr. Williams]

[84] Second session Fortieth Congress, Globe Supplement, p. 147.
[85] Salmon P. Chase, of Ohio, Chief Justice.
[86] Second session Fortieth Congress, Senate Journal, p. 396; Globe Supplement, p. 174.
[87] Second session Fortieth Congress, Globe Supplement, p. 162.

announced his purpose to test the sense of the Senate in regard to whether they will alter the rule at all the Chief Justice conceives his motion to be in order.

2104. Instance wherein a Senator sitting in an impeachment trial was excused from voting on an incidental question.—On May 15, 1876,[88] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, a question arose as to the sufficiency of the pleadings. After the arguments had been concluded, but before the Senate had rendered a decision, Mr. James L. Alcorn, a Senator from Mississippi, attended and took the oath prescribed for Senators sitting in impeachment trials.

Having taken the oath, Mr. Alcorn rose and stated that he had been unavoidably absent from the sessions of the Senate sitting for the trial of impeachment heretofore held, and for that reason he asked to be excused from voting upon the question now under consideration presented by the pleadings.

Thereupon Mr. John Sherman moved that Mr. Alcorn, for the reasons stated, be excused from voting on the question as presented by the pleadings and now before the Senate.

The motion was agreed to.

2105. Instances of a call for a quorum in the Senate sitting for an impeachment trial.

The Presiding Officer of the Senate sitting in an impeachment trial directed the counting of the Senate to ascertain the presence of a quorum.

On April 22, 1868,[89] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, during the argument of Mr. Manager George S. Boutwell, the attendance after a recess was so scanty that Mr. John Sherman, of Ohio, moved a call of the Senate under the then existing Rule 16 of the Senate. The motion was carried and the roll was called.

2106. On May 4, 1876,[90] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, Mr. Aaron A. Sargent, of California, commented on the fact that less than a quorum were presented, and moved a call of the Senate.

And thereupon the roll was called.

2107. On June 16, 1876,[91] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, Mr. George F. Edmunds, of Vermont, suggested that there was no quorum present, and asked the President pro tempore to ascertain.

The President pro tempore [92] said:

The Secretary will count the Senate.

The Chief Clerk having counted the Senators present, the President pro tempore announced that the Senators present did not constitute a quorum.

Thereupon, on motion of Mr. Edmunds, the Sergeant-at-Arms was directed to request the attendance of absentees.

This having failed to secure sufficient attendance, the Senate thereupon adjourned.

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[88] First session Fortieth Congress, Senate Journal, p. 933; Record of trial, pp. 72, 73.
[89] Second session Fortieth Congress, Senate Journal, p. 921; Globe Supplement, p. 274.
[90] First session Forty-fourth Congress, Record of trial, p. 31.
[91] First session Forty-fourth Congress, Senate Journal, p. 952; Record of trial, p. 171.
[92] T. W. Ferry, of Michigan, President pro tempore.

2108. Instances of temporary suspensions of the sitting of the Senate in an impeachment trial.—On July 10, 1876,[93] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, the President pro tempore [94] said:

The Chair is informed that there is a message to be submitted from the House of Representatives. If there is no objection the proceedings of the trial will be temporarily suspended for that purpose.

A message was received from the House of Representatives.

After which the President pro tempore said:

The Senate resumes its session sitting for the trial of the impeachment.

Later another message was received in the same way.[95]

2109. On July 19, 1876,[96] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, Mr. William Windom, a Senator from Minnesota, asked that the proceedings might be suspended in order that he might make a report from the committee of conference on the sundry civil bill.

The President pro tempore [97] said:

If there be no objection proceedings will be suspended for that purpose.

After some time spent in legislative session, the Senate resumed the trial of the impeachment of William W. Belknap.

2110. Admission to the Senate galleries during the Johnson trial was regulated by tickets.

The Senators occupied their usual seats during the Johnson trial.

On March 4, 1868,[98] Mr. Henry B. Anthony, of Rhode Island, during the proceedings preliminary to the trial of President Andrew Johnson, proposed the following:

Ordered, That during the trial of the impeachment now pending no person besides those who now have the privilege of the floor shall be admitted to the galleries, or to that portion of the Capitol set apart for the use of the Senate and its officers, except upon tickets to be issued by the Sergeant-at-Arms. Such tickets shall be numbered, and shall be good only for the day on which they are dated. The number of tickets issued shall not exceed the number of persons who can be comfortably seated in the galleries, leaving the steps and passages entirely free. The portion of the gallery set apart for the diplomatic corps shall be exclusively appropriated to it, and tickets of admission thereto shall be issued to the foreign legations. Four tickets shall be issued to each Senator, 2 tickets to each Member of the House of Representatives, 2 tickets to the Chief Justice and to each justice of the Supreme Court of the United States, 2 tickets to the chief justice and to each justice of the supreme court of the District of Columbia, and 2 tickets to the chief justice and to each judge of the Court of Claims. Sixty tickets shall be issued by the Presiding Officer to the reporters for the press, and the remaining tickets shall be distributed under his direction.

The Sergeant-at-Arms, under the direction of the Presiding Officer of the Senate, shall carry out these regulations, and, with the approbation of the Committee on Contingent Expenses, shall be authorized to employ such additional force as may be necessary for the preservation of order.

On March 6 [99] this proposition was referred to the select committee, of which Mr. Jacob M. Howard, of Michigan, was chairman, and

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[93] First session Forty-fourth Congress, Record of trial, p. 230.
[94] T. W. Ferry, of Michigan, President pro tempore.
[95] Record of trial, p. 234.
[96] First session Forty-fourth Congress, Record of trial, p. 282.
[97] T. W. Ferry, of Michigan, President pro tempore.
[98] Second session Fortieth Congress, Senate Journal, pp. 258, 259, Globe, p. 1649.
[99] Senate Journal, p. 277; Globe, pp. 1701, 1702.

which had in charge the forms of procedure and arrangements for the trial.

On March 10[1] Mr. Howard reported the order with amendment. There was considerable debate as to the propriety of making any rule, the argument being that the public should not be excluded. On the other hand it was urged that order and decorum during the trial were of great importance, and that there should be arrangements which would secure an audience disposed to preserve order.

Another question that was discussed at length was the provision for seating Senators. At the Humphries trial the Senators had occupied benches placed at the right and left of the presiding officer. Senators who had sat during those proceedings objected to such arrangement as uncomfortable and also as inconvenient because of difficulty in hearing. It was pointed out that the attendance of Members of the House was not likely to be large, as already in the preliminary proceedings not over fifty had attended at any one time. Finally, on motion of Mr. Anthony, an amendment was agreed to providing that the Senators should occupy their usual seats during the trial. The order as amended was agreed to as follows:

That during the trial of the impeachment now pending no persons besides those who have the privilege of the floor and clerks of the standing committees of the Senate shall be admitted to that portion of the Capitol set apart for the use of the Senate and its officers, except upon tickets to be issued by the Sergeant-at-Arms.

The number of tickets shall not exceed 1,000.

Tickets shall be numbered and dated, and be good only for the day on which they are dated.

The portion of the gallery set apart for the diplomatic corps shall be exclusively appropriated to it, and 40 tickets of admission thereto shall be issued to the Baron Gerolt for the foreign legations.

Four tickets shall be issued to each Senator, 4 tickets each to the Chief Justice of the United States and the Speaker of the House of Representatives, 2 tickets to each Member of the House of Representatives, 2 tickets each to the associate justices of the Supreme Court of the United States, 2 tickets each to the chief justice and associate justices of the supreme court of the District of Columbia, 2 tickets to the chief justice and each judge of the Court of Claims, 2 tickets to each Cabinet officer, 2 tickets to the General commanding the Army, 20 tickets to the Private Secretary of the President of the United States, for the use of the President, and 60 tickets shall be issued by the President pro tempore of the Senate to the reporters of the press. The residue of the tickets to be issued shall be distributed among the Members of the Senate in proportion to the representation of their respective States in the House of Representatives, and the seats now occupied by the Senators shall be reserved for them.

On March 24,[2] during the trial, Mr. John Sherman, of Ohio, proposed the following:

Ordered, That after to-morrow the order of the 15th of March ultimo, relative to admission to the gallery, be suspended until further order, and that the Sergeant-at-Arms of the Senate shall take special care that order shall be observed in the galleries during the trial of the impeachment now pending, and he is hereby authorized to arrest and bring before the Senate any person who violates the orders of the Senate, and he shall take effective measures to secure admission to the diplomatic gallery, the ladies' gallery, and the reporters' gallery to those only who are entitled to admission thereto under the rules.

On April 2[3] the resolution was debated briefly. Mr. Sherman intimated that the audiences had not been very orderly, and that the people who would attend with open galleries would do as well.

[1] Senate Journal, p. 288; Globe, pp. 1775–1782.
[2] Senate Journal, p. 336; Globe, p. 2078.
[3] Senate Journal, p. 364; Globe, p. 2233.

On April 4 [4] the proposition was debated, principally as to the conduct of the audiences, but was not acted on and apparently did not come before the Senate again.

On May 5 [5] a proposition to give seats in the gallery to the members of the United States Medical Association was discouraged in debate, and did not come to a vote, it being urged that they could seek admission by tickets in the usual way.

2111. According to the best considered practice, the Senate sitting for an impeachment trial does not obtain the use of Senate archives without an order made in legislative session.—On April 4, 1868,[6] in the Senate sitting as a court of impeachment for the trial of Andrew Johnson, President of the United States, Mr. Manager Benjamin F. Butler, in the course of the production of testimony on behalf of the House of Representatives, asked that the Executive Journal of the Senate for a cretain date might be produced, and he asked that the Senate direct its production.

Mr. John Sherman, of Ohio, a Senator, moved that the Journal be furnished.

The motion was agreed to.

2112. On April 15, 1868,[7] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, Mr. Benjamin R. Curtis, of counsel for the respondent, moved for an order on the proper officer of the Senate to furnish a statement of the dates of the beginning and end of each session of the Senate.

The Chief Justice [8] said:

The Chief Justice is of opinion that that is an application which can only be addressed to the Senate in legislative session. If the court desire it, he will vacate the chair in order that the President pro tempore may take it.

Very soon thereafter, on motion of Mr. Reverdy Johnson, of Maryland, "the Senate sitting for the trial of the President upon articles of impeachment adjourned to 12 o'clock m. to-morrow."

Thereupon the President pro tempore resumed the Chair, and in the course of legislative business, on motion of Mr. Johnson, it was:

***Order*, That the Secretary of the Senate be directed to furnish to the counsel for the President a statement of the beginning and end of each executive and legislative session from 1789 to 1868.**

2113. During the trial of President Johnson the Senate voted to receive resolutions of a State constitutional convention on the subject of the impeachment.—On March 25, 1868,[9] while proceedings for the impeachment of President Johnson were going on before the Senate, the President pro tempore [10] laid before the Senate resolutions adopted by the constitutional convention of North Carolina, returning thanks for the vigilance with which the House and Senate had proceeded in the matter of impeachment.

Mr. Willard Saulsbury, of Delaware, said:

I object, Mr. President, to the reception of that paper, and for this reason: It purports to be addressed to the Senate of the United States, and the Members

[4] Senate Journal, p. 366; Globe, pp. 2237, 2238.
[5] Globe, p. 2362.
[6] Second session Fortieth Congress, Globe Supplement, p. 119.
[7] Second session Fortieth Congress, Senate Journal, pp. 383, 961; Globe Supplement, p. 194.
[8] Salmon P. Chase, of Ohio, Chief Justice.
[9] Second session Fortieth Congress, Senate Journal, p. 337; Globe, p. 2084.
[10] Benj. F. Wade, of Ohio, President pro tempore.

of the Senate of the United States compose the court of impeachment, and any communication addressed to the Members of that court upon the pending subject is improper to be entertained by the Senate, the Senate composing that court, as being an attempt to exercise an influence upon the minds of the judges.

The President pro tempore put the question on the reception of the resolutions, and the Senate voted to receive them.

The resolutions were then laid on the table.

2114. In the Swayne trial a Senator who had not heard the evidence was excused from voting on the question of guilt.—On February 27, 1905,[11] in the Senate sitting for the impeachment trial of Judge Charles Swayne, as the vote was about to be taken on the first article, Mr. P. C. Knox, of Pennsylvania, said:

Mr. President, having been prevented by illness from attending the sessions of the Senate sitting in this impeachment trial at which the testimony was produced, and also having been prevented by the effects of the illness from reading the testimony, I ask that the Senate may excuse me from voting upon this and all subsequent roll calls taken to ascertain the judgment of the Senate upon the charges against the respondent.

The Presiding Officer said:

Senators, you have heard the request of the Senator from Pennsylvania [Mr. Knox]. Those who would excuse him from voting will say "aye;" opposed, "no." [Putting the question.] The "ayes" have it. The Senator from Pennsylvania is excused.

2115. The expenses of the Senate in the Swayne trial was defrayed from the Treasury.—On January 24, 1905,[12] the Senate, in legislative session, agreed to this resolution:

Resolved, etc., That there be appropriated from any money in the Treasury not otherwise appropriated the sum of $40,000, or so much thereof as may be necessary, to defray the expenses of the Senate in the impeachment trial of Charles Swayne.

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[11] Third session Fifty-eighth Congress, Senate Record, p. 3468.
[12] Third session Fifty-eighth Congress, Record, p. 1289; 33 Stat. L., p. 1280.

Conduct of Impeachment Trials* [1]

1. Appearance of respondent. Sections 2116–2118.
2. Form of summons. Section 2119.[2]
3. Answer of respondent, replication, etc. Sections 2120–2125.[3]
4. Presentation of articles. Sections 2126, 2127.[4]
5. Return on summons. Sections 2128, 2129.
6. Counsel and motions. Sections 2130, 2131.
7. Opening and final arguments. Sections 2132–2143.[5]
8. Conduct and privilege of managers and counsel. Sections 2144–2154.

2116. Under the parliamentary law, if the party impeached at the bar of the Lords do not appear, proclamations are issued giving him a day to appear.

Provisions for rectification of an error in the process to secure attendance of respondent impeached by the Commons.

The party impeached at the bar of the Lords not appearing, his goods may be arrested and they may proceed.

In Chapter LIII of Jefferson's Manual, the following is given in the "sketch of some of the principles and practices of England," on the subject of impeachments:

Process. If the party do not appear, proclamations are to be issued giving him a day to appear. On their return they are strictly examined. If any error be found in them, a new proclamation issues, giving a short day. If he appear not, his goods may be arrested, and they may proceed. (Seld. Jud., 98, 99.)

2117. In the English usage the articles of impeachment are substituted for an indictment and distinguished from it by less particularity of specification.—In Chapter LIII of Jefferson's Manual the following is given in the sketch of some of the principles and practices of England" on the subject of impeachments:

Articles. The accusation (articles) of the Commons is substituted in place of an indictment. Thus, by the usage of Parliament, in impeachment for writing or speaking, the particular words need not be specified. (Sach. Tr., 325; 2 Wood., 602, 605; Lords' Journ., 3 June, 1701; 1 Wms., 616.)

*Hinds' Precedents, Vol. 3, p. 438 (1907).

[1] Other procedure illustrated by the conduct of the several trials relates to the following subjects: Delivery of the impeachment at the bar of the Senate. Sections 2296, 2320, 2343, 2367, 2385, 2412, 2413, 2445, 2505 of this volume. Drawing of articles. Sections 2297, 2299, 2300, 2323, 2343, 2344, 2368, 2387, 2412, 2415, 2416, 2418, 2444, 2448, 2472, 2506, 2514. Form of articles in the following cases: Blount's (sec. 2302), Pickering's (sec. 2328), Chase's (sec. 2346), Peck's (sec. 2370), Humphrey's (sec. 2390), Johnson's (sec. 2420), Belknap's (sec. 2449), Swayne (sec. 2476). Organization for trial. Section 2328, 2349. As to postponement of trial. Sections 2044, 2353, 2425, 2426, 2430, 2456. Questions by Senators during testimony. Sections 2176–2183.

[2] Issuance of writ of summons. Sections 2304, 2307, 2322, 2329, 2347, 2391, 2423, 2451, 2479.

[3] Appearance and answer. Sections 2307–2310, 2332, 2333, 2349, 2351, 2371, 2374, 2392, 2393, 2424, 2428, 2431, 2452, 2453, 2461, 2480, 2481. The replication. Sections 2311, 2352, 2375, 2431, 2432, 2454, 2482. Managers file a brief on respondent's plea to jurisdiction. Section 2015.

[4] Presentation of articles in the Senate. Sections 2301, 2325, 2328, 2346, 2370, 2390, 2420, 2449, 2473, 2476. As to presentation of before the Chief Justice takes his seat as presiding officer. Section 2057. Precedent in Blount's case. Section 2295.

[5] See also Sections 2312, 2326, 2355, 2378, 2433, 2434, 2456, 2458, 2464, 2465, 2484. As to admission of evidence during final arguments. Section 2166.

2118. Articles of impeachment being presented against a Senator, he was sequestered from his seat and was ordered to and did recognize for his appearance.

Form of recognizance given by the respondent in an impeachment case for his appearance.

The Senate Journal included in full the bond given by a respondent for his appearance to answer articles of impeachment.

On July 7, 1797,[6] when articles of impeachment from the House of Representatives were exhibited in the Senate against William Blount, a Senator, it was ordered that he be sequestered from his seat and enter into recognizance for his appearance to answer said impeachment.

Mr. Blount thereupon named his sureties, who were satisfactory to the Senate, and the recognizance was approved by the Senate and executed in its presence as follows:

Be it remembered, That on the 7th day of July, in the year of our Lord 1797, personally appeared before the President pro tempore and Senate of the United States William Blount, esq., Senator of the State of Tennessee; Thomas Blount, esq., Member of the House of Representatives of the United States from the State of North Carolina, and Pierce Butler, esq., of South Carolina, who severally acknowledged themselves to owe to the United States of America the following sums, that is to say: The said William Blount the sum of $20,000, and the said Thomas Blount and Pierce Butler each the sum of $15,000, to be levied on their respective goods and chattels, lands, and tenements, on the condition following, that is to say:

The condition of the foregoing recognizance is such that if the said William Blount shall appear before the Senate of the United States to answer to certain charges of impeachment to be exhibited against him by the House of Representatives of the United States, and not depart therefrom without leave, that then the above recognizance shall cease to exist, otherwise be and remain in full force and virtue.

Sealed and delivered in Senate of the United States this 7th day of July, 1797.

WILLIAM BLOUNT. [L. S.]
THOMAS BLOUNT. [L. S.]
PIERCE BUTLER. [L. S.]

Attest:
SAMUEL A. OTIS,
Secretary of the Senate of the United States.

This bond appears in full in the Senate Journal.

2119. Form of writ of summons issued to respondent in an impeachment case.

Form of precept indorsed on writ of summons in an impeachment case.

All processes in an impeachment trial are served by the Sergeant-at-Arms of the Senate unless otherwise ordered.

Rule XXIV of the "Rules of procedure and practice of the Senate when sitting in impeachment trials" provides:

FORM OF SUMMONS TO BE ISSUED AND SERVED UPON THE PERSON IMPEACHED

THE UNITED STATES OF AMERICA, *ss:*
The Senate of the United States to ——— ———. *greeting:*

Whereas the House of Representatives of the United States of America did, on the ——— day of ———, exhibit to the Senate articles of impeachment against you, the said ——— ———, in the words following:

[6] First session Fifth Congress, Senate Journal, p. 389.

[Here insert the articles.]

And demand that you, the said ——— ———, should be put to answer the accusations as set forth in said articles, and that such proceedings, examinations, trials, and judgments might be thereupon had as are agreeable to law and justice;

You, the said ——— ———, are therefore hereby summoned to be and appear before the Senate of the United States of America, at their Chamber in the city of Washington, on the —— day of ———, at 12:30 o'clock p. m., then and there to answer to the said articles of impeachment, and then there to abide by, obey, and perform such orders, directions, and judgments as the Senate of the United States shall make in the premises according to the Constitution and laws of the United States.

Hereof you are not to fail.

Witness ——— ———, and [Presiding Officer of the said Senate], at the city of Washington, this —— day of ———, in the year of our Lord ———, and of the Independence of the United States the ———.

——— ———.

Presiding Officer of the Senate.

FORM OF PRECEPT TO BE INDORSED ON SAID WRIT OF SUMMONS.

THE UNITED STATES OF AMERICA, *ss:*

The Senate of the United States to ——— ———, *greeting:*

You are hereby commanded to deliver to and leave with ——— ———, if conveniently to be found, or, if not, to leave at his usual place of abode, or at his usual place of business in some conspicuous place, a true and attested copy of the within writ of summons, together with a like copy of this precept; and in whichsoever way you perform the service, let it be done at least —— days before the appearance day mentioned in said writ of summons.

Fail not, and make return of this writ of summons and precept, with your proceedings thereon indorsed, on or before the appearance day mentioned in the said writ of summons.

Witness ——— ———, and Presiding Officer of the Senate, at the city of Washington, this —— day of ———, in the year of our Lord ———, and of the Independence of the United States the ———.

——— ———,

Presiding Officer of the Senate.

All process shall be served by the Sergeant-at-Arms of the Senate, unless otherwise ordered by the court.

This is the form agreed to in 1868.[7]

2120. Under the parliamentary law the respondent answers the summons in custody if the case be capital and the accusation by special, but not if it be general.

The accusation being of misdemeanor only, the respondent, under the English usage, does not answer the summons in custody, but the Lords may commit him until he finds sureties for his future appearance.

Under the parliamentary law the respondent, if a Lord, answers the summons in his place; if a Commoner, at the bar.

Under the English practice a copy of the articles is furnished to the respondent and a day is fixed for his answer.

According to the parliamentary law the respondent, on accusation for misdemeanor, may answer the articles by person or by writing or by attorney.

A respondent in a case of impeachment for misdemeanor answers the articles before the Lords in such a state of liberty or restraint as he was in when the Commons complained of him.

[7] Second session Fortieth Congress, Senate Report No. 59; Senate Journal, pp. 244–246; Globe, pp. 1590–1593.

In English impeachments the respondent has counsel in accusation for misdemeanor, but not in capital cases.

In Chapter LIII of Jefferson's Manual the following is given in the "sketch of some of the principles and practices of England" on the subject of impeachments:

Appearance. If he appear, and the case be capital, he answers in custody; though not if the accusation be general. He is not to be committed but on special accusations. If it be for a misdemeanor only, he answers, a Lord in his place, a Commoner at the bar, and not in custody, unless on the answer the Lords find cause to commit him till he finds sureties to attend and lest he should fly. (Seld. Jud., 98, 99.) A copy of the articles is given him and a day fixed for his answer. (T. Ray.; 1 Rushw. 268; Fost., 232; 1 Clar. Hist. of the Reb., 379.) On a misdemeanor his appearance may be in person or he may answer in writing or by attorney. (Seld. Jud., 100.) The general rule on accusation for a misdemeanor is that in such a state of liberty or restraint as the party is when the Commons complain of him, in such he is to answer. (Ib., 101.) If previously committed by the Commons, he answers as a prisoner. But this may be called in some sort judicium parium suorum. (Ib.) In misdemeanors the party has a right to counsel by the common law, but not in capital cases. (Seld. Jud., 102, 105).

2121. Under the parliamentary law the answer of the respondent to impeachment need not observe the great strictness of form.

The respondent in an impeachment case may not, under the English law, plead in his answer a pardon as bar to the impeachment.

In Chapter LIII of Jefferson's Manual the following is given in the "sketch of some of the principles and practices of England" on the subject of impeachments:

Answer. The answer need not observe great strictness of form. He may plead guilty as to part and defend as to the residue; or, saving all exceptions, deny the whole, or give a particular answer to each article separately. (1 Rush., 274; 2 Rush., 1374; 12 Parl. Hist., 442; 3 Lords' Journ., 13 Nov., 1643; 2 Wood., 607.) But he can not plead a pardon in bar to the impeachment. (2 Wood., 615; 2 St. Tr., 735.)

2122. Under the parliamentary law of impeachments the pleadings may include a replication, rejoinder, etc.—In Chapter LIII of Jefferson's Manual the following is given in the "sketch of some of the principles and practices of England" on the subject of impeachments:

Replication, rejoinder, etc. There may be a replication, rejoinder, etc. (Seld. Jud., 114; 8 Grey's Deb., 233; Sach. Tr., 15; Journ. House of Commons, 6 March, 1640–41.)

2123. The pleadings were the subject of full discussion during the Belknap trial.

The extent of dilatory pleadings in the Belknap trial was commented on as an innovation on American and English precedents.

In the Belknap trial the House was sustained in averring in pleadings as to jurisdiction matters not averred in the articles.

The articles of impeachment in the Belknap case were held sufficient although attacked for not describing the respondent as one subject to impeachment.

The Senate having assumed jurisdiction in the Belknap impeachment, declined to permit the respondent to plead further, but gave leave to answer the articles.

On May 4, 1876,[8] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, the President pro tempore announced that the Senate had adopted the following:

That the Senate proceed first to hear and determine the question whether W. W. Belknap, the respondent, is amendable to trial by impeachment for acts done as Secretary of War, notwithstanding his resignation of said office; and that the managers and counsel in such arguments discuss the question whether the issues of fact are material, and whether the matters in support of the jurisdiction alleged by the House of Representatives in the pleadings subsequent to the articles of impeachment can be thus alleged if the same are not averred in said articles.

As to the second question referred to, Mr. Matt H. Carpenter, of counsel for the respondent, summarized thus:[9]

Briefly, the attitude of the case is this:

The articles of impeachment charge that the respondent, Belknap, was at one time Secretary of War, and while holding that office did certain things which are declared by said articles to be high crimes and misdemeanors.

The respondent pleads to the jurisdiction of the court that when this proceeding was commenced he was not an officer of the United States, but was a private citizen.

The first replication avers that he was Secretary of War when he committed the acts complained of, and the respondent has demurred.

A second replication by the House charges that after the acts were committed the House had commenced an investigation, with a view to impeachment, and that the respondent with full knowledge of the fact resigned his office, with intent to evade impeachment. This replication has closed in issues of fact which are pending for trial.

The court has ordered an argument in regard to the sufficiency of the plea in abatement, the materiality of the issues of fact, and also whether the House can support the jurisdiction by matters alleged in subsequent pleadings, but not alleged in the articles of impeachment.

Mr. Manager Scott Lord summarized[10] more at length:

For the proper consideration of these questions it is expedient that at this stage of the case I call your attention precisely to what the issues are. I do not intend to read the pleadings in full, but only such parts of them as may be necessary for the understanding of this point. Article 1 presents as follows:

"That William W. Belknap, while he was in office as Secretary of War of the United States of America, to wit, on the 8th day of October, 1870, had the power and authority, under the laws of the United States, as Secretary of War as aforesaid, to appoint a person to maintain a trading establishment at Fort Sill, a military post of the United States that said Belknap, as Secretary of War as aforesaid on the day and year aforesaid, promised to appoint one Caleb P. Marsh to maintain said trading establishment at said military post.

* * * * * * *

"That thereafter, to wit, on the 10th day of October, 1870, said Belknap, as Secretary of War aforesaid, did, at the instance and request of said Marsh, at the city of Washington, in the District of Columbia, appoint said John S. Evans to maintain said trading establishment at Fort Sill, the military post aforesaid, and in consideration of said appointment of said Evans, so made by him as Secretary of War as aforesaid, the said Belknap did, on or about the 2d day of November, 1870, unlawfully and corruptly receive from said Caleb P. Marsh the sum of $1,500, and that at divers times thereafter to wit, on or about the 17th day of January, 1871, and at or about the end of each three months during the term of one whole year, the said William W. Belknap, while still in office as Secretary

[8] First session Forty-fourth Congress, Senate Journal, p. 928; Record of trial, p. 27.
[9] Record of trial, p. 37.
[10] Pages 81, 82.

of War as aforesaid, did unlawfully receive from said Caleb P. Marsh like sums of $1,500 in consideration of the appointment of said John S. Evans by him, the said Belknap, as Secretary of War as aforesaid, and in consideration of his permitting said Evans to continue to maintain the said trading establishment at said military post during that time."

Then in article 3:

"Yet the said Belknap, well knowing these facts, and having the power to remove said Evans from said position at any time and to appoint some other person to maintain said trading establishment, but criminally disregarding his duty as Secretary of War and basely prostituting his high office to his lust for private gain, did unlawfully and corruptly continue said Evans in said position and permit him to maintain said establishment at said miltary post during all of said time, to the great injury and damage of the officers and soldiers of the Army of the United States stationed at said post, as well as of emigrants, freighters, and other citizens of the United States, against public policy, and to the great disgrace and detriment of the public service.

"Whereby the said William W. Belknap was, as Secretary of War as aforesaid, guilty of high crimes and misdemeanors in office."

The defendant in this case answered to these articles:

"And the said William W. Belknap, etc., says, that before and at the time when the said House of Representatives ordered and directed that he, the said Belknap, should be impeached at the bar of the Senate, and at the time when the said articles of impeachment were exhibited and presented against him, the said Belknap, by the said House of Representatives, he, the said Belknap, was not, nor hath he since been, nor is he now, an officer of the United States."

The House of Representatives duly adopted and filed a general and special replication. A part of the latter is as follows:

"The House of Representatives of the United States say that the said William W. Belknap, after the commission of each one of the acts alleged in the said articles, was and continued to be such officer, as alleged in said articles, until and including the 2d day of March, A.D. 1876, and until the House of Representatives, by its proper committee, had completed its investigation of his official conduct as such officer in regard to the matters and things set forth as official misconduct in the said articles, and the said committee was considering the report it should make to the House of Representatives upon the same, the said Belknap being at the time aware of such investigation and of the evidence taken and of such proposed report.

"And the House of Representatives further say that while its said committee was considering and preparing its said report to the House of Representatives recommending the impeachment of the said William W. Belknap for the matters and things set forth in the said articles, the said William W. Belknap, with full knowledge thereof, resigned his position as such officer on the said 2d day of March, A.D. 1876, with intent to evade the proceedings of impeachment against him. And the House of Representatives resolved to impeach the said William W. Belknap for said matters as in said articles set forth on said 2d day of March, A.D. 1876."

To this replication the defendant rejoins, among other things, that the—

"Chairman of said committee then declared to said Belknap that he, said Clymer, should move in the said House of Representatives, upon the statement of said Marsh, for the impeachment of him, said Belknap, unless the said Belknap should resign his position as Secretary of War before noon of the next day, to wit, March the 2d, A.D. 1876; and said Belknap regarding this statement of said Clymer, chairman as aforesaid, as an intimation that he, said Belknap, could, by thus resigning, avoid the affliction inseparable from a protracted trial in a forum which would attract the greatest degree of public attention and the humiliation of availing himself of the defense disclosed in said statement itself which would cast blame upon said other persons, he yielded to the suggestion made by said Clymer, chairman as aforesaid."

There is a joinder in demurrer and a surrejoinder by the House of Representatives, a portion of which surrejoinder I will read:

"And the said House of Representatives, as to the first and second subdivisions of the rejoinder to the second replication of the House of Representatives to the plea of the defendant to the said articles of impeachment, wherein the said defendant demands trial according to law, the said House of Representatives, in behalf of themselves and all the people of the United States, do the like."

Now, I call the attention of this court to the fact that in regard to two of the allegations made in the second replication by the House the defendant tendered

issues and the House of Representatives joined in such issues, and I shall argue to this court and produce authorities presently to show that the defendant, having thus tendered issues joined in by the House, he can not go behind them, and can not question the right of this tribunal to hear and determine the matters thus brought before it.

Then there are four special rejoinders which the defendant made. One of them I have read to this court. In regard to each of the other three not read, the House of Representatives tendered an issue to be tried by this court; and what does the defendant do? Does he say that these matters are improperly before this court? Does he say that any injury will result to him in having these facts fully and fairly and truthfully investigated by this tribunal? Not at all. So far from it, with great formality he tenders a similiter in the following words:

"And the said Belknap, as surrejoinders of said House of Representatives to the third, fourth, fifth, and sixth rejoinders of the said Belknap to the second replication of said House of Representatives above pleaded, whereof said House of Representatives have demanded trial, the said Belknap doth the like."

We say that they are estopped upon every principle known to legal proceedings, known to the trial of cases in court, from attempting now to evade these issues. It was very proper on the part of this tribunal to raise this question, if it saw fit, but I apprehend, when the authorities are reviewed upon this point it will be seen that it was too late for anybody to raise this question. Of course any question involving the jurisdiction of this court may be raised at any time; but on questions which do not involve its jurisdiction, but only facts pertaining thereto, no matter in what form of pleading these facts get before it, it is too late, when both parties have so tendered issues to be tried by this tribunal, for the defendant or for any member of this court to prevent such trial; and this I shall show abundantly by the authorities. If otherwise this tribunal, the most august in the land, supposed above all others capable of reaching to the direct truth regardless of forms and ceremonies, has not the power of a court of a justice of the peace; for I affirm that on the other side not one authority can be found, in the whole range of authorities, showing that when issues are joined on questions of fact before the most inferior court it has not the power to try and determine them; and therefore the question amounts to this: Has this tribunal less authority than the most inferior court in the United States or in any other land?

The first authority I introduce upon this point affirms this doctrine, that the plaintiff in his replication may introduce new matter to fortify his declaration. Now what is the question before this court? The very resolution gives us the victory in this regard; it assumes that such facts are in aid of a pertinent question before this court in support of its jurisdiction. I admit we could allege no new offense in this way; we could tender no new or distinct issue upon the merits as to the crime or misdemeanor which this defendant committed; but the question which he raises is a dilatory one, it is not one relating at all to his guilt or his innocence. It is a question of jurisdiction. He raises that question and affirms certain facts relating thereto; and we, in aid of that jurisdiction, bring in certain other facts relating thereto. This is the true statement of the case; we did what we have done in aid of the jurisdiction, and this the pleader may always do.

After the citation of various authorities, Mr. Manager Lord continued:[11]

I call the attention of the court now to the report of a committee of the British House of Commons, a learned and intelligent committee, a committee which has made a report that will go down with the ages, and I apprehend be received as the law on this subject so long as civilization exists. I call attention to Burke's Works, seventh volume, page 490, where the committee consider the "rules of pleading in courts of impeachment." I never have heard yet of any rule as to pleadings in a criminal court besides the indictment and the plea. Sometimes a defendant puts in what we call a special plea. If a question of jurisdiction is raised it is usually raised ore tenus. But what are the rules of pleading in this court? Such committee say:

"Your committee do not find that any rules of pleading, as observed in the inferior courts, have ever obtained in the proceedings of the high court of Parliament, in a cause or matter in which the whole procedure has been within their

[11] Page 33.

original jurisdiction. Nor does your committee find that any demurrer or exception as of false or erroneous pleading hath been ever admitted to any impeachment in Parliament as not coming within the form of the pleading."

The members of this court know the distinguished character of Mr. Walpole not only as a lawyer but as a statesman.

Mr. Walpole said——

Page 497——

"Those learned gentlemen (Lord Wintoun's counsel) seem to forget in what court they are. They have taken up so much of your lordship's time in quoting of authorities and using arguments to show your lordships what would quash an indictment in the court below that they seem to forget they are now in a court of Parliament and on an impeachment of the Commons of Great Britain."

And page 501——

"A great writer on the criminal law, Justice Foster, in one of his discourses, fully recognizes those principles for which your managers have contended, and which have to this time been uniformly observed in Parliament. In a very elaborate reasoning on the case of a trial in Parliament (the trial of those who had murdered Edward the II) he observes this: 'It is well known that in parliamentary proceedings of this kind it is, and ever was, sufficient that matters appear with proper light and certainly to a common understanding, without that minute exactness which is required in criminal proceedings in Westminister Hall. In these cases the rule has always been loquendum et vulgus."

We say, therefore, if the articles are defective and the second replication not of strict right, all is cured by rejoinder, surrejoinder, and similiter. And in regard to the main question presented by the second replication—not the most conclusive question perhaps, but it may be called the main question of the second replication—namely, whether this defendant has the right to evade the Constitution and defeat its operations by his own will, he confesses and avoids. He admits on the record that he resigned for the purpose of evading this impeachment. It is true he says he was not guilty, and resigned for other purposes; but that is utterly immaterial to this question, because he does admit, I repeat, that he resigned for the purpose of defeating this impeachment.

I will not stop, Senators, to answer the suggestion of counsel that the chairman of that committee had the right, in behalf of this nation, and in behalf of the House if Representatives of the United States of America, to make a contract with the defendant that if he would get out of the office of Secretary of War before a certain hour he should not be impeached for these high crimes and misdemenaors, which, if these articles are true, had polluted him for years, and made him of all men that have ever appeared in a court of impeachment the most unfit to hold civil office. I deny such a right. I am astonished that counsel of respectability and of high standing should stand in this court and assume for a moment that the chairman of a committee had a right to make any such infamous contract; but that is one of the issues. I was surprised the more to hear it stated here, because it is one of the issues. The allegation of such agreement we absolutely deny; we deny that any such contract was made. By our surrejoinder we tender an issue upon that question, and it is accepted by the other side by filing their similiter.

Reference has been made also to the fact that the Constitution leaves the defendant subject to an indictment, and that an indictment may be found against him. The two proceedings, Senators, are entirely and absolutely distinct. One has nothing to do with the other, for the statute to which the counsel referred (sec. 1781 of the Revised Statutes) does not pretend to change the law or rules of impeachment.

Now I wish to call the attention of this tribunal to another consideration, and that is that on this question you are not to give the defendant the benefit of any of those rules which are provided for criminal cases. Assuming, for the sake of the argument, that he is accused as a criminal, and that this proceeding is a criminal proceeding, so that when we get to the merits he may say that he is entitled to the presumption of innocence, that he is entitled to be defended by counsel—and certainly he has illustrious counsel—that he would be entitled to the right of challenge before a jury, and is entitled to confront the witnesses: assuming that this was an indictment and he was before one of the courts of the land and should stand up and claim all these privileges, they of course would be given to him, and we do not care about challenging them here. For the sake of the argument, we admit that here upon the merits he has all these privileges, so far as applicable in this court. What I say is that on this question of jurisdic-

tion he has no such privilege; on the contrary, he has not as many privileges, as the authorities will show, as he would have in a civil action.

This is not one of the questions over which the law watches with such jealousy to guard the rights of a defendant. So long as it is true that no case of fact can be made, no evidence can be offered under which speculation may not peer: so long as it is true that sometimes innocent men suffer; so long as that maxim exists in our law that it is better that ninety-nine guilty men go free than that one innocent man suffer, the common law will allow a person accused of crime the presumption and privileges we have referred to. But what these questions to do with a mere abstract question of law? The question now presented to you has nothing to do with his guilt or innocence; it has nothing to do with his imprisonment; it has nothing to do with any question personal to himself. It is purely a legal one, and must be considered precisely as though it arose in a civil action, excepting, as before suggested, that he has not all the privileges in this regard that he would have in a civil action. When a defendant in a criminal action raises a dilatory plea it does not receive the consideration which it does in a civil action.

What is the object in pleading in criminal actions? Allow me to call the attention of the court to 2 Archbold's Criminal Practice and Pleadings, sixth edition, volume 2, page 206:

"The object of pleading, whether in civil or criminal actions, is to inform the parties of the facts alleged by each against the other with such clearness and distinctness as to enable them to prepare for the trial of disputed facts or for the application of the law to those which are admitted. In its application to criminal cases it is a statement of crime imputed to the prisoner with such a particularly of circumstances only as will enable him to understand the charge and prepare for his defense, and as will authorize the court to give appropriate judgment upon conviction."

At common law a defendant in a criminal action was not allowed to plead in abatement as in civil action (1 Archold, p. 110; Barber's Criminal Law, p. 343), and can not tender a bill of exception. (Garbett's Criminal Law, vol. 2, p. 521.) Therefore you see, Senators, that while the law has always been watchful to protect life and liberty, intending that no innocent man should be falsely accused of crime, yet in regard to the surroundings of the case, in regard to the mere question of pleadings, he has certainly had no more privilege, and certainly has now no more privilege, than in a civil action.

Mr. Montgomery Blair, of counsel for the respondent, said: [12]

I pass now to the second branch of the question presented by the order of the Senate, and that is on the materiality of the allegations of the second replication and of our rejoinder. We did not regard the replication as tendering a material issue, and for that reason we might, and perhaps ought to have, demurred; but having, as we believed, a conclusive answer to it in the rejoinder which we made, we chose that course, preferring that in this maneuvering for position—that is all it amounts to—our friends on the other side should not have the advantage of us.

It needs no argument to show that if only persons holding office are amenable to impeachment it must be charged in the articles that they hold office; and describing the defendant as "late Secretary of War" does not bring him within the description of persons given in the Constitution as amenable to impeachment. It would not be sufficient for them to have alleged that "the defendant does not now hold office, but was an officer at one time, and resigned in order to avoid impeachment." That would not have been sufficient certainly, for, if so, an ordinary court of justice might entertain jurisdiction of a person who had not been served with process upon an allegation that the defendant, hearing that it was intended to serve process upon him, had incontinently taken himself out of the jurisdiction of the court. There is no imaginable difference between the cases. We heard that they intended to impeach us, and, as the Constitution limited the prosecution to persons in office, we stepped over the line, just as a citizen of the United States who happens to be in New York, and learns that somebody there wants to serve him with a writ, betakes himself to New Jersey.

A man has a right to avoid lawsuits. The defendant here had a right, however innocent he might have been, to avoid the ruin which the law-books tell him attend invariably the prosecution of a private person by this overwhelming

[12] Page 31.

power. No sensible man, unless he had ample means, would undertake a conflict of that sort if he could avoid it and character enough to stand before the country to justify his action. But the Supreme Court of the United States have settled again and again an analogous question that a man residing in one State may convey his property to persons outside of it to give a court jurisdiction, provided he does it in good faith. That principle was decided in the case of McDonald *v.* Smalley (1 Peters, 120) ; also Smith *v.* Kernochen (7 Howard, 198) ; Jones *v.* Lee (18 Howard, 76) ; Briggs *v.* French (2 Sumner, 252).

The court also holds in those cases that a man may change his residence from a State in order to assert his title to property within that State in the Federal courts against persons holding it adversely provided he changes his residence in good faith. Does anybody doubt that we resigned in good faith? Does anybody suppose or suspect that the defendant's was a colorable resignation; that he is to be restored to office when this prosecution ceases? Certainly not. And therefore the case corresponds entirely in principle to the decision I have cited. If jurisdiction may be obtained by the voluntary act of a party done in good faith, no reason can be suggested why a jurisdiction may not be avoided by a voluntary act done also in good faith. We were inclined to demur to the original pleading, and the original pleading is defective in the point that I have already brought to the attention of the court in not describing this defendant as one subject to impeachment, and in describing him in fact as a person who is not subject to impeachment, because it says that he was "late Secretary of War."

On the third question which is presented for consideration by the order of the Senate I think little need be said. They can not amend their articles by a new assignment in a replication. Nobody ever heard of an amendment of an indictment; and I may add that the court in the case of Barnard held that articles of impeachment were not amendable. I could, by looking over the books, perhaps find some accidental decision of a refusal of a court to allow an indictment to be amended. Indictments are quashed for defects which could be amended at any stage of a civil action as of course, and a new indictment must be found before further proceedings can be had. This, with the decision in the case of Barnard, at page 192, volume 1, that there could be no amendment of articles of impeachment, will dispose of the question suggested by the order of the Senate as to whether a necessary allegation not made in the articles could be supplied in the subsequent pleadings.

Mr. Matt. H. Carpenter, also of counsel for respondent, said: [13]

This court can only acquire jurisdiction, in a proceeding of impeachment, by articles presented by the House, showing a case of impeachable criminality; that is, a case where the act complained of is impeachable, and the actor subject to impeachment. In other words, the articles must be such as to require no aid from subsequent pleadings. In this case the articles describe the respondent as "late Secretary of War." Within the strictness of allegation required by common law criminal courts such descriptio personæ would not be equivalent to an allegation that he was no longer in that office. Therefore, and to meet the view sometimes entertained that a citizen holding one office may be impeached for misconduct in another, we interposed the plea to the jurisdiction, stating affirmatively that at the time of impeachment the respondent was not any officer of the United States. He was impeached at the bar of the Senate—if formal announcement that articles would be presented against him is an impeachment—on the 2d day of March, A.D. 1876. Some of the articles charge that he continued to be Secretary of War to or until (I forget which) the 2d day of March. This excludes the 2d day of March from his holding office; therefore, if we are right in contending that only a person holding office can be impeached, the articles fail to show a case within jurisdiction.

And I think it would have been safe for us to demur to the articles. But not wishing to take risks upon a technical construction, we thought it safer to plead affirmatively the fact that the respondent was not holding any office at the time of impeachment. Undoubtedly, to any plea of the respondent in confession and avoidance of the articles, the prosecution might have relied in confession and avoidance; but not so to a plea which, in substance, is denial of any fact which should have been stated in the articles, to show jurisdiction. If the articles themselves are deficient in not stating any fact necessary to entire jurisdiction—jurisdiction of the offense and the offender—then this court never acquired jurisdiction.

[13] Page 45.

It results from the fact that this court has only a special jurisdiction, that the first pleading must show a case within the jurisdiction. This was held with regard to jurisdiction of circuit courts of the United States in Brown *v.* Keene (8 Peters, 112); Jackson *v.* Ashton (8 Peters, 148); Hodgson *v.* Bowerbank (5 Cranch, 303); Mossman *v.* Higginson (4 Dallas, 12), and Jackson *v.* Twentyman (2 Peters 136).

The honorable manager [Mr. Lord] yesterday referred us to two cases—2 Chitty's Reports, 367, and 2 Maule & Selwyn, 75. These were actions of quo warranto—that is, civil suits to try the title to an office, to be followed by a judgment for damages and costs. The court held, what everybody would concede, that resignation did not preclude final judgment.

One Senator at least—Senator Howe—will remember a somewhat remarkable case of this kind in our own State, where he happened to be on the winning and myself on the losing side. I refer to the case State on the relation of Bashford *v.* Barstow. In this case, after the court had declared its jurisdiction, the attorney-general came into court and filed a discontinuance.

But the court held that the case was really a civil cause, in favor of the relator, against Barstow, who was in possession of the office; that the State had no interest in the question, and was only a formal party.

The learned manager also asserted that in a criminal cause there could be no such thing as a replication and rejoinder. If he will take the trouble to examine Wentworth's Pleadings he will find that he is in error; and if he will examine Archbold's Criminal Pleadings he will find the very forms from which we have drawn our pleadings subsequent to the plea in abatement.

On May 20 [14] the Senate, after several days of deliberation, agreed to these resolutions, the first by a vote of yeas 37, nays 29, and the second by a vote of yeas 35, nays 22.

1. *Resolved*, That in the opinion of the Senate, William W. Belknap, the respondent, is amenable to trial by impeachment for acts done as Secretary of War, notwithstanding his resignation of said office before he was impeached.

2. *Resolved*, That at the time specified in the foregoing resolution [fixing the time for delivering this judgment] the President of the Senate shall pronounce the judgment of the Senate as follows: "It is ordered by the Senate sitting for the trial of the articles of impeachment preferred by the House of Representatives against William W. Belknap, late Secretary of War, that the demurrer of said William W. Belknap to the replication of the House of Representatives to the plea to the jurisdiction filed by said Belknap be, and the same hereby is, overruled; and it being the opinion of the Senate that said plea is insufficient in law, and that said articles of impeachment are sufficient in law, it is therefore further ordered and adjudged that said plea be, and the same hereby is, overruled and held for naught, which judgment thus pronounced shall be entered upon the Journal of the Senate sitting as aforesaid."

On June 1,[15] after the announcement of the decision, Mr. Matt H. Carpenter, of counsel for the respondent, commented on the effect of the findings:

The defendant first pleaded to the jurisdiction of this court. The managers filed a replication, to which the respondent demurred; and the managers joined in the demurrer.

The rule is that each pleading must answer the preceding one. The replication, if sufficient in law, was a valid answer to the plea. The validity of the replication in matter of law was put in issue by our demurrer. And had the court upon the demurrer held the replication bad, then the court would have looked back to the plea itself to see whether or not it was sufficient in law; and if it had found the plea to be bad, then the court would have held in favor of the prosecution; upon the principle that a bad replication is as good as the bad plea to which it is a response. But in this case the court overruled our demurrer to the replication, thus holding the replication a sufficient answer to the plea. Was there therefore any necessity for the court to go back through the record and pass upon the sufficiency of prior pleadings? The plea to the jurisdiction having been answered by a replication which the court held good by overruling our demurrer to it, what was the necessity for the court to go back through the record? The only

[14] Senate Journal, pp. 944–947; Record of trial, p. 76.
[15] Record of trial, pp. 159, 160, 163.

question raised by the plea was the jurisdiction of this court over the respondent; and whether or not the prosecution was entitled to a final judgment, or whether the judgment should be respondeat ouster, is a question to be examined.

But I submit with great confidence that the question of sufficiency in law of the articles of impeachment was not before the court; and that after judgment upon the question of jurisdiction, of respondeat ouster, the respondent was at liberty to begin his defense, as he might have done without questioning the jurisdiction.

In case on indictment, when the defendant challenges the jurisdiction of the court, and fails to make good his objection, he is remitted to every privilege he would have possessed if he had commenced his defense with questioning the jurisdiction; that is, he may move to quash, or he may plead in bar, or plead the general issue.

If I were compelled alone to take the responsibility in this case I should plead no further, but leave the managers to their own course; and in that case would not the managers be entitled to move for final judgment? This would be so, I think, had the issue been one of fact only. But here there was an issue of law and several issues of fact, all of which the court has disposed of by the order just entered.

We have appeared and pleaded, and if the court have held our defense insufficient, may we not stand upon it, without filing further pleadings? My impression is that the next step to be taken is for the managers to move for judgment, after which we could move for leave to plead further, which I have no doubt the court would grant.

All this, of course, is upon the supposition that the court has overruled the plea to the jurisdiction. The order declaring the jurisdiction was not concurred in by two-thirds of the Senators present. That is, less than two-thirds of the Senate think there is jurisdiction to convict the respondent.

Manifestly a court which has not jurisdiction to convict has no jurisdiction to try the respondent; and such pretended trial would be wholly extrajudicial. No witness could be indicted for false swearing at such trial, nor punished for contempt for not obeying a subpoena.

It therefore becomes a very important question to be settled by the respondent's counsel, whether any, and if any what, further steps should be taken on the part of the respondent. An order has been entered in the record, as an order of the court, overruling the plea to the jurisdiction. But the journal of the proceedings shows that thirty-five Senators concurred in the order, and twenty-two dissented.

Speaking for myself only (not having consulted with my colleagues), I maintain that upon the whole record the order is void, for the reason that it was not concurred in by two-thirds of the Senators.

Mr. Manager Scott Lord said:

One question which the learned counsel has discussed before you the managers do not feel authoried to discuss while the order of this Senate remains. By its order the demurrer to the replication of the House of Representatives is overruled, the plea of the defendant is overruled and held for naught, and the article of impeachment are held sufficient. Now, apprehending that this order has been made upon due consideration, that the Senators understood all these pleadings and made this order in that view, we do not feel called upon, I repeat, to discuss the questions pertaining thereto until some motion is made to change the order: and if such a motion should be made, if the Senate, after this deliberation and after this carefully prepared order, takes into consideration the question whether it will change its order, then the managers will desire to be heard.

And on June 6,[16] when the Senate was determining the length of time to be allowed to the respondent to answer on the merits, Mr. Manager William P. Lynde said:

We have already been occupied for several weeks with dilatory pleadings. We have had a plea to the jurisdiction of the Senate. It has been suggested by the counsel for the respondent that they would yet demur, or ask leave of the Senate to demur, to the articles of impeachment. The managers believe that these dilatory pleadings have been indulged in by this Senate quite too long and without a precedent. I find no precedent either in England or in this country for dilatory

[16] Record of trial, p. 168.

pleadings on impeachment. In the first case tried under our Constitution against Senator Blount, it is true, the respondent filed a plea to the jurisdiction which is regarded as a dilatory pleading; but that was without authority and without precedent. There never had been a case in England where a plea of that kind had been allowed to be put into articles of impeachment, and it stands alone in this country.

The time which has already been occupied in this case must satisfy the Senate that it is not right that these dilatory pleadings should be introduced or allowed. In the case of Judge Barnard in New York, where the counsel for the respondent applied to the court for leave to file a demurrer or leave to move to quash certain articles of impeachment, the court refused the request and required the defendant to plead to the merits, stating that in the course of the trial of the case all those questions of law could be availed of by the parties and would be decided by the court.

Now, we think that if a precedent of this kind is established, if this Senate will go on and hear dilatory plea after dilatory plea, first a plea to the jurisdiction, a plea in abatement, then a demurrer to the form, there is no end; and when shall we arrive at a trial of this case upon the merits? If there was an officer of this Government now in office who endangered the liberties of the people, who was engaged in a conspiracy against the Government, and he stood impeached before the Senate, if these dilatory pleas were allowed, the evil to be apprehended from his action might be carried into effect and realized. And yet it is claimed that it is a matter of right by the respondent, on the other side, and the courts of impeachment of this country have, by precedent at least if not by direct vote, decided that when an officer of the Government is impeached he can not be suspended from the functions of his office while the trial is progressing. No; it has been the aim and intention of the courts in all cases of impeachment that a speedy trial should be had, that the respondent should be required to answer to the merits, and then the court would consider the question, and the whole question, and protect and save the country.

Mr. Carpenter also raised another question: [17]

The question of the sufficiency in law of the articles themselves has not been raised by a demurrer thereto, has not been argued by either side, nor submitted to the court. The only question raised, argued, or submitted was the question of jurisdiction of the defendant; that is, whether the court had power to pass upon the sufficiency of the articles, or take any other step whatever in the cause. Had the court affirmed jurisdiction (as I claim it has not), then we could have moved to quash the articles, or demurred to them, or joined issue for trial. I do not hesitate to affirm that none of these articles, with possibly one exception, state the necessary facts to constitute a good indictment. Mere rhetoric and denunciation will not do. It is not enough to say that the defendant has been guilty of high crimes and misdemeanors; but the articles must state every fact which is an element of crime. And although the same strictness of pleading has not been required in cases of impeachment as in ordinary criminal causes, yet every fact relied upon to constitute the crime must be stated; and on the trial the proof can not go beyond the averments of the articles. In the several impeachment trials in this country defendants have not resorted to formal pleadings. In Blount's case his response was more like an answer to a bill in chancery than a pleading in a criminal cause. It was a plea to the jurisdiction, a demurrer, and answer, all in one.

But I assume that where the respondent chooses to avail himself of formal and particular pleading, which the experience of a thousand years has shown to be essential to the protection of innocence, this court will not deny the right, at least without a hearing.

I therefore assume that the court, on its attention being called to the very sweeping terms of this order, will, of its own motion, vacate so much of it as holds that the articles of impeachment are sufficient in law.

The sufficiency in law of the articles is as material to the conviction of the respondent as is the truth in point of fact of the matters therein charged. Before there can be a conviction several things must be established:

First. That the defendant, in fact, has done, or omitted to do, certain things;

Second. That the things he has done or omitted constitute a crime;

[17] Record of trial, page 159.

Third. And not merely a crime, but a high crime or misdemeanor, meriting impeachment; and

Fourth. That the respondent is subject to impeachment, and this court has jurisdiction over him for the hearing and determination of this cause.

If any one of these elements be wanting, there can be no conviction. And of course, as soon as any one of these propositions is established in favor of the respondent he is entitled to an acquittal. I think the point as to jurisdiction has been determined in his favor, inasmuch as more than one-third of the Senate has declared against jurisdiction. But what course we ought to take as a matter of expediency—whether we should move to vacate the order altogether and that the respondent be dismissed; or demur to the articles; and if the demurrer is overruled, answer to the merits and go to trial—should only be determined after consultation of the respondent's counsel.

To this Mr. Manager Scott Lord replied: [18]

One other suggestion. We apprehend that the true object of all trials, civil or criminal, is to reach the merits at the earliest moment. The defendant here stands accused by impeachment, having been a high officer of the Government, of certain crimes and misdemeanors. He has put in one dilatory plea, and that has occupied all his time. He now proposes, after this Senate has so deliberately entered this order; after it, having examined all the pleadings, has found these articles of impeachment sufficient, to try again in that direction. He proposes to demur to the articles of impeachment; and while I can not, perhaps, strictly call a demurrer a plea, yet, in a broader sense, it is. The defendant proposes another dilatory proceeding; I may call it properly another dilatory plea. And how many shall he have? It is absolutely in the discretion of the Senate whether to give him this privilege or not. It is in the discretion of any court of civil or criminal jurisdiction, unless controlled by statutory law.

This defendant accused of these high crimes, after having by his dilatory plea occupied weeks of time, seeks further delay. After this court, under rules which are broader and more liberal than in other courts in regard to pleadings, has deliberately overruled his demurrer, deliberately held his plea for naught, and that the only pleading before this tribunal is the pleading called the "articles of impeachment," and after this court has solemnly adjudged that these articles are sufficient, the defendant by his learned counsel asks you to go back into the courts of law, for rules not binding even there. He wants you to adopt the rules which he says are held in criminal courts, and give him the right, under all the circumstances of this case, to put in this further dilatory plea, because he says what? That he could go into a criminal court and take up these articles of impeachment, and one by one satisfy the tribunal that the pleading would not be good as an indictment. What if he could, and what if the technical rule availed here? It nevertheless is in the discretion of this court whether it will allow him again to stand on a technical point instead of proceeding to the merits. I apprehend it is an application which will not be favored by the Senate. I apprehend this Senate sitting as a court of impeachment will hardly take the position, after this deliberate order, that it will open the whole case again, and for what? Not from a sense of justice to the defendant; not for the purpose of ascertaining the truth; but simply that learned counsel skilled in the criminal courts may stand in this august tribunal and urge that these articles of impeachment have not all the words and phraseology which he thinks would be necessary in a court of criminal jurisdiction to maintain an indictment.

I will not now discuss the question whether the articles of impeachment are sufficient. The counsel himself has confessed the rule that pleadings in this court are entirely distinct and separate as to mere technical rules from pleadings in ordinary criminal proceedings. This court has a broader range; it has an easier path in its high jurisdiction to reach the merits, and therefore I may say, with all respect to this tribunal, that it would be a most extraordinary proceeding, in the judgment of the managers, for this court, without claim of any possible injustice to the defendant, to open this case for another dilatory plea instead of requiring him to go to trial upon the merits.

The Senate finally [19] discarded an order providing that the respondent "have leave to plead further or answer the articles of impeachment within ten days," and agreed to the following:

[18] Record of trial, page 160.
[19] Senate Journal, p. 949; Record of trial, pp. 164, 165.

Ordered, That W. W. Belknap have leave to answer the articles of impeachment within ten days from this date; and that in default of an answer to the merits within ten days, by respondent, to the articles of impeachment, the trial shall proceed as upon a plea of not guilty.

This question of pleadings was touched upon also in the final arguments, Mr. Matt H. Carpenter, speaking [20] at length on the view already advanced by him, and Mr. Manager Scott Lord opposing.[21]

2124. The answer of respondent is part of the pleadings of an impeachment trial, and exhibits in the nature of evidence may not properly be attached thereto.—On February 3, 1905,[22] in the Senate, sitting for the trial of Judge Charles Swayne, at the end of the portion of respondent's answer relating to the first article of impeachment, certain exhibits were attached to show the practice of other Federal judges in certifying their expense accounts to the Department at Washington. Judge Swayne was accused in the first article of rendering false accounts.

At the conclusion of the reading of this portion of the answer, Mr. John M. Thurston, of counsel for the respondent, said:

Mr. President, we have attached as exhibits to this answer to the first article three certificates, one from the fifth, one from the seventh, and one from the ninth judicial circuits of the United States, which show that, almost without exception, the amount of $10 per diem was drawn by each and all of the judges, both of the circuit and district courts of those circuits, in their attendance outside of their districts, under the provisions of the law. We have been unable up to the present time to secure from the Secretary of the Treasury the additional certificates for the other districts.

After concluding the reading of the entire answer of the respondent, Mr. Thurston said:

Now, Mr. President, referring to the fact that certain exhibits which we desired to attach to our answer to article No. 1 had not been attached because of the fact that the Secretary of the Treasury in the short space of time has been unable to furnish it to us we move as follows:

Counsel for respondent move on order giving them leave to hereafter attach to the answer herein to article 1, as exhibits, additional copies of certificates of the Secretary of the Treasury, showing the amounts certified to and received from the United States by the judges of the first, second, third, fourth, sixth, and eighth judicial circuits, as their reasonable expenses for travel and attendance while holding court away from the place of their residences, and outside of their respective districts, in the year 1903 it having been impossible for the Secretary of the Treasury to prepare and furnish the same to respondent up to the present time.

Mr. Manager Palmer said that the managers did not admit that these exhibits were material,[23] but that they would not object except on the question of delay that might be caused.

Mr. Charles W. Fairbanks, of Indiana, offered this order:

Ordered, That the respondent, Charles Swayne, have leave to hereafter, not later than the 10th instant, attach as further exhibits to his answer to article 1 of impeachment copies of the certificates of the Secretary of the Treasury, referred to in said answer, showing the amounts certified to and received from the United States by the judges of the first, second, third, fourth, sixth, and eighth judicial circuit as their reasonable expenses for travel and attendance while holding court away from the place of their residence, and outside of their respective districts, in the year 1903.

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[20] Record of trial, pp. 330–334.
[21] Pages 334, 335.
[22] Third session Fifty-eighth Congress, Record, pp. 1820, 1830–1832.
[23] They had been excluded in the examination before the committee of the House of Representatives, with the assent of the minority as well as majority of the committee. See minority views, House Report No. 3021, third session Fifty-eighth Congress.

Mr. Joseph W. Bailey, a Senator from Texas, said:

Mr. President, as a matter of good practice—and I presume we are to conduct this trial according to good practice—it seems to me that this is a request for time in which to exhibit evidence as a part of the pleadings. If this matter is admissible before this court at all, it is admissible as evidence. It does not occur to me as an appropriate proceeding to be giving time in which counsel for the respondent may file evidence with their pleadings. That is as I look at it. If it were desirable to give the counsel time to prepare new allegations I should not object to an order for that; but I do object to having this court put into the attitude of expressly and by order providing for delay, in producing as a part of the pleadings, what properly, as it seems to me, belongs only to the production of evidence.

Mr. Manager Palmer also said:

If, as suggested by the Senator from Texas [Mr. Bailey], it is true that these exhibits are to be considered as evidence, then certainly they ought to be attached before the managers are asked to reply. We had expected to ask until next Monday to reply or to demur or to except to this answer, and the answer ought to be complete before we are asked to reply to it. If this time is postponed until the 10th of February our answer will have been in, and if these matters are matters of evidence it might be quite a serious consideration. Therefore we object to the extension of the time until the 10th of February.

Mr. Thurston then said:

The President, the respondent and his counsel are so anxious to interpose no obstruction to the speedy trial of this case that if, as suggested, our motion would be taken as a ground for asking delay we here and now withdraw it.

The Presiding Officer announced:

The motion is withdrawn, and the Chair supposes the order proposed by the Senator from Indiana is also withdrawn.

So the subject was dropped.

2125. Counsel for respondent in the Swayne trial interposed a plea as to jurisdiction of offenses charged in certain articles, but declined to admit that it was a demurrer with the admissions pertinent thereto.

During time of presentation of testimony in the Swayne trial counsel of respondent were permitted to file a brief on their pleas to jurisdiction.

Form of brief on plea to jurisdiction filed by counsel for respondent in Swayne trial.

On February 22, 1905,[24] in the Senate sitting for the impeachment trial of Judge Charles Swayne, after the counsel for the respondent had begun to present testimony, but before they had concluded, Mr. John M. Thurston, of counsel for the respondent, said:

Mr. President, the respondent has at all times insisted, and still does insist, upon the pleas to the jurisdiction as to the first seven counts. It had been the purpose of my associate, Mr. Higgins, to present our statement and arguments with respect to those as a part of his opening statement. In deference to the evident wish of the Senate and to the imperative demand for the completion of the legislative duties of the Senate, he decided to waive that privilege.

We have prepared a statement and argument as to those pleas to the jurisdiction which we could, of course, use on the final arguments in the case. But we feel it would be fairer to the Senate and to the manager to present those now, and as our position upon the pleas to the jurisdiction and as a part of our presentation of the case we now ask to present our statement and argument and have it printed in the Record, so that the Senate and the managers may have an oppor-

[24] Third session, Fifty-eighth Congress, Record, pp. 3026–3035.

tunity before the close of the case to consider it. [To the managers on the part of the House.] Is there any objection?

Mr. Manager Henry W. Palmer, of Pennsylvania, replied that the managers did not object.

The Presiding Officer [25] said:

The brief prepared by counsel on the question of jurisdiction as to the first seven articles will be inserted in the Record unless there be objection on the part of the managers or of Senators.

Mr. Thurston then said:

Mr. President, I feel it is our duty to state that this presentation of the historical, constitutional and parliamentary procedure in impeachment proceedings has been prepared not by counsel for respondent, whose names are attached to it, but by a gentleman who is renowned as a scholar along constitutional lines and a lawyer of great ability, and without naming him we wish to disclaim any credit that may attach to the preparation of this document.

Mr. Manager Palmer then stated a question, and the following occurred:

Mr. Manager PALMER. Are you demurring to the first seven articles of impeachment upon the ground that they do not charge an impeachable offense? Is that the idea?

Mr. THURSTON. Our pleas are in to that effect, if the manager has read them.

Mr. Manager PALMER. Exactly. I understand you are filing a demurrer to the first seven articles on the ground that they do not charge impeachable offenses.

Mr. THURSTON. We did interpose special pleas to those articles.

Mr. Manager PALMER. And this argument is intended to support those pleas?

Mr. THURSTON. Yes, sir.

Mr. Manager PALMER. Of course your demurrer admits the truth of all that is stated in those articles.

Mr. THURSTON. I beg pardon.

Mr. Manager PALMER. It could not be a demurrer if it did not.

Mr. THURSTON. I beg pardon, Mr. President. We have not demurred. Our pleas stand, and the manager can take any legal view of them that he chooses to present.

The heading and signatures of the document were as follows:

In the Senate of the United States sitting as a court of impeachment. The United States of America against Charles Swayne, a judge of the United States in and for the northern district of Florida. Upon articles of impeachment presented by the House of Representatives.

Argument in support of pleas to the jurisdiction interposed in behalf of the respondent to articles 1, 2, 3, 4, 5, 6, and 7, such pleas presenting the contention that the facts set forth in said articles, even if true, do not constitute impeachable high crimes and misdemeanors as defined in the Constitution of the United States.

* * * * * * *

The pleas to the jurisdiction interposed in behalf of respondent to articles 1, 2, 3, 4, 5, 6, and 7 should be sustained, because the facts set forth in said articles, even if true, do not constitute "high crimes and misdemeanors," as defined in Article II section 4, of the Constitution of the United States.

ANTHONY HIGGINS,
JOHN M. THURSTON,
Counsel for Respondent.

2126. The managers being introduced in the Senate and having signified their readiness to exhibit articles of impeachment, the Presiding Officer directs proclamation to be made.

Form of proclamation made by the Sergeant-at-Arms when managers bring articles of impeachment to the Senate.

[25] Orville H. Platt, of Connecticut, Presiding Officer.

Articles of impeachment being exhibited by the managers, the Presiding Officer says that the Senate will take proper order and inform the House thereof.

In 1868 the Senate ceased in its rules to describe the House of Representatives while acting in impeachment cases as the grand inquest of the nation.

Present form and history of Rule II of the Senate rules for impeachments.

Rule II of the "Rules of procedure and practice in the Senate when sitting on impeachment trials" is as follows:

When the managers of an impeachment shall be introduced at the bar of the Senate and shall signify that they are ready to exhibit articles of impeachment against any person, the [Presiding Officer] of the Senate shall direct the Sergeant-at-Arms to make proclamation, who shall, after making proclamation, repeat the following words, viz: "All persons are commanded to keep silence, on pain of imprisonment, while the House of Representatives is exhibiting to the Senate of the United States articles of impeachment against ——— ———;" after which the articles shall be exhibited, and then the Presiding Officer of the Senate shall inform the managers that the Senate will take proper order on the subject of the impeachment, of which due notice shall be given to the House of Representatives.

The origin of this rule is found in the trial of William Blount in 1797.[26] In 1804 [27] at the impeachment of Judge Pickering, the committee having charge of the rules—Messrs. Uriah Tracy, of Connecticut, Stephen R. Bradley, of Vermont, Abraham Baldwin, of Georgia, Robert Wright, of Maryland, and William Cocke, of Tennessee—made a new draft of the words to be repeated after proclamation. At the trial of Blount they had been:

All persons are commanded to keep silence while the Senate of the United States are receiving articles of impeachment against ——— ———, on pain of imprisonment.

Mr. Tracy's committee modified this to this form:

All persons are commanded to keep silence, on pain of imprisonment, while the grand inquest of the nation is exhibiting to the Senate of the United States, sitting as a court of impeachments, articles of impeachment against ——— ———.

For the trial of Judge Chase, in 1805, the rule was adopted in practically the identical form agreed to by Mr. Tracy's committee, except that the words "sitting as a court of impeachments" were omitted.[28] There does not seem to have been significance in the omission of these words, since the articles of impeachment against Judge Chase were received by the Senate sitting as a high court of impeachment. In 1868, during the proceedings against President Johnson, the rules were revised, but the committee reported [29] this rule in the form as used since 1805. While the rules were under debate on February 29, Mr. Thomas A. Hendricks, of Indiana, said as to the language of the announcement:

In the Constitution which the fathers adopted, after grave consideration, they said that the House of Representatives should impeach an officer. We say that "the grand inquest of the nation" shall impeach. Where is the advantage of this new language? Why not make proclamation in the Senate here that "the House of Representatives impeaches the President of the United States?" It is not

[26] First session Fifth Congress, Senate Journal, p. 433; Annals, p. 498.
[27] First session Eighth Congress, Senate Journal, pp. 382, 383; Annals, p. 225.
[28] Second session Eighth Congress, Senate Journal, pp. 509, 510.
[29] Second session Fortieth Congress, Senate Report No. 59, Senate Journal, pp. 246, 248, 811; Globe, pp. 1521, 1522, 1594.

sufficiently high sounding is all the trouble about it. It expresses exactly the thought that the Constitution does, truly and correctly, and does not refer us to some body of men not known to our system of government.

The matter was not further discussed, and on March 2,[30] on motion of Mr. Hendricks, without further debate or diversion, the words "grand inquest of the nation" were stricken out and "House of Representatives" inserted. So the rule came to its present form.

2127. Upon presentation of articles of impeachment and the organization of the Senate for the trial, a writ of summons is issued to the accused.

The writ of summons to one accused in articles of impeachment recites the articles and notifies him to appear at a fixed time and place and file his answer.

The rule specifying the method of serving writs of summons to one accused in articles of impeachment.

The person accused in articles of impeachment failing to appear or to answer, the trial proceeds as on a plea of not guilty.

The person accused in articles of impeachment may appear in person or by attorney.

If a plea of guilty be entered in answer to articles of impeachment, judgment may be entered without further proceedings.

Present form and history of Rule VIII of the Senate sitting for impeachment trials.

Rule VIII of the "Rules of procedure and practice in the Senate when sitting on impeachment trials" is as follows:

Upon the presentation of articles of impeachment and the organization of the Senate as hereinbefore provided, a writ of summons shall issue to the accused, reciting said articles, and notifying him to appear before the Senate upon a day and at a place to be fixed by the Senate and named in such writ, and file his answer to said articles of impeachment, and to stand to and abide the orders and judgments of the Senate thereon; which writ shall be served by such officer or person as shall be named in the precept thereof, such number of days prior to the day fixed for such appearance as shall be named in such precept either by the delivery of an attested copy thereof to the person accused, or if that can not conveniently be done, by leaving such copy at the last known place of abode of such person, or at his usual place of business in some conspicuous place therein; or if such service shall be, in the judgment of the Senate, impracticable, notice to the accused to appear shall be given in such other manner, by publication or otherwise, as shall be deemed just; and if the writ aforesaid shall fail of service in the manner aforesaid, the proceedings shall not thereby abate, but further service may be made in such manner as the Senate shall direct. If the accused, after service, shall fail to appear, either in person or by attorney, on the day so fixed therefor as aforesaid, or, appearing, shall fail to file his answer to such articles of impeachment, the trial shall proceed, nevertheless, as upon a plea of not guilty. If a plea of guilty shall be entered, judgment may be entered thereon without further proceedings.

This rule dates from 1868,[31] when it was adopted preliminary to the trial of President Johnson. It was reported from a committee of which Mr. Jacob M. Howard, of Michigan, was chairman, in its present general form; but during consideration in the Senate the word "court" was stricken out wherever it occurred, and the word "Senate" substituted, to conform to a general decision of the Senate.

[30] Senate Journal, p. 246; Globe, p. 1594.
[31] Second session Fortieth Congress, Senate Journal, pp. 238, 812; Globe, pp. 1533, 1534, 1602; Senate Report No. 59.

2128. At 12:30 p.m. on the day of the return of the summons against a person impeached, the Senate suspends business and the Secretary administers an oath to the returning officer.

Form of oath administered to the returning officer in an impeachment case.

The oath taken by the returning officer in an impeachment case is spread on the records.

Present form and history on Rule IX of the Senate in impeachment cases.

Rule IX of the "Rules of procedure and practice in the Senate when sitting on impeachment trials" is as follows:

> At 12:30 o'clock afternoon of the day appointed for the return of the summons against the person impeached, the legislative and executive business of the Senate shall be suspended, and the Secretary of the Senate shall administer an oath to the returning officer in the form following, viz: "I, ——— ———, do solemnly swear that the return made by me upon the process issued on the —— day of ——, by the Senate of the United States, against ——— ———, is truly made, and that I have performed such service as therein described: So help me God." Which oath shall be entered at large on the records.

This rule, with slight changes, date from the Chase trial in 1805.[32] In 1868 [33] in preparation for the trial of President Johnson, it was adopted in exactly its present form.

2129. In an impeachment case the writ of summons being returned, the accused is called to appear and answer the articles.

The person impeached being called to appear and answer, a record is made as to appearance or nonappearance.

The person impeached may appear to answer the articles in person or by attorney, and a record is made as to the mode of appearance.

When the person accused in articles of impeachment appears by agent or attorney, a record is made naming the person appearing and the capacity in which he appears.

Present form and history of Rule X of the Senate sitting for impeachments.

Rule X of the "Rule of procedure and practice in the Senate when sitting on impeachment trials" provides:

> The person impeached shall then be called to appear and answer the articles of impeachment against him. If he appear, or any person for him, the appearance shall be recorded, stating particularly if by himself, or by agent or attorney, naming the person appearing and the capacity in which he appears. If he do not appear, either personally or by agent or attorney, the same shall be recorded.

This rule was first adopted in 1805,[34] for the Chase trial. In 1868,[35] during proceedings for the impeachment of President Johnson, the rules were generally reviewed, but this rule was changed only by dropping out the word "exhibited" after "articles of impeachment." It was then agreed to in the present form.

2130. In impeachment proceedings before the Senate counsel for the respondent is admitted and heard.

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[32] Second session Eighth Congress, Senate Journal, pp. 511–513; Annals, pp. 89–92.
[33] Second session Fortieth Congress, Senate Report No. 59; Senate Journal, p. 813; Globe, p. 134.
[34] Second session Eighth Congress, Senate Journal, pp. 511–513; Annals, pp. 89–92.
[35] Second session Fortieth Congress, Senate Journal, p. 813; Globe, p. 1534; Senate Report No. 59.

Present form and history of Rule XIV of the Senate sitting for impeachment trials.

Rule XIV of the "Rules of procedure and practice for the Senate when sitting in impeachment trials" is as follows:

Counsel for the parties shall be admitted to appear and be heard upon an impeachment.

This rule in identically its present form dates from the Chase trial in 1805.[36] It then embodied what had been the practice in preceding trials.

2131. In impeachment trials all motions made by the parties or counsel are addressed to the Presiding Officer, and must be in writing, if required.

Present form and history of Rule XV of the Senate sitting for impeachment trials.

Rule XV of the "Rules of procedure and practice for the Senate when sitting in impeachment trials" is as follows:

All motions made by the parties or their counsel shall be addressed to the President Officer, and if he, or any Senator, shall require it, they shall be committed to writing, and read at the Secretary's table.

This rule was first drafted in 1805,[36] for the trial of Judge Chase. It had then an additional clause providing how the vote should be taken on such motions. In 1868,[37] when the rules were revised, it was given its present form, the words "presiding officer" being substituted for "President of the Senate," and the clause relating to voting being stricken out. The words "or any Senator" were also inserted at this time.

2132. In an impeachment trial the case is opened by one person on each side.

The final arguments on the merits in an impeachment trial are made by two persons on each side, unless ordered otherwise upon application.

The final argument on the merits in an impeachment trial is opened and closed by the House of Representatives.

Present form and history of Rule XXI of the Senate sitting for impeachment trials.

Rule XXI of the "Rules of proceeding and practice for the Senate when sitting in impeachment trials" is as follows:

The case, on each side, shall be opened by one person. The final argument on the merits may be made by two persons on each side (unless otherwise ordered by the Senate upon application for that purpose), and the argument shall be opened and closed on the part of the House of Representatives.

This rule dates from 1868,[38] when a committee, of which Mr. Jacob M. Howard, of Michigan, was chairman, reported a revision of the rules, in view of the approaching trial of President Andrew Johnson. The rule as reported was in this form:

XXI. The final argument on the merits may be made by two persons on each side, and the argument shall be opened and closed on the part of the House of Representatives.

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[36] Second session Eighth Congress, Senate Journal, pp. 511–513; Annals, pp. 89–92.
[37] Second session Fortieth Congress, Senate Report No. 59; Senate Journal, p. 813; Globe, p. 1568.
[38] Second session Fortieth Congress, Senate Report No. 59.

On March 2,[39] this rule was debated fully, and amended so as to stand in its present form. Mr. Charles Sumner, of Massachusetts, proposed an amendment which, after discussion, was adopted in form as follows:

The case, on each side, shall be opened by one person.

During the debate Mr. Roscoe Conkling explained this amendment on behalf of Mr. Sumner, who has been called away:

The Senator from Massachusetts thought that when the managers came here and rose to open their case and had proceeded an hour perhaps the Senator from Indiana or some other Senator would say, "This now is a proceeding, a question falling within the first of these two rules; it is a preliminary or interlocutory matter, and therefore to be restricted to an hour." That there might be no question about it, the Senator from Massachusetts proposes that the two rules shall stand precisely as they are now, the latter of which rules gives to counsel the right to sum up the evidence at any length they please, be it a day or four days or ten days each; but that before the evidence has been delivered, before the witnesses are called, that explanatory statement which is called "an opening" shall be made by one person on each side, one manager on the part of the House of Representatives in the beginning, and one counsel on the part of the respondent after the evidence for the prosecution is closed and the respondent comes to make his case. To cover that, the Senator from Massachusetts interposes this rule between the two (leaving the previous rule to operate upon interlocutory matters, as it does), to provide for the opening of the case on each side respectively before the evidence is delivered, and then to leave to counsel to sum up, or close the case, or, in the language of the rule, to make the "final argument on the merits" at any length they please. That is the meaning of it, as I understand it.

A question having been raised by Mr. Thomas A. Hendricks, of Indiana, Mr. Conkling said further:

The idea is that the practice is to be precisely as it is in Indiana—not the practice in Westminster Hall, but the practice as we know it in this country. The plaintiff, for illustration, opens his case and gives his evidence and finishes it; then the defendant opens his case and gives his evidencce and finishes it; and then the summing up occurs. That is the design here—that the prosecutors for the House of Representatives open their case and prove it as far as they can; then the respondent opens his case and proves it as far as he can. That is precisely what the amendment means, I submit. I know that is the design of the mover.

The amendment was agreed to without division.

A more serious question arose as to the number of persons who should be permitted to sum up on each side. Mr. James W. Grimes, of Iowa, objected that the number should not be restricted, saying:

If I remember rightly the history of impeachment trials in England, the members of the managers and the counsel on the part of the defense have addressed their arguments to a particular issue that was involved in a particular specification; and I think that was the case in this country in the celebrated Chase trial, and in the Peck trial.. There were divers and sundry specifications, to each of which the defendant pleaded not guilty. One manager argued each particular specification; and one of the counsel on the part of the defense replied to him. Each article was one of the points upon which the court had to pronounce that the defendant was either guilty or not guilty, and each was argued separately.

Now, had we not better leave this whole matter to be settled by a conference between the attorneys of the respective sides when they shall reach the argument than to say now peremptorily that ten or twenty articles shall all be combined in the speech of the counsel instead of being severed, as they have been in previous trials, and limiting them to two speeches on each side? My own opinion is that a question of practice of that kind belongs purely to the court; and if we are to resolve ourselves from a Senate into a court, it ought to be

[39] Senate Journal, pp. 242, 243, 814; Globe, pp. 1580-1585.

settled by the court itself, when the Chief Justice, who is to preside over us, is present to give us the aid of his counsel.

Mr. Garrett Davis, of Kentucky, speaking in the same line, said:

I can state to the honorable Senator from Vermont and to the Senate that in every case of crime of any great interest, and especially a capital crime, I have never known the argument of the case on the part of the defense by a less number of counsel than three, and it is often by five. I agree with the Senator from Indiana that in the management of the case, if you introduce more than two counsel, if they are competent counsel, you embarrass the case and you weaken the prosecution or the defense. But it is not so always in the argument of cases of importance. It is a universal practice in the criminal courts of Kentucky that where a case of interest involving capital punishment is under trial, and the accused desires it, he is heard by at least three counsel in his defense.

Mr. President, I have learned this fact in relation to impeachments—that they are to be treated with more liberality on both sides than the stringent practice and forms and rules of proceeding in criminal cases, and that those rules which are introduced into criminal cases to economize time have never been resorted to as a general rule in the trial of impeachments. It seems to me that all the modes of proceeding and all the practice in cases of impeachment ought to be more liberal, ought to be more free from restrictions, and especially technical restrictions, and restrictions simply to save time, than criminal prosecutions. And yet the honorable committee that have reported these rules of proceeding and practice are restricting the proceedings in this and all future cases of impeachment much more rigorously than is known in the criminal practice in the courts of Kentucky.

Mr. James Dixon, of Connecticut, said:

I most deeply regret to see what I think I see, what I can not help seeing, in the remarks of the Senator from Massachusetts and some other Senators. That Senator speaks as if the consumption of a day or two days or three days or even four days, taken up in the defense of this great trial, was to be regretted, a thing to be deprecated and avoided; and he points out as something to be shunned that Mr. Burke spoke four days in the great trial of Warren Hastings. I confess I have not that feeling. I regret that the Senator has it; I regret that any Senator has it. I do not think it is to the credit of this body when entering upon this great trial, impartial as undoubtedly we all are, wishing to do justice in a solemn case of this kind, bringing before us the President of the United States, the gentlemen are disposed to deny him on the final argument upon ten charges the privilege of being heard by as many counsel as he wishes.

In behalf of the restriction, Mr. Sumner said:

The Senator forgets that on the trial of Judge Peck Mr. Wirt, in a speech which I have sometimes thought was the most masterly forensic effort in the history of our country, occupied the attention of the Senate two full days. The Senator will also remember that on the trial of Warren Hastings, Mr. Burke occupied the attention of the court of impeachment for four successive days, and there were other gentlemen on both sides, managers, and also counselors for the defense, who occupied the attention of the court each for several days.

I merely refer to these historical precedents that we may be reminded in advance of the possibilities of a trial like this; and a Senator near me says, the probabilities. Perhaps that is a better word; but I refer to express myself in the most moderate manner, and I therefore said simply "the possibilities." It seems to me that it is our duty to provide against probabilities or possibilities even.

And Mr. George F. Edmunds, of Vermont, said:

Now, as to the propriety of this rule as a general rule. Is there a Senator on this floor who would stand up and say of his own personal knowledge of criminal practice in his own State that this rule does not exist in all their courts? I do not mean as a written rule necessarily; but is it not a general rule in every court in the United States of America, either State or national, that only two counsel are heard on a side in the summing up of a cause? A man is tried for his life, and, as a general rule—there may be exceptions, but I never heard of them in that case—only two counsel are heard in his defense, and only two for the prosecution. So all civil rights and questions involving the operations of law over vast

sections of country are determined in the same way. This very day, in another Chamber of this building, before the Supreme Court of the United States, a cause is argued which may involve the peace and safety of the inhabitants of ten States, and of millions of persons, and it is confined, by the rules of that court, to two counsel on a side, and nobody complains that any injustice is being done to any one.

After the debate had continued for some time, Mr. Edmunds proposed the following amendment, which was agreed to without division:

Insert, after the words "on each side," the words "unless otherwise ordered by the court upon application for that purpose."

The word "court" was afterwards changed to "Senate" in accordance with a general conclusion to which the Senate had arrived.

Mr. Dixon, referring to the law of Connecticut as a precedent, then proposed the addition of the following clause:

And the counsel of the party accused in all trials to which these rules are to apply shall be allowed the closing turn in the final argument.

Mr. Orris S. Ferry, of Connecticut, said it had been the law of Connecticut since 1848, but had worked badly. The amendment was rejected without division.

2133. In the opening address in an impeachment trial it is proper to outline what it is expected to prove; but it is not proper to quote evidence which may or may not be admissible later.—On February 10, 1905,[40] in the Senate sitting for the trial of Charles Swayne, Mr. Henry W. Palmer, of Pennsylvania, was making the opening address on behalf of the managers, and had outlined what they expected to prove in support of the article charging the improper use of a private railway car. Mr. Palmer went on to say:

The respondent acknowledged the facts, as above stated, but defended his action upon the ground that the property of the railroad company being in the hands of the court, he, the judge of the court, had a right to use it without making compensation to the railroad company.

When questioned on the subject, we shall prove that he said, in answer to this question:

"Q. You said this car was one of the cars in possession of the court, because the road was in the hands of a receiver?—A. Yes."

"Q. You said that it was the privilege of the court to use that car, because the road was in the hands of a receiver?—A. Yes."

Mr. John M. Thurston, of counsel for the respondent, objected:

Mr. President, the statement that is now being read, as the record shows, is a part of the testimony of Judge Swayne taken before the committee of the House of Representatives, which, under the acts of Congress, can not be used against him in any criminal prosecution; and therefore it is improper to make the statement that the chairman of the managers is now proceeding to make. We object to the presentation here, by statement or otherwise, of any testimony that was given by Judge Swayne, the respondent, before the House committee, claiming his right, under the law of the Congress of the United States, that it can not be used against him in any criminal prosecution, of which this certainly is one.

After brief argument the Presiding Officer[41] said:

Of course, the managers on the part of the House and the counsel on the part of the respondent have somewhat wide latitude in their opening statements, but the Presiding Officer is of opinion that testimony which has been given by Judge Swayne on the occasion referred to ought not to be cited at length. He has a right to plead his privilege. He can not be obliged to criminate himself. * * * It seems to the Presiding Officer to be an indirect way of getting before the

[40] Third session Fifty-eighth Congress, Record, pp. 2232–2233.
[41] Orville H. Platt, of Connecticut, Presiding Officer.

Senate the fact that Judge Swayne had testified to this. The Presiding Officer suggests to the manager that he may properly omit the reading of testimony which had been given on another occasion by Judge Swayne.

Very soon after, in outlining the case as to the charge of nonresidence, Mr. Palmer said:

The facts, as they will appear in the testimony, are that after his confirmation as judge in 1890 he established his residence at St. Augustine, in a house rented from Mr. Flagler, and lived there with his family until the boundaries of his district were changed by the act of Congress in the year 1894. Judge Swayne states that he was urged by his friends not to move his family or furniture, that the next Congress would probably restore his district, and therefore his furniture was allowed to remain in St. Augustine until the year 1900, when he rented the Simmons cottage in Pensacola and lived there at intervals until 1903, when his wife bought a home. During the six years——

Mr. Higgins objected.

Mr. President, I wish to say that that statement is again contrary to the rule we have invoked as to the statute.

The Presiding Officer[42] held—

The Presiding Officer thinks that the manager has a right to state what he expects to prove, but that he ought not to go further by citing any testimony which has been given by Judge Swayne on another occasion as the means by which he expects to prove it.

2134. The opening address in an impeachment trial should be confined to what is to be proven, and how it is to be proven, and should not include extended argument on the whole case.—On February 21, 1905,[43] in the Senate sitting for the impeachment trial of Judge Charles Swayne Mr. Anthony Higgins, of counsel for the respondent, was making the opening address preliminary to the introduction of testimony for the respondent, and in the course of his remarks made various citations which he asked the Secretary to read. Thus he had read extracts from the decisions of the Supreme Court of the United States in the cases of Bradley *v.* Fisher; In re Cuddy, petitioner; In re Savin, and an extract from the answer of one O'Neal in a lawsuit out of which arose one of the causes of Judge Swayne's impeachment.

After the reading of this extract the Presiding Officer interrupted saying:

The Secretary will suspend for a moment. Why does the counsel claim that this is proper in an opening? The Presiding Officer supposed that the opening of a case on the part of the managers or on the part of counsel should be limited to a statement of the issues raised in the case, and what the parties propose to prove either for the prosecution or the defense. How do these extracts which the Secretary has been asked to read fall within what the Presiding Officer supposes to be the proper line of an opening on behalf of the respondent?

Mr. Higgins replied:

I will state, Mr. President, in the first sentence, that a perusal of the statement of counsel in the Peck case shows that the managers went very fully into the merits of the case on the argument. Mr. Meredith, in opening for the respondent, did not. I thought, therefore, that I was entirely within the rules of this anomalous proceeding, which is not by common law, is not in equity, but is according to the lex et consuetudo parliamenti. The articles and answers are drawn from the civil law. They are not known to our own practice, and therefore I have supposed that it was a proceeding where the largest latitude was given to counsel in the first instance.

[42] Orville H. Platt, of Connecticut, Presiding Officer.
[43] Third session Fifty-eighth Congress, Record, p. 2977.

In the second place I desire to say, Mr. President, on this interesting point that the Greenhut testimony has not been read, and it is impossible to get a statement of the issues without it. I could have had read the affidavit of Greenhut. I could have read Greenhut's testimony, so as to get them before the court as to what they would show, but I have elected to leave them out, and was stating what O'Neal's was. Moreover, I thought it was the shortest way in which I could proceed.

The Presiding Officer then said:

The Presiding Officer, of course, does not wish to limit counsel for respondent as to any of their just rights, but as was suggested a moment ago the Presiding Officer supposed that an opening on behalf of the person accused was to be confined strictly to the issues raised and what the counsel expected to prove, and how they expected to be able to prove it. This opening seems to have taken the form of an extended argument on the whole case, which the Presiding Officer had supposed would be more proper, to say the least, when the case came to be finally argued. Perhaps the Presiding Officer is only expressing a little the impatience of the Senate, and without attempting to fix limits, he wants to suggest that the opening should be concluded as quickly and as rapidly as counsel feel that it can be in presenting their case to the Senate.

2135. At the trial of President Johnson both managers and counsel for respondent objected successfully to the rule limiting the number speaking in final argument.

In the final argument in the Johnson trial the conclusion was required to be by one manager.

The privilege of submitting a written instead of an oral argument in the final summing up was allowed in the Johnson trial.

In the Johnson trial the Senate declined to limit the time of the final arguments.

The Chief Justice ruled during the Johnson trial that a proposed order should, under the Senate practice, lie over one day before consideration.

On April 11, 1868,[44] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, Mr. Frederick T. Frelinghuysen, Senator from New Jersey, proposed the following:

Ordered, That as many of the managers and of the counsel for the respondent be permitted to speak on the final argument as shall choose to do so.

The Chief Justice [45] held that under the rules of the Senate the order would not be considered until the next day.

On April 13,[46] the order came up in the Senate sitting for the trial, and Mr. Charles Sumner, of Massachusetts, at once proposed the following to come in at the end:

Provided, That the trial shall proceed without any further delay or postponement on this account.

Mr. Manager Thomas Williams, of Pennsylvania, referred to the rule of the Senate (Rule XXI), which provided that the final arguments "may be made by two persons on each side (unless otherwise ordered by the Senate upon application for that purpose), and the argument shall be opened and closed on the part of the House of Representatives," and said that the rule as it stood was calculated to embarrass the managers, whose number had been fixed by the House at seven. In the preceding impeachment cases wherein a defense had been made,

[44] Second session Fortieth Congress, Senate Journal, p. 887; Globe Supplement, p. 147.
[45] Salmon P. Chase, of Ohio, Chief Justice.
[46] Senate Journal, p. 891; Globe Supplement, pp. 160–163.

the cases of Judges Chase and Peck, the numbers of managers were, respectively, seven and five, and in the one case six of the seven managers were heard in concluding argument, and in the other all five were heard. In neither of those cases did there seem to have been any question as to the right of the House to be heard through all its managers. And going to the English precedents, in the famous case of Warren Hastings all the managers were heard in argument.

After further debate Mr. Frelinghuysen modified his order as follows:

Ordered, That as many of the managers and of the counsel for the President be permitted to speak on the final argument as shall choose to do so: *Provided*, That the trial shall proceed without any further delay or postponement on this account: *And provided further*, That only one manager shall be heard in the close.

Mr. Manager George S. Boutwell objected to the proposition to limit the close to one manager. He recited that in the trial of Judge Peck the case was first summed up by two managers on the part of the House, then the case of the respondent was argued by two of his counsel, and then the case was closed by the arguments of two managers. And in the case of Judge Peck, after the counsel for the respondent had concluded, the case was closed by three managers. He also cited the ably conducted trial of Judge Prescott, in Massachusetts, wherein two arguments were made by the managers after the close of the argument for the respondent.

Mr. Sumner then proposed to amend by striking out the last proviso and inserting:

And provided, That according to the practice in cases of impeachment the several managers who speak shall close.

Mr. George H. Williams, of Oregon, in order to test the sense of the Senate as to the desirability of changing the existing rule, moved that the order and pending amendment be laid on the table. This motion was agreed to, yeas 38, nays 10.

On April 14,[47] Mr. Sumner offered this order:

Ordered, In answer to the motion of the managers, that under the rule limiting the argument to two on a side unless otherwise ordered, such other managers and counsel as choose may print and file arguments at any time before the argument of the closing manager.

This order going over for consideration until the next day a discussion arose as to the time of submitting the written arguments, and Mr. John Conness, of California, proposed this amendment:

Strike out all after the word "ordered" and insert:

"That the twenty-first rule be so amended as to allow as many of the managers and of the counsel for the President to speak on the final argument as shall choose to do so: *Provided*, That not more than four days on each side shall be allowed; but the managers shall make the opening and the closing argument."

The question being taken, the substitute was disagreed to, yeas 19, nays 27.

Thereupon Mr. Jonathan Doolittle, of Wisconsin, proposed an amendment:

Strike out all after the word "ordered" and insert:

[47] Senate Journal, pp. 896, 897; Globe Supplement, pp. 174, 175.

"That upon the final argument two managers of the House open, two counsel for the respondent reply; that two other managers rejoin, to be followed by two other counsel for the respondent; and they, in turn, to be followed by two other managers of the House, who shall conclude the argument."

Thereupon Mr. Charles D. Drake, of Missouri, moved that the proposed order and pending amendment be postponed indefinitely. This motion was agreed to, yeas 34, nays 15.

On April 20,[48] after the introduction of evidence had been concluded, Mr. Manager John A. Logan asked of the Senate sitting for the impeachment trial, that he be permitted to file a printed argument instead of arguing orally. After some discussion Mr. William M. Stewart, a Senator from Nevada, offered this order:

Ordered, That the honorable Manager Logan have leave to file his written argument to-day and furnish a copy to each of the counsel for the respondent.

To this Mr. John Sherman, a Senator from Ohio, offered the following as a substitute:

That the managers on the part of the House of Representatives and the counsel for the respondent have leave to file written or printed arguments before the oral argument commences.

Mr. Stewart accepted the substitute as an amendment, and it was considered by the Senate in lieu of the original resolution offered by Mr. Stewart.

On April 22 the amendment of Mr. Stewart, in its modified form, was considered, and Mr. George Vickers, a Senator from Maryland, proposed as a substitute:

As the counsel for the President have signified to the Senate sitting as a court for the trial of the impeachment, that they did not desire to file written or printed arguments, but preferred to argue orally, if allowed to do so: Therefore,

Resolved, That any two of the managers other than those who under the present rule are to open and close the discussion, and who have not already addressed the Senate, be permitted to file written arguments at or before the adjournment of to-day, or to make oral addresses after the opening by one of the managers and the first reply of the President's counsel, and that other two of the counsel for the President who have not spoken may have the privilege of reply, but alternating with the said two managers, leaving the closing argument for the President and the managers' final reply to be made under the original rule.

This proposed substitute was agreed to, yeas 26, nays 20; but immediately thereafter the order as amended by the substitute was disagreed to, yeas 20, nays 26.

Thereupon Mr. Vickers offered the following:

Ordered, That one of the managers on the part of the House be permitted to file his printed argument before the adjournment of to-day, and that after an oral opening by a manager, and the reply of one of the President's counsel, another of the President's counsel shall have the privilege of filing a written or of making an oral address, to be followed by the closing speech of one of the President's counsel, and the final reply of a manager under the existing rule.

Mr. John Conness, a Senator from California, thereupon moved to amend by striking out all after the word "ordered" and inserting:

That such of the managers and counsel for the President as may choose to do so have leave to file arguments on or before Friday, April 24.

The amendment of Mr. Conness was disagreed to, yeas 24, nays 25.

The original order as proposed by Mr. Vickers being under consideration, it was, on motion of Mr. Reverdy Johnson, of Maryland,

[48] Senate Journal, p. 916; Globe Supplement, pp. 247–251.

amended by striking out the word "one" in the first line and inserting "two." Then, on motion of Mr. John Sherman, of Ohio, the words "or written" were inserted between the words "printed" and "arguments." And on motion of Mr. John Conness, of California, the time was lengthened from "adjournment of to-day" to "before to-morrow noon."

Thereupon Mr. John B. Henderson, of Missouri, offered an amendment subsequently modified to read as follows:

Amend by striking out all after the word "ordered" and inserting:
"That subject to the twenty-first rule all the managers not delivering oral arguments may be permitted to file written arguments at any ime before the 24th instant, and the counsel for the President not making oral arguments may file written arguments at any time before 11 o'clock of Monday, the 27th instant."

A motion to lay the whole subject on the table was disagreed to, yeas 13, nays 37.

At this stage of the proceedings Mr. Thomas A. R. Nelson, of Tennessee, of counsel for the President, addressed the Senate, asking that all the counsel for the President who should be able to participate—Mr. Stanbery being ill—should have leave to address the Senate either orally or in writing, as they should elect. He concluded:

I may say, although I am not expressly authorized to do so, that I am satisfied the President desires that his cause shall be argued by the two additional counsel whom he has provided in the case, besides the three counsel who were heretofore selected for that purpose; and I trust you will not deny us this right. I trust that you will feel at liberty to extend it to all the counsel in the case. If we choose to avail ourselves of it we will do so. I have no sort of objection, so far as I am concerned that the same right shall be extended to all or to more than an equal number of managers on the other side. I trust that the resolution be so shaped as to embrace all the counsel who are engaged in the cause in behalf of the President.

Mr. Nelson also cited the precedent of Judge Chase's trial, when six of the managers and five of counsel for the respondent were permitted to address the Senate.

After consideration of suggested amendments, Mr. Lyman Trumbull, of Illinois, proposed to amend Mr. Henderson's amendment by striking out all after the word "that" and inserting:

As many of the managers and of the counsel for the President as desire to do so be permitted to file arguments or to address the Senate orally.

And this amendment was agreed to, yeas 29, nays 20.

Then, on motion of Mr. Charles R. Buckalew, of Pennsylvania, these words were added:

But the conclusion of the oral argument shall be by one manager, as provided in the twenty-first rule.

Mr. Richard Yates moved to amend by striking out all after the word "that" and inserting:

Four of the managers and four of the counsel for the respondent be permitted to make printed or written or oral arguments, the managers to have the opening and closing, subject to the limitation of the twenty-first rule.

This amendment to the amendment was disagreed to, yeas 18, nays 31.

Then by a vote of yeas 28, nays 22 the substitute of Mr. Henderson, as amended by the propositions of Messrs. Trumbull and Buckalew, was agreed to, and then the order as amended was agreed to. So it was—

Ordered, That as many of the managers and of the counsel for the President as desire to do so be permitted to file arguments or to address the Senate orally, but the conclusion of the oral argument shall be by one manager as provided in the twenty-first rule.

2136. After elaborate investigation it was held that the opening and closing arguments on incidental questions in impeachment trials belong to the side making the motion or objection.

The claim of the managers to the closing of all arguments arising in course of an impeachment trial has been denied after examination of American and English precedents.

Discussion of the technical forms of pleading in an impeachment trial, as related to right of opening and closing arguments on an incidental question.

Instance wherein the Senate sitting for an impeachment trial fixed the number of managers and counsel to argue on an incidental question.

One of the managers in an impeachment trial may not move to rescind an order of the Senate as to the conduct of the trial.

On March 23, 1868,[49] in the Senate while sitting for the trial of the impeachment of President Johnson, the counsel of the President offered an application that thirty days be allowed the President and his counsel for the preparation of his case.

The managers for the House of Representatives were first heard, Mr. Manager John A. Logan opposing the request. Then Mr. William M. Evarts, of counsel for the President, was heard in favor. Mr. Manager James F. Wilson next opposed, and was followed by Mr. Henry Stanbery, counsel for the President, who favored the application.

Then Mr. Manager John A. Bingham proposed to reply on behalf of the House of Representatives.

The Chief Justice,[50] who was the Presiding Officer under the Constitution, said:

The Chair announced at the last sitting that he would not undertake to restrict counsel as to number without the further order of the Senate, the rule not being very intelligible to him. He will state further that when counsel make a motion to the court the counsel who makes the motion has invariably the right to close the argument upon it.

Thereupon Mr. Manager Bingham asked the decision of the Senate, saying:

Mr. President, with all respect touching the suggestion just made by the Presiding Officer of the Senate, I beg leave to remind the Senate, and I am instructed to do so by my associate managers, that from time immemorial in proceedings of this kind the right of the Commons in England and of the Representatives of the people in the United States to close the debate has not been, by any rule, settled against them. On the contrary, in Lord Melville's case, if I may be allowed and pardoned for making reference to it, the last case, I believe, reported in England, Lord Erskine presiding, when the very question was made which has now been submitted by the Presiding Officer to the Senate, one of the managers of the House of Commons arose in his place and said that he owed it to the Commons to protest against the immemorial usage being denied to the Commons of England to be heard in reply to whatever might be said on behalf of the accused at the bar of the Peers. In that case the language of the manager, Mr. Giles, was:

"My Lords, it was not my intention to trouble your lordships with any observations upon the arguments you have heard; and if I now do so it is only for the

[49] Second session Fortieth Congress, Globe Supplement, pp. 23–27.
[50] Salmon P. Chase, of Ohio, Chief Justice of the United States.

sake of insisting upon and maintaining that right which the Commons contend is their knowledge and undoubted privilege—the right of being heard after the counsel for the defendant has made his observations in reply. It has been invariably admitted when required."—(State Trials, vol. 29, p. 762; 44 to 46 George III.)

Lord Erskine "responded the right of the Commons to reply was never doubted or disputed."

Following the suggestion of the learned gentleman who has just taken his seat, I believe that when that utterance was made it had been the continued rule in England for nearly five hundred years.

In this tribunal, in the first case of impeachment that ever was tried before the Senate of the United States under the Constitution (I refer to the case of Blount), the Senate will see by a reference to it that although the accused had the affirmative of the issue, although he interposed a plea to the jurisdiction, the argument was closed in the case by the manager of the House, Mr. Harper. (Wharton's State Trials of the United States, pp. 314–315.)

When I rose, however, at the time the honorable Senator spoke, I rose for the purpose of making some response to the remarks last made for the accused; but as the Presiding Officer has interposed the suggestion to the Senate whether the managers can further reply I do not deem it proper for me to proceed further until the Senate shall pass upon this question.

Some discussion arising, Mr. Reverdy Johnson, of Maryland, called for the reading of this rule:

20. All preliminary or interlocutory questions and all motions shall be argued for not exceeding one hour on each side, unless the Senate by order, extend the time.

Mr. Manager Bingham thereupon stated the the managers had used but thirty-five minutes of their time.

Thereupon Mr. Bingham was allowed to proceed.

At the close of his remarks there was no claim for recognition from the counsel for the President. and a vote was taken.

2137. On April 1, 1868,[51] in the Senate during the impeachment trial of Andrew Johnson, President of the United States, Hon. Walter A. Burleigh, Delegate from Dakota Territory, a witness called by the managers, was being examined, when counsel for the President objected to the competency of a certain question. After arguments had proceeded for some time, the following colloquy occurred between Messrs. Managers John A. Bingham and Benjamin F. Butler on the one side and Mr. Henry Stanbery, of counsel for the President, on the other:

Mr. Manager BINGHAM. I rise to a question here. I understand that we speak here under a rule of the Senate, as yet at least, that requires us to be restricted to an hour on each side.

Mr. STANBERY. And one counsel, if you go according to the rule.

Mr. Manager BINGHAM. No; I do not understand that. I understand, on the contrary, that the practice heretofore thus far in the progress of this trial has been to allow the counsel to divide their time as they pleased, within but one hour on each side. The point to which I rise now, however, is this: That we understand that in a proceeding of this sort the managers have always claimed and asserted, where the point was raised at all. the right to conclude upon all questions that were raised in the progress of the trial. The hour has been well nigh expended in this instance on each side, as I am told, though I have not taken any special note of the time. But we raise the question; and I state that the fact that our time has been exhausted, as I am advised, is the only reason why I raise it now; and thus we are cut off from any further reply. Our only objective in raising the question is that we shall not be deemed to have waived it, because we are advised that it was settled years ago in Melville's case by the

[51] Second session Fortieth Congress, Globe Supplement, p. 70.

Lord Chancellor presiding and by the Peers that the managers might waive their privilege by their silence.

Mr. Manager BUTLER. We have the affirmative.

Mr. STANBERY. On this question? Oh, no.

2138. On April 28, 1876,[52] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, the following order was made in a secret session of the Senate, which had retired for consultation, and was reported:

Ordered, That the hearing proceed on the 4th of May, 1876, at 12 o'clock and 30 minutes p.m.; that the opening and close of the argument be given to the respondent; that three counsel and three managers may be heard in such order as may be agreed on between themselves, and that such time be allowed for argument as the managers and counsel may desire.

The argument here referred to was on a question in the nature of a demurrer raised by the plea of the respondent that he was not amenable to impeachment for acts done as Secretary of War because of his resignation of said office.

The order having been read in the Senate sitting publicly for the impeachment, Mr. Manager Scott Lord, on behalf of the House of Representatives, announced that the managers requested to be heard on the question of the opening and closing arguments, and also in regard to the number of managers who should be allowed to speak.

Then Mr. Manager Lord proposed a motion [53] to rescind the order.

The President pro tempore [54] said:

The Chair would state to the manager that a motion by him to rescind the order of the Senate would not be in order; but the manager is permitted to address the Senate.

The question being thrown open to argument, three main points were involved:

1. The rule suggested by the state of the question.
2. The American precedents.
3. The effect of English usage.

(1) As to the rule suggested by the state of the question, Mr. Matt. H. Carpenter, of counsel for the respondent, stated, in support of their claim to the opening and closing, the conditions under which the question presented itself:

Now let me briefly state the condition of the pleadings in this case.

To the articles of impeachment the respondent interposed a plea to the jurisdiction, averring that, when the House ordered the impeachment, and when the articles were exhibited, he was not an officer of the United States, but was a private citizen, etc.

It is contended by some that a citizen holding one office may be removed by impeachment for prior misdemeanors in another office. If this be sound, then the plea to the jurisdiction set up new matter; that is, that he was not in any office. Some of the articles of impeachment did not show that he was out of office as Secretary of War, and none of them averred that he was a private citizen. To this plea the House of Representatives replied double; first, that he was Secretary of War when the acts complained of were done, and continued in such office "down to the 2d of March, 1876;" second, that he was in such office "until and including the 2d day of March, 1876," and until the House, by its committee, had completed an investigation, etc.

At this point Mr. Roscoe Conkling, of New York, interposed to say that this reply of the House was a replication.

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[52] First session Forty-fourth Congress, Senate Journal, pp. 925–927; Record of trial, pp. 19–27.

[53] Record of trial, p. 19.

[54] T. W. Ferry, of Michigan, President pro tempore.

Mr. Carpenter (continuing) said:

Certainly, and so they call it.

To the first replication the respondent interposed a demurrer; found on page 8 of printed proceedings. And the managers filed a joinder in demurrer; found on page 9.

The honorable manager [Mr. Hoar] now claims that the first replication was a demurrer. An inspection will show that it was not. It does not object to the plea as insufficient in matter of law, but because of certain facts therein set forth. We demurred to this replication, and they joined in demurrer.

If all the pleadings subsequent to the articles of impeachment are regarded as immaterial, then the substance of the matter is, we have demurred to the articles. And a demurrer to the articles is an affirmative assertion that, conceding the truth of the matters therein contained, they are insufficient in law; and upon this proposition we hold the affirmative.

Mr. Carpenter also said:

There is no question as to what is the rule in the courts of law. There it is well settled that the party demurring has the right to open and close the argument. The rules of pleading and proceeding in the ordinary courts of justice, no less than the great canons of the common law, have resulted from centuries of practical experience in the administration of justice, and have been approved by the sages of the law as the best methods to elicit truth and administer justice. If these rules are wisely devised to insure these ends, why should they be departed from in this trial? Is there other motive here than to ascertain the truth and do justice? One of two things is clear; those rules should be observed here or abolished there. It is impossible to maintain that one system of procedure will secure justice in one tribunal and produce injustice in another. And the question is whether the methods which have been established, and from time to time improved, in the courts of law, which are in almost continuous session and dealing with endless variety of causes, are less reliable than rules which might be adopted in a court like this which sits only occasionally after long intervals, and where the personnel of the court is likely to be wholly changed between one trial and another.

Mr. Montgomery Blair, also of counsel for the respondent, said:

The first to which I will call the attention of the Senate is the case of Barnard, with which the managers have shown their familiarity, having referred to it in connection with this plea in abatement. Throughout that case the rule which obtains in courts of justice was adhered to, that counsel who maintained the affirmative of the issue had the opening and reply upon such issue. I would also say—and I am making my remarks very brief—in regard to the affirmative of the issue that this is substantially a demurrer to the articles, because every lawyer knows that in a proceeding like this the articles themselves must allege all the facts necessary to give the jurisdiction in the case alleged and proved. This court of impeachment is a court of limited jurisdiction under the Constitution, and in every court of that character the facts upon which the jurisdiction rests must appear on the complaint by which the case is initiated and inviting the action of the court.

Now, every party demurring has the opening and closing, and the argument which is addressed to the court on the other side, that, as they have the affirmative of the general issue, therefore they ought to be heard in opening and replying upon all the questions arising in the progress of the case, would with equal propriety give the plaintiff in every other court the reply on all such questions, whether applied to a question of law or a question of fact. But that is not the rule. In this case we demur, and thus say that, assuming all the facts alleged to be true, the House of Representatives has no case. That is an affirmative proposition that no impeachment can be maintained on the facts charged, and therefore we are entitled to the opening and conclusion of the argument.

Mr. Manager George F. Hoar, on the other hand, contended:

I desire for one moment to call the attention of the Senate to the fact that the managers undertake here the affirmative of this issue. It is true that the respondent has interposed what he calls a plea to the jurisdiction, and that the jurisdictional question has been raised by making an issue upon that plea; but that is a matter of form and not of substance. If the counsel for the respondent

had seen fit to enter a general plea of "not guilty," the question of the jurisdiction of the Senate to try and convict would have been involved in the final vote upon that question. To show the jurisdiction of the court over the subject-matter of the inquiry is a part of the affirmative issue involved in the presentment of articles. So that by the logic of ordinary practice we are brought to the same result as we should be if it were not a question of the prerogative of the House, and the accustomed and well-settled methods of proceeding in impeachment.

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The substance of this issue is this: The House of Representatives say the defendant did certain acts as Secretary of War, and remained Secretary of War until the 2d day of March. The defendant replies, "I was not Secretary of War when you presented your articles, or before," leaving it ambiguous whether he means never before, or that there was a time before when he did not hold the office. In order not to be entangled by that ambiguity, the House of Representatives say, "We mean to assert, as we said before, that you were Secretary of War down to the 2d day of March; and the fact that you have gone out since (which is the only fact, as we understand the pleadings, now newly set up by you) is not a sufficient answer to our original article."

* * * * * * *

I understand that the question which the Senate ought to determine is this—this is the substance of the whole thing: Is the fact newly affirmed, and first affirmed by this respondent, to wit, the fact that he had ceased to be Secretary of War when these articles were presented, a sufficient answer to the charge? You can not escape that simple proposition. That is what you have got to try: Is the fact newly set up by the defendant, that he had ceased to be Secretary of War when these articles were presented, a sufficient answer to this charge? He sets that up and the House of Representatives say that is no sufficient answer; and that is a demurrer in substance and in fact; and on the question whether a fact so set up by my antagonist newly, for the first time in the case, is a sufficient answer to what I have said, I am always entitled to the opening and close.

The House of Representatives, in the first instance, allege in the original articles:

"ART. 3. That said William W. Belknap was Sercetary of War of the United States of America before and during the month of October, 1870, and continued in office as such Secretary of War until the 2d day of March, 1876."

Now, if the Senate will be good enough to observe the plea, which was put in by the honorable counsel, it is this:

"That this honorable court ought not to have or take further cognizance of the said articles of impeachment exhibited and presented against him by the House of Representatives of the United States, because he says that before and at the time when the said House of Representatives ordered and directed that he, the said Belknap, should be impeached at the bar of the Senate, and at the time when the said articles of impeachment were exhibited and presented against him, the said Belknap, by the said House of Representatives, he, the said Belknap, was not, nor hath he since been, nor is he now, an officer of the United States."

In that replication there is an ambiguity. If the respondent had said that at the time of the presentment of the articles of impeachment he was not a civil officer, it would have presented the naked question of jurisdiction without ambiguity or difficulty, and the House would have demurred; but he inserts the word "before." That may have one of two meanings. It may amount to an allegation that he was never, before the original articles of impeachment were presented, a civil officer of the United States. I do not say that that astute purpose was in the mind of the counsel who drew the pleading. If we had demurred simply, if we had made a simple demurrer, the respondent might then have come before the Senate and argued that he had responded to the articles that he never was a civil officer of the United States at any time before they were presented, and we should have been left to a discussion upon the verbiage of the article and to the danger of being excluded from court by a blunder in not giving the proper construction to the defendant's language. Accordingly, we set up no new matter, but we simply reassign, in regard to the fact which is left doubtful on the expression of the defendant's plea, what we said in our original articles; in other words, we say, "We mean to say that you were a civil officer of the United States until the 2d of March; and therefore, that being the meaning of our original article, your plea presents no legal or proper response." It is a case, therefore, of a reassignment or a reaffirmation of a fact originally set forth in a mode in which the

meaning of the original allegation can not be questioned, and saying that, therefore, that fact being considered, the plea of the respondent shows no answer in law. Thus we have presented to the Senate in substance an issue made here in this way—a statement of the original articles that the defendant was a civil officer of the United States down to the 2d day of March, reaffirmed in the replication; a statement by the defendant that before these articles were presented he had ceased to be such civil officer; and a statement on the part of the House of Representatives that that last allegation is no defense to the charge; in other words, a simple demurrer to what is pleaded and well pleaded in the original article; and on such demurrer by the invariable rule of courts both of law and equity the party sustaining the demurrer has the affirmative.

Upon the larger question (setting aside now the pleadings and taking the substance of the issue upon the question of jurisdiction) the plaintiff always has the affirmative. If the respondent had contented himself with introducing a naked plea of "not guilty," he could have availed himself of his objection to the jurisdiction upon that plea, and it would have required the judgment of the court to be given against him or in his favor, without setting up the fact at all, because the original articles do not allege that at the time of the presenting of the articles he was a civil officer of the United States.

And it may be proper to say one further word in conclusion. I understand, in accordance, as was suggested in the very significant question put I think by the honorable Senator from New York, that the true rule of pleading in impeachment cases is this: The House of Representatives present articles setting up the substance of the transaction on which they rely, not in the form of an indictment or of a bill in equity or of a civil declaration certain to a certain intent in general, but setting forth the substance of a transaction. It is not necessary to give dates. You may say "on or about the time." It is not necessary to give legal results or intendments. Then the defendant comes in and in his answer either denies the whole matter if there was no such transaction as is set up, or if there was a transaction of the kind, but an innocent and not a guilty one, with certain different and other circumstances, he tells the story as he alleges it to be, setting up at the same time all special suggestions of law or of defense of fact on which he relies; and the pleadings are made up in that way by a joinder of issue. I do not think it is in the power of parties by pleadings of fact such as take place in ordinary courts of law to compel the Senate to determine, except in its discretion, several issues of fact in succession. Suppose an issue of fact were made up on this question of jurisdiction, is the Senate to be compelled to lay aside its legislative business and determine that, and then the defendant answer over, perhaps setting up some other matter strictly in bar, and have that determined, and so the Senate put to a trial of half a dozen successive issues of fact? I respectfully submit that that is not the rule, but that the proper method of pleading is the one which I have first stated.

Undoubtedly it would have been very proper that the matter set up in this second replication should have been set up in the original articles; but it is also well settled in matters of impeachment that the House of Representatives has in its discretion the right at any time to file additional articles if it see fit. It is also true that this new matter set up in the second replication has been pleaded to without objection on the part of the defendant; that it is before the Senate as an allegation in the cause presented by the authority of the House; and whether it should or should not have been originally inserted in the articles becomes now of no consequence.

(2) As to the American precedents, Mr. Manager Hoar said:

This question arose in the trial of President Johnson, and with the leave of the Senate I will cite that authority and the English authority on which the Senate then based its action. After a discussion of a question of practice which came up, as to the course of proceeding in the trial, the Chief Justice, then presiding in the Senate, after the managers for the House had closed what they had to say, inquired of the counsel for the President respondent whether they desired to reply to what had been said by the managers, and the managers representing the House interposed with this suggestion:

"Mr. Manager BINGHAM. Mr. President, with all respect touching the suggestion just made by the Presiding Officer of the Senate, I beg leave to remind the Senate, and I am instructed to do so by my associate managers, that from time immemorial in proceedings of this kind the right of the Commons in England, and of the Representatives of the people in the United States, to close the debate

has not been by any rule settled against them. On the contrary, in Lord Melville's case—"

And this, I believe, is the last case of impeachment which has taken place in England—"if I may be allowed and pardoned for making reference to it, the last case, I believe, reported in England, Lord Erskine presiding, when the very question was made which has now been submitted by the Presiding Officer to the Senate, one of the managers of the House of Commons arose in his place and said that he owed it to the Commons to protest against the immemorial usage being denied to the Commons of England to be heard in reply to whatever might be said on behalf of the accused at the bar of the Peers. In that case the language of the manager, Mr. Giles, was:

"My lords, it was not my intention to trouble your lordships with any observations upon the arguments you have heard; and if I now do so, it is only for the sake of insisting upon and maintaining that right which the Commons contend is their acknowledged and undoubted privilege, the right of being heard after the counsel for the defendant has made his observations in reply. It has been invariably admitted when required.' (29 State Trials, p. 762, 44–46 George III.)

"Lord Erskine 'responded the right of the Commons to reply was never doubted or disputed.'

"Following the suggestion of the learned gentleman who has just taken his seat, I believe that when that utterance was made it had been the continued rule in England for nearly five hundred years.

"In this tribunal, in the first case of impeachment that ever was tried before the Senate of the United States under the Constitution (I refer to the case of Blount), the Senate will see by a reference to it that although the accused had the affirmative of the issue, although he interposed a plea to the jurisdiction, the argument was closed in the case by the manager of the House, Mr. Harper."

In response to that claim, the distinguished and able counsel for the President, who, I need not remind many of the most distinguished Members of this body, fought every inch of ground, yielded to the demand; and throughout the President's trial, from that time, the House of Representatives was heard in reply upon every question that arose, whether a question of the admission of evidence, of the proceedings, or the final question, following therein the English precedents for five hundred years and the precedent adopted in the first case of impeachment in the Senate, and acting therein also in accordance with what, so far as I have been able to examine, has been the proceeding in every case of impeachment in a State tribunal in this country.

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In the Blount trial, I believe I have stated with sufficient distinctness, the plea being that William Blount was a Senator of the United States, and therefore not an impeachable civil officer, and also that he had laid down his office before the proceedings were instituted—upon that issue, which presented simply the question of jurisdiction, the opening and close were with the House.

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Blount's case was the case to which I referred. In the haste of replying to the learned counsel I used the phrase, "the rule settled by itself for the Senate in the first case which came before them." In point of fact, it appears upon the report that the order of proceeding was settled by the four distinguished counselors who took part in it by an agreement, and there is no vote or other express action of the Senate to be found; and it was my purpose, on the suggestion of one of my honored associates, to have made that explanation to the Senate at this time, but it passed from my mind. But Blount's case seems to me to be a very significant and important authority, for it is not credible that those four lawyers, four as able lawyers as the bar of the United States afforded at that time, Mr. Jared Ingersoll, Mr. Bayard, Mr. Harper, and Mr. Dallas, would have conceded so important an advantage to the managers on the part of the House of Representatives without any equivalent, unless they had understood the practice to be so.

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I speak at this moment only from memory, but I do not understand that the learned counsel correctly states the only American precedent to which he has referred—the case of Barnard. In Barnard's case a plea was interposed to the jurisdiction, in substance the same plea which is interposed here, applying to several of the articles. That plea was argued by itself, and upon that argument the counsel for the State had the opening and the close.

On the other hand, Mr. Carpenter said:

In Blount's trial the House of Representatives had interposed the first demurrer, and therefore the managers were entitled to open and close the argument. In the report of that case (2 Annals of Congress, p. 2248), it is said:

"Mr. Bayard, the chairman, having communicated with Mr. Ingersoll, the leading counsel for the defendant, it was agreed between them that the managers should proceed in the argument first on the part of the prosecution, and that the right to reply should belong to the managers."

That is, the managers and the counsel for the defendant, being good lawyers, were agreed that the managers were entitled to open and close the argument upon the demurrer interposed by them. Such is the rule in all courts of justice. And yet the honorable manager [Mr. Hoar] refers to this understanding between counsel as to the rights of the managers, in that case, to show that the managers, in all cases, are entitled to open and close the argument upon a demurrer interposed by the defendant; which would be exactly the reverse of the rule in courts of law.

Indeed, the broad proposition is maintained by the honorable manager that in the argument of every question to arise in this case, upon every motion made by either side, and upon every demurrer, no matter by which side interposed, the managers are entitled to the opening and close. And I understood him to contend at your last sitting that this was conceded by the eminent counsel who defended the impeachment against President Johnson, when the question was first raised by Mr. Manager Bingham; and that the court and counsel on both sides thereafter proceeded on that hypothesis.

But an examination of the report of that trial shows that the honorable manager was under a total misapprehension. I read from page 77 of the first volume of the Congressional edition of that trial:

"Mr. Howard and Mr. Manager Bingham rose at the same time.

"The CHIEF JUSTICE. The Senator from Michigan.

"Mr. Manager BINGHAM. On the part of the managers I beg to respond to what has just been said.

"Mr. HOWARD. I beg to call the attention of the President to the rules that govern the body.

"Mr. Manager BINGHAM. I will only say that we have used but thirty-five of the minutes of the time allowed us under the rule.

"The CHIEF JUSTICE. The Chair announced at the last sitting that he would not undertake to restrict counsel as to number—

They had been restricted as to time—

"without the further order of the Senate, the rule not being very intelligible to him. He will state further that when counsel make a motion to the court, the counsel who makes the motion has invariably the right to close the argument upon it.

"Several SENATORS. Certainly."

Mr. Bingham, however, wished to be heard, and by unanimous consent was heard, just as this body, unquestionably, by unanimous consent would hear any manager on this honorable board who might ask such indulgence. So Mr. Bingham was heard. It is true that in his remarks he set up this unwarrantable claim, which has been repeated by his successor, that the House of Representatives had the right to close every argument whether they had the affirmative of the particular issue or not; but the silence with which the Senate listened leads me to infer that they were perfectly satisfied with the ruling of the Chief Justice, made before Mr. Bingham took the floor, and never recalled, and which was supported by "several Senators" answering from their places "certainly." No vote was taken on the question. It was an interlocutory question; I believe a motion by the defendant for additional time to answer.

The Chief Justice ruled emphatically that whichever party made a motion, the counsel who made it had invariably the right to close the argument upon it, and several Senators responded "certainly." And nothing occurred to show that the remarks of Mr. Bingham affected the opinion of the Chief Justice or of the Senators who responded in approval. Certainly the ruling was not changed.

(3) As to the English precedents, Mr. Manager Hoar said:

I understand that the rules of proceedings upon impeachment are not governed by the principles or precedents of ordinary criminal courts. The House of Lords or the Senate sitting as a court of impeachment undoubtedly derives great light in the application of the principles of common justice and of law from the sages of the law; but nevertheless impeachment is a proceeding which stands on its

own constitutional ground. It is an investigation into the guilt of great public offenders abusing official trusts by the legislative bodies of the country where that practice prevails. In that investigation, as everywhere else, those legislative bodies are equals. Neither branch of the American Congress stands as a suitor at the bar of the other; neither branch of the British Parliament stands as a suitor at the bar of the other; but the concurrent judgment of the two branches is necessary to an impeachment, just as the concurrent judgment of the two branches is necessary to an act of legislation. In the English Parliament the House of Commons brings to the bar of the Lords every bill which it passes, and requests the assent of the Lords thereto, just as in the English Parliament the House of Commons brings to the bar of the House of Lords the fact that it has ascertained the guilt of a great public offender in the course of its official duty, and asks the judgment of the House of Lords as to his guilt and his punishment.

It is an absolutely settled principle of right that upon all questions which arise in the trial of an impeachment the House of Commons has the right to reply. It is a principle which has existed in England for four hundred years, which, when the term "impeachment" is used in our Constitution in clothing this body with one of its highest functions, was imported, as all the other constitutional attendants of an impeachment were imported, except where they are expressly varied by the Constitution itself.

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But the burden and the duty is on us of providing that charge according to the precedents of this Senate and of all senates, according to the precedents of the House of Lords in England sitting as a court of impeachment, and not according to the precedents of police courts or inferior courts of any other kind sitting anywhere. And the precedents of this Senate and of all senates sitting as a court of impeachment have adopted the rule practiced upon in the English House of Lords, from which impeachments come, for five hundred years, that on all questions the party instituting the proceeding and having the burden of proof throughout the whole issue has the right to reply. That is the proposition, and to that proposition no answer whatever has been vouchsafed or suggested by the honorable counsel for the defendant.

The further proposition, to which no reply has been suggested, was that in this particular on this special issue now made up, the precedent of this Senate and of all senates sitting as a court of impeachment precisely corresponds and agrees with the precedents of all courts whatever, that where a plea to the jurisdiction is interposed and to that plea a demurrer is filed, which—leaving out now this second matter of fact—is the question here, the party demurring has the affirmative and the reply in support of his demurrer.

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In regard to the English precedent, I beg leave respectfully to refer honorable Senators to a report of which Mr. Burke is the author from a committee appointed by the House of Commons to inspect the journals of the Lords with a view of ascertaining the occasion of the great delay which had happened in the trial of Warren Hastings. This inspection and report were made in the seventh year of that trial. Mr. Burke makes in this report a most ample and thorough discussion of the entire procedure in cases of impeachment in Parliament. He begins by considering the matter of pleadings and the matter of evidence and other matters of procedure, and states in the fullest manner the principle upon which the claim of the managers rested. I do not mean to say that he states anything in regard to this particular question of the opening and close. The report is silent upon that particular subject, but he states the doctrine. He begins by saying:

"Your committee finds that the Lords, in matter of appeal or impeachment in Parliament, are not of right obliged to proceed according to the course or rules of the Roman civil law, or by those of the law or usage of any of the inferior courts in Westminister Hall, but by the law and usage of Parliament."

Then he cites various precedents from the earliest times, and finds that always the court proceed according to the law and usage of Parliament. Then he cites Lord Coke:

"As every court of justice hath laws and customs for its direction, some by the common law, some by the civil and canon law, some by peculiar laws and customs, etc., so the high court of Parliament, suis propriis legibus et consuetudinibus subsistit. It is by the lex et consuetudo parliamenti that all weighty matters in any parliament moved, concerning the peers of the realm, or Commons in Par-

liament assembled, ought to be determined, adjudged, and discussed by the course of the Parliament and not by the civil law, nor yet by the common laws of this realm used in more inferior courts.

"This is the reason that judges ought not to give any opinion of a matter of Parliament, because it is not to be decided by the common laws, but secundum legem et consuetudinem parliamenti; and so the judges in divers Parliaments have confessed."

Then he goes on under the "rule of pleading:"

"Your committee do not find that any rules of pleading as observed in the inferior courts have ever obtained in the proceedings of the high court of Parliament in a cause or matter in which the whole procedure has been within their original jurisdiction. Nor does your committee find that any demurrer or exception, as of false or erroneous pleadings, hath been ever admitted to any impeachment in Parliament, as not coming within the form of the pleading; and, although a reservation or protest is made by the defendant—matter of form, as we conceive—'to the generality, uncertainty, and insufficiency of the articles of impeachment,' yet no objections have in fact been ever made in any part of the record."

I do not think it is worth while to detain the Senate with reading very full and copious extracts from this report. I will take the liberty of placing the book where it will be reached by Senators when they discuss this question.

Taking the other view, Mr. Carpenter said:

In the next place, whatever may be the precedents in the House of Lords in trying an impeachment, we have the authority of the honorable manager himself who has just taken his seat that they are not binding at all in a trial of impeachment under our Constitution. In the debate which took place in the House (if it can be called a debate where nobody was allowed to speak) as to the ordering of the impeachment, the honorable manager himself stated that the British rules were not applicable, and consequently no aid could be drawn from the trial of Warren Hastings. Now I submit that whatever may have been the rule in the trial of impeachments in England this court should make its own rule, and that should be the rule of right and justice.

I deny, as respectfully as a man may deny anything that comes from a coordinate branch of this Congress, that the House appears here in any other attitude than we appear here, a suitor in this cause. Is it possible, where the Constitution says we are to have a trial, and the House of Representatives presents itself here as the accuser, that it is a part of the court; that it is entitled to any favor here that we are not entitled to? The rule uniformly adopted by the courts of law is a rule which the experience of hundreds of years has determined to be wise and proper, and that is the rule which I understand this Senate has ordered for this trial.

And Mr. Montgomery Blair argued:

It is altogether a mistake, also, that this proceeding was ever otherwise considered here or in England as standing upon any different footing in its general principles than any other proceedings at law Woodeson, in his lecture on the subject of impeachment (volume 2, page 596), treats it as a suit. His language is that "the House of Commons, as the grand inquest of the nation, become suitors for penal justice." Wilson in his Parliamentary Law speaks of the articles as analogous to an indictment, and hence the rules of practice ought to conform to those of the courts in analogous circumstances, and if they vary from them in England, it does not follow a practice there which does not conform to the general principles recognized here. We have greatly restricted the impeachment proceeding; it is not the proceeding here as there in many of its essential features.

In conclusion, Mr. Carpenter quoted from Cushing's Law and Practice of Legislative Assemblies.

Mr. Joseph E. McDonald, of Indiana, moved to rescind the order giving the opening and closing to the counsel for the respondent.

Mr. A. S. Merrimon, of North Carolina, asked this question:

Do the managers claim to reply in the discussion of all questions, as a matter of right, or only on the ground of practice, which the court may in its sound discretion rightfully change?

Mr. Manager Hoar replied:

I respectfully reply to that question that we do not concede that whatever be the constitutional and lawful prerogatives of the House of Representatives in this regard can be rightfully changed without the assent of the House itself.

The Senate, by a vote of 40 yeas, 18 nays, voted to retire for consultation.

Having retired, the question recurred on the motion of Mr. McDonald, which was decided in the negative; yeas 20, nays 34.

Thereupon, on motion of Mr. George S. Boutwell, of Massachusetts, it was—

Ordered, That four managers on the part of the House of Representatives may be allowed to submit arguments upon the question whether the respondent is amenable to trial by impeachment for acts done as Secretary of War, notwithstanding his resignation of said office, and whether the issues of the fact presented in the pleadings are material, and also whether the matters in support of the jurisdiction alleged by the House of Representatives in the pleadings subsequent to the articles of impeachment can be thus alleged if the same are not averred in said articles.

And then, the Senate having returned to its chamber, the President pro tempore said:

The presiding officer is directed to state that the motion to reconsider the vote by which the order of argument was made is overruled, and also to state that an order is made granting the request of the managers on the part of the House that four of the managers be permitted to argue the case.

2139. On July 7, 1876,[55] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, a question arose as to the admissibility of certain testimony.

Mr. Manager John A. McMahon, who had objected to the testimony, claimed the right as the objector to the opening and closing of the argument, but offered to waive the opening.

Mr. Matt. H. Carpenter, of counsel for the respondent, admitted the right claimed, and insisted that the managers should exercise it.

Thereupon Mr. McMahon argued, and was followed by Mr. Carpenter. Then Mr. Manager George A. Jenks closed.

2140. Instance of action by the Senate as to improper language used by counsel for respondent in an impeachment trial.

The presiding officer at an impeachment trial exercises authority to call to order counsel using improper language.

On April 29, 1868,[56] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, and during the final arguments in the case, Mr. Charles Sumner, a Senator from Massachusetts, offered the following:

Whereas Mr. Nelson, one of the counsel for the President, in addressing the Senate, has used disorderly words, as follows, namely: Beginning with personalities directed to one of the managers he proceeded to say, "So far as any question that the gentleman desires to make of a personal character with me is concerned, this is not the place to make it. Let him make it elsewhere if he desires to do it:" and whereas such language, besides to fight a duel, contrary to law and good morals: Therefore,

Ordered, That Mr. Nelson, one of the counsel of the President, has justly deserved the disapprobation of the Senate.

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[55] First session Forty-fourth Congress, Record of trial, pp. 192, 193.
[56] Second session Fortieth Congress, Senate Journal, p. 927; Globe supplement, p. 341.

The Chief Justice [57] said that the proposition of Mr. Sumner was not before the Senate if objected to.

Mr. John Sherman, of Ohio, thereupon objected.

Mr. Manager Benjamin F. Butler, who was the manager referred to, asked that no further action be taken in regard to the language referred to.

On April 30,[57] the proposition came before the Senate sitting for the trial.

Pending consideration, Mr. Henry B. Anthony, of Rhode Island, asked Mr. Nelson if he intended by the language to challenge the manager to a duel.

Mr. Nelson said that he did not particularly have a duel in mind. He simply resented a charge by the manager, and he had no idea of insulting the Senate.

Mr. Reverdy Johnson, of Maryland, moved that the proposition lie on the table, and the motion was agreed to; yeas 35, nays 10.

2141. On June 16, 1876,[58] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, Mr. Jeremiah S. Black, of counsel for the respondent, offered a paper in the nature of a plea that the proceeding be dismissed because the Senate had affirmed its jurisdiction of the case by less than a two-thirds vote.

Objection arose to placing the paper on file, whereupon Mr. Black said:

Mr. President, we offer a paper asserting our legal and constitutional rights, as we understand them. A Senator rises and says he objects; a manager rises and says he objects. Is that a reason for simply throwing it under the table? Is there not to be some reason given for such a thing as that? What is to be done with this? Walk over us I admit you can, if a majority see proper to do so. They can do as they please; they can order it to be thrown under the table; but some little respect ought to be shown a man who is struggling for his liberty and his reputation——

Mr. George F. Edmunds, a Senator from Vermont, interrupting, said:

I call the counsel to order. I do not think that the language he is addressing to the Chair is fit to be addressed to this court.

The President pro tempore [59] said:

Counsel will use language which is proper and decorous. * * * The counsel will proceed, using proper language. The Chair will call him to order if he does not use proper language.

2142. It was held that a motion relating to the sitting of the Senate in an impeachment trial might be argued by counsel.— Only July 7, 1876,[60] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, Mr. George F. Edmunds, a Senator from Vermont, moved that the Senate take a recess until 7:30 p.m. for the purpose of an evening session.

Mr. Matt H. Carpenter, of counsel for the respondent, was making an appeal against an evening session, when Mr. Edmunds raised the question of order that on a question of this kind of counsel were not entitled to be heard.

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[57] Senate Journal, p. 928; Globe Supplement, pp. 350, 351.
[58] First session Forty-fourth Congress, Record of trial, p. 170.
[59] T. W. Ferry, of Michigan, President pro tempore.
[60] First session Forty-fourth Congress, Record of trial, p. 202.

The President pro tempore [59] overruled the point of order.

Thereupon Mr. Carpenter made his protest, and the Senate decided the motion of Mr. Edmunds in the negative.

2143. In arguing in an impeachment trial counsel take position under direction of the Senate.—On July 25, 1876,[61] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, Mr. Matt. H. Carpenter, of counsel for the respondent, was about to address the Senate in the final summing up, when Mr. John A. Logan, a Senator from Illinois, said:

Before the counsel proceeds, I will state that I have heard some complaints made about the position that the counsel and managers have to occupy in the presence of the Senate. I therefore suggest that the counsel be allowed to occupy any position he desires from which to address the Senate.

Thereupon, by unanimous consent, Mr. Carpenter was permitted to stand in the outer tier of seats.

2144. Instance wherein a manager was permitted to move a change of the rules governing the Senate in impeachment trials.—On April 11, 1868,[62] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, Mr. Manager John A. Bingham, on behalf of the managers, moved in the Senate for a change in one of the rules governing the trial.

This motion was entertained.

2145. Instance wherein the managers of an impeachment declined to answer a question propounded by a Senator during the trial.—On April 1, 1868,[63] in the Senate during the impeachment trial of Andrew Johnson, President of the United States, Hon. Walter A. Burleigh, Delegate from Dakota Territory, was under examination. Counsel for the President objected to a question tending to elicit from witness the substance of a conversation with General Thomas, and statements of the latter as to the means by which the President proposed to obtain possession of the war office.

In the course of the discussion as to the admissibility of the question, Mr. Reverdy Johnson, Senator from Maryland, propounded the following:

The honorable managers are requested to say whether evidence hereafter will be produced to show—

First, That the President, before the time when the declarations of Thomas, which they propose to prove, were made, authorized him to obtain possession of the office by force or threats, or intimidation, if necessary; or,

Secondly, If not, that the President had knowledge that such declarations had been made and approved of them.

To which Mr. Manager John A. Bingham replied:

I am instructed by my associates to say—and I am in accord in judgment with them, Mr. President—that we do not deem it our duty to make answer to so general a question as that; and it will certainly occur to the Senate why we should not make answer to it.

2146. During an impeachment trial the managers and counsel for the respondent are required to rise and address the Chair before speaking.—On July 7, 1876,[64] in the Senate sitting for the

[61] First session Forty-fourth Congress, Record of trial, pp. 318, 319.
[62] Second session Fortieth Congress, Globe supplement, p. 147.
[63] Second session Fortieth Congress, Globe supplement, pp. 70, 71.
[64] First session Forty-fourth Congress, Record of trial, pp. 190, 191.

impeachment of trial of William W. Belknap, late Secretary of War, Mr. Manager John A. McMahon, and Mr. Matt. H. Carpenter, of counsel for the respondent, were engaged in a colloquy, when the President pro tempore [65] said:

The Chair will remind the gentlemen that they must rise to speak, and address the Chair. The Chair will insist upon it. * * * The Chair will again remind gentlemen, and hopes he does it for the last time, that the counsel as well as the managers should address the Presiding Officer, that he may maintain the rights of the parties. It is due to the Senate that it should be done; and the duty of the Chair demands it to protect the respect due to the Senate. The Chair will state, also, that he will not recognize a gentleman on either side unless he does rise and address the Presiding Officer.

2147. During an impeachment trial a proposition by managers or counsel is not amendable by Senators, but yields precedence to one made by a Senator.

A proposition offered by a Senator during an impeachment trial is amendable by Senators, but not by managers or counsel.

On June 6, 1876,[66] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, a proposition fixing the time for the hearing of evidence on the merits was under discussion, and motions were offered by the managers for the House of Representatives, by the counsel for the respondent, and by Senators. A question arising as to amendment and precedence the President pro tempore [67] said:

The Chair has ruled that a proposition made by managers or counsel is not amendable by Senators; but any proposition made by a Senator is amendable by a Senator, nor can the proposition made by Senators be amended by the counsel or managers. A motion made by a Senator has priority of one offered by the managers or the counsel.

2148. During an impeachment trial an order proposed by a Senator is debatable by managers and counsel, but not by Senators.—On June 1, 1876,[68] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, Mr. William Pinckney Whyte, a Senator from Maryland, offered an order fixing the time for further pleadings on behalf of the respondent. Mr. Matt. H. Carpenter, of counsel for the respondent, and Mr. Manager Scott Lord, on behalf of the House of Representatives, discussed the proposed order at some length.

Thereupon Mr. Allen G. Thurman, a Senator from Ohio, proposed to address the Senate.

The President pro tempore [1] reminded him that debate was not in order:

Mr. Thurman said:

I do not wish to debate, but I want to know the rule of the Senate on this subject. I want to know whether there is to be an unlimited discussion of counsel and managers on every order that is offered by a Senator. In my judgment it is all irregular.

The President pro tempore said:

The Chair will state in reply to the Senator from Ohio that the Chair was holding under the rule that each of the parties is entitled to one hour's debate on any motion or order submitted.

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[65] T. W. Ferry, of Michigan, President pro tempore.
[66] First session Forty-fourth Congress, Record of trial, p. 166.
[67] T. W. Ferry, of Michigan, President pro tempore.
[68] First session Forty-fourth Congress, Record of trial, p. 160.

2149. During the Peck impeachment trial the respondent assisted his counsel in examining witnesses, in argument on incidental questions, etc.—On January 11, 1831,[69] in the high court of impeachment during the trial of the case of the United States *v.* James H. Peck, the respondent, who was United States district judge of Missouri, assisted his counsel, personally addressing the court to offer documentary evidence, to explain testimony which he proposed to offer, to propound questions to the witness, to make a statement supplementary to the testimony of a witness, and to argue as to the admissibility of certain testimony.

2150. Delays in the Johnson trial caused by illness of counsel for respondent were the occasion of protest on the part of the managers and of action by the Senate.—On April 16, 1868,[70] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, Mr. William M. Evarts, of counsel for the President, announced that the defense had reached a point where it would not be convenient to produce any more testimony on this day. On April 14 the Senate had adjourned because of the illness of Mr. Henry Stanbery, of counsel for the respondent, and on April 15 the proceedings had been modified somewhat because of his continued illness. He was still absent on the 16th, when Mr. Evarts, after introducing considerable testimony made announcement as above stated.

This caused a protest from Mr. Manager Benjamin F. Butler, in the course of which he said:

> We adjourned early on Monday, as you remember, and on the next day there was an adjournment almost immeditely after the Senate met because of the learned Attorney-General. Now, all we ask is that this case may go on.
>
> If it be said that we are hard in our demands that this trial go on, let me contrast for a moment this case with a great State trial in England, at which were present Lord Chief Justice Eyre, Lord Chief Baron McDonald, Baron Hotham, Mr. Justice Buller, Sir Nash Grose, Mr. Justice Lawrence, and others of Her Majesty's judges in the trial of Thomas Hardy for treason. There the court sat from 9 o'clock in the morning until 1 o'clock at night, and they thus sat there from Tuesday until Friday night at 1 o'clock, and then, when Mr. Erskine, aftewards Lord Chancellor Erskine, asked of that court that they would not come in so early by an hour the next day because he was unwell and wanted time, the court after argument refused it, and would not give him even that hour in which to reflect upon his opening which he was to make, and which occupied nine hours in its delivery, until the jury asked it, and then they gave him but a single hour, although he said upon his honor to the court that every night he had not got to his house until between 2 and 3 o'clock in the morning, and he was regularly in court at 9 o'clock on the following morning.
>
> That is the way cases of great consequence are tried in England. That is the way other courts sit. I am not complaining here, Senators, understand me. I am only contrasting the delays given, the kindnesses shown, the courtesies extended in this greatest of all cases, and where the greatest interests are at stake, compared with every other case ever tried elsewhere. The managers are ready. We have been ready; at all hazards and sacrifices we would be ready. We only ask that now the counsel for the President shall be likewise ready, and go on without these interminable delays with which when the House began this impeachment the friends of the President there rose up and threatened.

At the conclusion of Mr. Butler's remarks, Mr. John Conness, Senator from California, offered this order:

> *Ordered*, That on each day hereafter the Senate sitting as a court of impeachment shall meet at 11 o'clock a.m.

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[69] Second session Twenty-first Congress, Report of trial of James H. Peck, pp. 267–272.
[70] Second session Fortieth Congress, Globe Supplement, pp. 208, 209; Senate Journal, pp. 906, 907.

Mr. Charles Sumner proposed the following as a substitute therefor:

That, considering the public interests which suffer from the delay of this trial, and in pursuance of the order already adopted to proceed with all convenient dispatch, the Senate will sit from 10 o'clock in the forenoon to 6 o'clock in the afternoon, with such brief recess as may be ordered.

Under the ruling the proposed order went over to April 17 for consideration, when Mr. Sumner's proposed substitute was disagreed to, yeas 13, nays 30. The original order offered by Mr. Conness was then agreed to, yeas 29, nays 14.

The Senate had heretofore met at 12 m. under the rule.

2151. Instance during an impeachment trial wherein the Presiding Officer admonished managers and counsel not to waste time.—On February 15, 1905,[70a] in the Senate sitting for the impeachment trial of Judge Charles Swayne, in the course of the introduction of testimony, the Presiding Officer [70b] said:

While the Presiding Officer makes no criticism on the course of the examination and cross-examination, he desires to say that the time of the Senate is very precious, and he hopes that there will be as little time taken by immaterial questions, either by the managers or by counsel, as possible, and that we may get along with this case.

2152. The Senate, and not the Presiding Officer, decides on a motion for attachment of a witness.

Instance wherein, during the Swayne trial, testimony was introduced to show the propriety of an attachment against an absent witness.

On February 10, 1905 [71] in the Senate sitting for the trial of Judge Charles Swayne, after the pleadings had been concluded and when the witnesses were called, Mr. Henry W. Palmer, of Pennsylvania, manager on behalf of the House of Representatives, said:

Mr. President, in the case of Joseph H. Durkee, of Jacksonville, Fla., we have a certificate of a physician stating that he is not able to attend. The certificate was sent to the Presiding Officer and by him handed to me, and it has been exhibited to counsel on the other side.

Mr. Durkee is a witness who has been subpoenaed by both sides, and is a material and important witness. I have a witness present who will testify with respect to Mr. Durkee's present condition, and I ask that Mr. B. S. Liddon be summoned to testify what Mr. Durkee's present condition is, for the purpose of moving for an attachment.

Mr. Liddon was then sworn and examined, giving testimony indicating that Mr. Durkee was able to attend.

The testimony being concluded, Mr. Palmer announced that on that showing the managers would ask for an attachment. He suggested, however, that if the counsel for respondent would consent, it could be arranged to take the deposition of the witness at his home. The counsel declined to agree to this.

Then the Presiding Officer [72] said:

The Senate will take into consideration the motion for an attachment, and decide it later on. The Presiding Officer will merely say at the present time that it seems to be understood that the witness is suffering from a serious disease, which makes it very difficult for him to travel, certainly without an attendant, and that for that reason his son, who is a physician, has been summoned. It

[70a] Third session Fifty-eighth Congress, Record, p. 2625.
[70b] Orville H. Platt, of Connecticut, Presiding Officer.
[71] Third session Fifty-eighth Congress, Record, pp. 2229, 2230.
[72] Orville H. Platt, of Connecticut, Presiding Officer.

would seem as if it were hardly required to issue an attachment until information is communicated to the Senate as to whether there is a real refusal on the part of the witness to come or whether the witness will come with his son as an attendant.

For the reason the Presiding Officer suggests that a decision of the motion be postponed, and the Sergeant-at-Arms will be instructed to ascertain whether the witness will come under the circumstances.

Later on this day, however, on a question relating to another witness, the Presiding Officer said [73]:

The rules require that a motion for an attachment shall be decided by the Senate rather than by the Presiding Officer. The Presiding Officer, however, will suggest that the motion being now made, a decision upon it can be delayed for a little time. There may be some further information. So it is not necessary to submit the question at this time to the Senate, unless it be desired.

2153. On February 13, 1905,[74] in the Senate sitting for the trial of Judge Charles Swayne, Mr. Anthony Higgins, of counsel for the respondent, said:

Mr. President, in respect to the application made by counsel for the respondent for an attachment against Louis P. Paquet, we desire to have the matter properly investigated as to whether the witness is really able to attend or not, and to that end we ask that the attachment may issue, and that the officer or the Sergeant-at-Arms serving the same may be charged with the discretion of determining whether the witness is able to attend or not. That is the course which has been pursued in practice with which I am familiar. In other words, where there is doubt in the mind of the court or of counsel as to whether a witness is able to attend or not, the court awaits the return of the sheriff or the marshal in the premises.

The Presiding Officer [75] said:

The sixth rule of the Senate for impeachment trials provides that motions for attachment must be decided by the Senate rather than the Presiding Officer. Whether it be necessary for the Senate to retire to consult upon this matter the Presiding Officer does not know, but he will state the motion to the Senate.

Mr. Paquet, a witness summoned for the respondent, has furnished the certificate of a physician that he has been ill since January 31, and is still ill, confined to his bed, and probably will not be able to travel for two or three weeks. Counsel for respondent now moves that an attachment may issue, and that the Sergeant-at-Arms in serving the same be authorized to use his discretion to determine whether the witness is or is not able to travel. Unless there be some motion made to retire for the consideration of this question, the Presiding Officer will submit the motion to the Senate.

Mr. John C. Spooner, a Senator from Wisconsin, said:

Mr. President, whether a witness shall be brought by an attachment or not is for the judgment of the Senate as a court, I should think, and I should like to hear it somewhat discussed, if there are authorities sustaining the proposition, that a court issues an attachment for a witness leaving it to the sheriff to determine whether the judgment of the court or the writ shall be executed or not. I should like to have the authorities produced.

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[73] Record, p. 2242.
[74] Third session Fifty-eighth Congress, Record, pp. 2459, 2460.
[75] Orville H. Platt, of Connecticut, Presiding Officer.

After this suggestion the motion for process was temporarily withdrawn.

2154. Rule in the Swayne trial governing Senators as to colloquies and questions addressed by them to managers, counsel, or other Senators.

In the Swayne trial Senators were permitted a freedom of debate greater than usual.

On January 27, 1905,[76] in the Senate sitting for the impeachment of Judge Charles Swayne, a debate arose between Mr. Henry W. Palmer, of the managers for the House of Representatives, and Mr. J. C. S. Blackburn, a Senator from Kentucky.

The Presiding Officer said:

> The Chair wishes to observe at this point that he doubts the propriety of debate between Senators and the managers of the impeachment on the part of the House. He does not speak positively upon that question, not having had an opportunity to examine the precedents.

On February 3,[77] in the Senate sitting for the trial, Mr. Augustus O. Bacon, of Georgia, offered and the Senate agreed to an order containing the following rule:

> It shall not be in order for any Senator to engage in colloquy, or to address questions either to the managers on the part of the House or the counsel for the respondent, nor shall it be in order for Senators to address each other, but they shall address their remarks directly to the Presiding Officer.

The effect of this rule seems to have been to permit debate and suggestions by Senators. Thus on February 10[78] Mr. Joseph W. Bailey, of Texas, suggested as to testimony and debated. On February 13[79] there was extended debate of Senators on the subject of issuing processes for witnesses. On February 14[80] Mr. Porter J. McCumber, of North Dakota, and others, discussed evidence. Also on February 23,[81] on an order relating to the printing of arguments of managers, there was free debate by the Senators. Yet on an important question relating to the admissibility of testimony, arising on February 14[82] and 16, the Senate, after some debate, decided to enforce the rule providing for secret sessions. In other cases, also, the doors were closed. But during this trial Senators were permitted a greater freedom of debate than in other trials.

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[76] Third session Fifty-eighth Congress, Record, pp. 1450, 1451.
[77] Record, p. 1819.
[78] Record, p. 2240.
[79] Record, pp. 2459, 2460.
[80] Record, p. 2532.
[81] Record, pp. 3142–3145.
[82] Record, pp. 2536–2540, 2720, 2721, 2899.

Presentation of Testimony in an Impeachment Trial*

1. Parliamentary law as to evidence. Section 2155.[1]
2. Attendance of witnesses. Sections 2156–2160.[2]
3. Administration of oath to witnesses. Sections 2161–2164.
4. Order of introduction. Sections 2165, 2166.
5. Admission and exclusion. Section 2167.[3]
6. Examination of witnesses. Sections 2168–2175.[4]
7. Questions asked by Senators. Sections 2176–2188.
8. Instances of general practices. Sections 2189–2192.[5]
9. Rulings of presiding officer as to evidence. Sections 2193–2195.[6]
10. Debates as to admission of evidence, etc. Sections 2196–2202.
11. Privileges of witnesses. Sections 2203–2205.
12. Irrelevant evidence. Sections 2206–2208.
13. Cross-examination, rebuttal evidence, etc. Sections 2209–2217.

2155. The judgment of the Lords in impeachments is given in accordance with the law of the land.

The trial of impeachments before the Lords is governed by the legal rules of evidence.

In Chapter LIII of Jefferson's Manual the following is given in the "sketch of some of the principles and practices of England," on the subject of impeachments.

Judgment. Judgments in Parliament, for death, have been strictly guided per legem terræ, which they can not alter; and not at all according to their discretion. They can neither omit any part of the legal judgment, nor add to it. Their sentence must be secundum, no ultra legem. (Seld. Jud., 168, 171.) This trial, though it varies in external ceremony, yet differs not in essentials from criminal prosecutions before inferior courts. The same rules of evidence, the same legal notions of crimes and punishments, prevailed; for impeachments are not framed to alter the law, but to carry it into more effectual execution against too powerful delinquents. The judgment therefore is to be such as is warranted by legal principles or precedents. (6 Sta. Tr., 14; 2 Wood., 611.) The chancellor gives judgment in misdemeanors; the lord high steward formerly in cases of life and death. (Seld. Jud., 180.) But now the steward is deemed not necessary. (Fost., 144; 2 Wood., 613.) In misdemeanors the greatest corporal punishment hath been imprisonment. (Seld. Jud., 184.) The King's assent is necessary in capital judgments (but 2 Wood., 614, contra), but not in misdemeanors. (Seld. Jud., 136.)

*Hinds' Precedents. Vol. 3, p. 485 (1907).

[1] Rules as to evidence in Blount's case (sec. 2309) and Pickering's case (sec. 2331).

[2] Subpœnas issued by direction of a committee. Section 2463 of this volume. As to issuing process. Section 2483. Senate decides as to attachment of witness. Section 2152. Witness excused. Section 2394.

[3] Objection to evidence by a Senator. Section 2268.

[4] A person charged with impeachable offense not compelled to furnish evidence against himself. Section 2514.

[5] Exhibitions in nature of evidence not to be attached to articles. Section 2124. Briefs as to pleas to jurisdiction filed during presentation of testimony. Section 2125. Testimony not in order during voting on the articles. Section 2396.

[6] See also sections 2082–2089, 2138, 2226, 2230, 2239.

2156. In the Belknap trial the Senate directed the managers and counsel for respondent to furnish to one another lists of the witnesses they proposed to call.

The Senate denied in the Belknap trial the application of respondent's counsel for a statement of the facts which the managers expected to prove by each witness.

Form of a motion submitted by counsel for respondent in an impeachment trial.

On June 6, 1876,[7] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, an order was made providing that on July 6, 1876, the Senate would proceed to hear the evidence on the merits of the trial in this case.

Thereupon Mr. Montgomery Blair, of counsel for the respondent, submitted this motion:

In the Senate of the United States sitting as a court of impeachment.

THE UNITED STATES

v.

WILLIAM W. BELKNAP

William W. Belknap, by his counsel, moves the court that an order be made upon the managers on the part of the House of Representatives to furnish within twenty-four hours to the accused or his counsel a list of the witnesses whom they intend to call, together with the particulars of the facts which they expect to prove by them.

It being stated on behalf of the managers that a large portion of the testimony, and especially the material testimony, had been printed, Mr. Blair said:

Of course in respect to that part of the testimony which has been printed, it is very easy to furnish it to us; but I beg leave to say that there is a large portion of the testimony taken before the Judiciary Committee of which we are not at all informed, which we have applied to the managers for copies of, but they repelled us and refused to give them to us. We do not know what part of it they may rely on at all. We have rumors of its character from the press; but we do not know what part of it they mean to rely upon, or what facts they mean to rely upon; and as we are ordered to prepare, we want to make that preparation to meet such case as they may make.

Mr. Allen G. Thurman, a Senator from Ohio, asked this question:

Is there any precedent for the order asked for, either in impeachment trials or in ordinary courts of criminal jurisdiction?

To this Mr. Jeremiah S. Black, of counsel for the respondent, replied:

No; but certainly there ought to be one made. * * * We do not go upon precedent here; that is, this application is not founded upon anything that has ever happened before. There never was a case like this before. I have never heard whether the managers object to this order or not. If they do, I can not conceive for what reason. Certainly they do not intend to keep us in ignorance of the kind of case they are going to produce against us and take us by surprise and then proceed and run over us and get a conviction against us on grounds that we have no notice of. They do not think it is unfair, I suppose, to tell us beforehand what sort of facts they intend to produce.

They have their witnesses here, or at least within easy reach. Ours are scattered all over the continent; some of them in California, others in the Indian Territory. It becomes absolutely necessary for us, as soon as we can, to get out our subpoenas for witnesses and use all diligence in bringing them here. If the trial is to go on upon the 6th of July or at any other time, even a month later than that, we will be hard pressed for time. We can not know

[7] First session Forty-fourth Congress, Senate Journal, p. 951; Record of trial, pp. 167–169.

what particular witness we need or how many of them unless we are informed of theirs and understand that facts they mean to prove or try to prove.

I maintain, as to every public accuser, a manager of the House of Representatives, an attorney-general, or district attorney, if he has a criminal case which he intends to prosecute against a citizen, that he is bound by his duty and as a lover of justice to disclose the whole case to the defendant as fully as possible and at the earliest moment.

The gentlemen say, when we ask them for this list, that it is a secret which they have the right to keep and they will keep it until the moment of the trial and then spring it upon us, so that we shall be unable to meet it by contradiction or explanation. They wish to take us by surprise as much as possible, and convict the defendant, if they can, without giving him a chance to show his innocence. They say there is no precedent for such a call as we make upon them now. Nothing like this is found in the common-law cases. I do not know how far back they want us to go for a precedent old enough to suit them. In modern times it has never been refused. I admit that by the common law, whose authority they invoke, a man on trial in any criminal court had no chance at all for life or liberty. He was not allowed counsel. He was not allowed to call witnesses. He was not confronted with the witnesses against him. None of those privileges which are secured in our Constitution were given to a party charged with a criminal offense by the ancient common law. That common law was a bloody old beast.

Mr. Manager Scott Lord, on behalf of the House of Representatives, said:

What is the proposition which the counsel makes? It is no more and no less than this, that he has the right to invade the room of the managers, that he has the right to ascertain their course of trial, that he has the right to know every possible witness to prove a certain fact.

Sufficient it is to say that the wisdom of all the ages is against it. The learned counsel had better devote himself to answering the question of the Senator, and find whether in all the past ages a single precedent of this kind has been had in any criminal proceeding. It is not enough for him to rise here and say he did not hear the managers object. He may possibly have been out of the room. It is not enough for him to stand here and say, "We need to make a precedent in this case." It is enough for us to answer that he asks for an extraordinary precedent, extraordinary proceeding, against the wisdom of all the past, and in regard to which he can not find the first authority in rummaging through all the books of the common law and all the books relating to criminal jurisprudence. I am surprised that any such proposition should be seriously made here, that we should be compelled, in advance, to disclose to him the names of witnesses and what each witness is expected to testify to, when we have laid before him in the broadest manner every charge that we make, and one article of these articles of impeachment contains seventeen specifications.

The order proposed by counsel for respondent was disagreed to by the Senate, without division.

The Senate then agreed to this order:

Ordered, That the managers furnish to the defendant, or his counsel, within four days, a list of witnesses, as far as at present known to them, that they intend to call this case; and that, within four days thereafter, the respondent furnish to the managers a list of witnesses, as far as known, that he intends to summon.

2157. In the Belknap trial the Senate adjourned to await the attendance of a witness declared by the respondent, on oath, to be "material and necessary for his defense."

The Senate declined to postpone formally the Belknap trial to await the attendance of a witness for the respondent.

Respondent's application in the Belknap trial for delay to await a witness's arrival was not required to be accompanied by a statement as to what he would prove.

Form of respondent's application for delay to await a witness in an impeachment trial.

On January 12, 1876,[3] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, after the testimony for the respondent had proceeded some time, Mr. Matt. H. Carpenter, of counsel for the respondent, announced that one witness whom they had asked to have summoned—John S. Evans—had not appeared. He said that his presence was necessary at this stage, and asked the Senate sitting for the trial to adjourn some reasonable time for Mr. Evans to arrive.

To this the managers on the part of the House of Representatives objected.

Mr. Manager George F. Hoar said:

I understand the rule and practice to be perfectly well settled and enforced in all courts where justice is administered according to the forms and practice of the common law that a party in a civil or criminal case applying either for a continuance or a postponement on account of the absence of a witness must show—

First. That the witness has been duly summoned;

Second. That the evidence which the witness would give if present is material and important to his cause; and,

Third. That the evidence must be so set forth that the opposite party may, if he choose, elect to admit that the witness, if present, would so testify; not to admit the fact, but that the witness, if present, would so testify; and that election is always tendered to the opposite party.

There is but one exception to the universality of that rule, which is, that where the evidence is of itself of a character which the witness only could state, that is not required of the party, as, for instance, if the question were of the construction of a dam which had been taken away, the scientific expert under whose direction that structure was built would be the only person who could describe it, and it would be impossible for the party ordinarily to say what his witness would testify to on that subject if he were present; but with that exception, of the evidence of experts where it is of such a character that the evidence could not be understood by the party who undertakes to set it forth, the rule is universal.

In the present case I fully concede that the defendant's counsel ought to stand before the Senate as if they had summoned the witness. They applied to the Senate for a subpoena. The Senate granted the order. The Sergeant-at-Arms did not execute it because, as he understood, there had been a subpoena issued already and served at the instance of the other party. So we agree that the defense stands here in all respects having used all diligence to obtain the presence of this witness; but the defendant shows no reason whatever why he should not state the evidence which Mr. Evans would give if he were present and give us an opportunity to elect to consent to that evidence. In fact, Mr. Evans, it appears, has been twice examined very fully in regard to this whole transaction before two different committees of the House. It is true that there was nobody present at that examination representing the defendant, and therefore certainly it is true that the defendant can not be sure that the facts favorable to him within Evan's knowledge were brought out in that examination. I do not overlook that. I make the concession also as fully as the learned counsel could desire. Still, either he can state what Mr. Evans would testify if he were present, and his reasons for believing that he would so testify, or he has no reason to believe that Evan's testimony would be valuable to him if he were here. He can not escape, as it seems to me, that dilemma. Either he has no reason to suppose that Mr. Evans would be more important to him than any other citizen of the United States who is at a distance of a thousand miles from this place or he can state what it is that this witness knows and would prove, and give us the opportunity to make our election.

I conceive that any distinction in practice which has grown up in State courts between a first continuance from term to term and a second continuance from

[3] First session Forty-fourth Congress, Senate Journal, pp. 976, 977; Record of trial, pp. 258–261.

term to term has nothing whatever to do with this matter. This is not a court having terms. It is a court which expires with its first and only term. This is not the case of an application for a continuance of a trial made before trial. It is a case where the trial has begun and has proceeded with the full consent in this particular of both parties. The evidence is fresh in the minds of all the members of the court. This, therefore, is a simple application for the postponement of a trial which is already far advanced toward its termination.

My associate [Mr. Manager Jenks] desires me to state the case of the trial of Smith and Ogden in the circuit court of the United States, where Judge Paterson establishes the rule that I have stated.

Mr. Montgomery Blair, of counsel for the respondent, said:

It is proposed, I suppose, from this initiatory proceeding, to treat this as an application for a continuance. Everything that has been said proceeds upon the assumption that we have applied for a continuance of this case, whereas we only ask that a witness who has been duly summoned, who ought to be here now, for whose absence we are not responsible, should be allowed a reasonable time to make his appearance, being detained by freshets or some other cause for which the party defendant is not in any way responsible. We have no disposition to abuse the patience of this body. We do not expect a delay beyond the time when the Senate will be in session in the transaction of its other business. We do not expect to detain this body with any long speeches. We have evinced no disposition whatever at any time, as I may appeal to the experience of every gentleman who hears me, to abuse the patience of this body in any respect, and above all not to try any sharp practice upon this body, but to have a fair trial.

I utterly protest against the application of rules derived from other proceedings altogether to the occasion which has arisen now, which is not an application for a continuance. We only ask that this body will wait until a man who has been summoned by its order makes his appearance here so that we may proceed with our examination.

While I am up I will say, however, that my learned friend on the other side and the very learned gentleman who makes this proposition are altogether mistaken or I am in regard to the rules of practice about what terms a party is to have who makes his application for a continuance. The gentleman who is associated with me has said that on application for a second continuance under the rules of the State in which I have practiced the party is required to state what the witness is expected to prove. The practice which prevails in the circuit court of this District and in Maryland, as my learned friend who represents that State on this floor [Mr. Whyte] will bear me out, is that where a party makes an application for a continuance, and states what he expects to prove by the witness, that proof is assumed to be a fact, not that the witness has proved it, but it is assumed to be a fact, an indisputable fact, according to the practice prevailing in this District, and in Maryland, from which State we derive the practice that prevails in the District. So that if the rule is to be enforced here, and the analogy is to be taken from the practice prevailing in this District, if we state what we expect to prove by this witness, and they proceed to trial, what we expect to prove is assumed to be an undisputed fact. That is the law of this District and the practice of the courts of the United States in the District of Columbia. That is a peculiar law. It does not prevail in the other courts with which I am familiar. It does not prevail in Missouri, where I practiced a great many years; but it is a law of this District and of Maryland. So then there are differences in respect to the laws of the different States. There is no uniform law on this subject. There is no common law upon this subject. There is none here recognized by this body. This court will have to make a rule for itself, and especially will it have to make a rule for itself in a proceeding which is not a motion for a continuance, but a motion for the delay of this trial until a witness can reach here who has been duly summoned. * * *

And, in response to a question by Mr. Manager Hoar, Mr. Blair said:

The gentleman knows perfectly well that when cases are called for trial in the ordinary courts of judicature the parties are asked whether they are ready for trial, that then and there the parties announce whether they are ready or not, and that motions for continuance are made and settled before they proceed to trial. Here there has been no occasion of that kind. We have been required to go to trial on this occasion without any "ifs" or "ands" about it, whether we

were ready or not. We have been appointed a given day to be here. We have been notified that our witnesses would be summoned, and we have had the allowance of a committee of this body to summon them. We put their names in the hands of the officer to summon them. He has summoned them; and it is not our fault that this witness is not here. The analogies of the gentleman break down. One of the most unjust things in this world is to apply false analogies. It is the most misleading of all modes of reasoning.

Mr. Jeremiah S. Black, also of counsel for the respondent, argued:

I deny utterly the rule which they lay down with so much emphasis as being the true and only rule applicable to such a case—that is, that when a party is caught with an absent witness whom he had used all diligence to get here, and who he had good reason to believe would be here—it is either fair or just or law to push him forward or make him show the specific testimony which the witness would give if he were here, unless there be some reason to doubt the good faith of the application or the materiality of the witness, supposing him to be here.

The managers have produced a book, The Trials of Smith and Ogden. There the counsel for the accused asked for the continuance of the cause until they should be able to get certain witnesses from Washington, to which it was objected that they had not stated what specific facts the witnesses would prove if they were present in court. Mr. Colden, of counsel for the defense, answered:

"That is not the law as we have hitherto understood it. If we are obliged to offer an affidavit, we conceive it to be sufficient, in the first instance, to declare generally that the witnesses are material without specifying the particular points to which they are to testify, and that without them our client can not safely proceed to trial."

To which the answer of the judge was this:

"You must offer an affidavit, and must show in what respect the witnesses are material."

Now mark the reason upon which that ruling was founded:

"The facts charged in the indictment took place, and are laid, in New York; the witnesses are admitted to have been during that period at Washington. The presumption is therefore that they can not be material, and this presumption must be removed by affidavit."

That is the rule. If we were asking for a postponement on account of a witness who manifestly was a thousand miles off at the time the fact which we wished to examine him upon occurred, that would raise such a presumption against us that the court would very properly call upon us to show how that witness could be a material witness. They have cited this book as a precedent, and, so far as I have read it, it is a sound precedent. Let them follow it up.

At the conclusion of the arguments, Mr. Roscoe Conkling, of New York, proposed this order, which was agreed to without division:

Ordered, That the Senate will receive any evidence otherwise competent which the counsel for the respondent assure the Senate will be connected with the case by the testimony of the witness Evans, now absent, but whom the respondent duly asked to have summoned and who is expected to appear.

Later, during the same day,[9] Mr. Carpenter announced:

Now, Mr. President, we have completed all the testimony that in our opinion as counsel we can properly and safely introduce until Mr. Evans is sworn. We now repeat the request that the court adjourn for a reasonable time to enable Mr. Evans to be present.

Mr. Manager McMahon said:

We certainly renew our objections, Mr. President, to a continuance without a compliance with the rule, or, if not the rule, a rule that ought to be established by the Senate, that the materiality or pertinency of the testimony expected be submitted to the Senate. The question has been argued.

Soon after Mr. Carpenter asked leave to file this affidavit in support of their motion:

[9] Senate Journal, pp. 978–981; Record of trial, pp. 269–273.

In United States Senate sitting as a court of impeachment

THE UNITED STATES

v.

WILLIAM W. BELKNAP

DISTRICT OF COLUMBIA, *ss:*

W. W. Belknap, being first duly sworn, on oath says that he has stated to his counsel, Hon. J. S. Black, Montgomery Blair, and Matt. H. Carpenter, what he expects to prove by John S. Evans, and after such statement is advised by his said counsel, and verily believes, that the testimony of said Evans is material and necessary for his defense in this cause, the said Evans being the same person upon whose appointment the articles of impeachment are based; that said affiant is informed and believes that said Evans is en route for Washington and detained by high water obstructing the roads, but that he will be in as soon as he can get here, and this application for postponement of the trial is made in good faith, and not for delay.

WM. W. BELKNAP.

Subscribed and sworn to before me this 12th day of July, A. D. 1876.

W. J. MCDONALD,
Chief Clerk Senate.

Mr. Manager McMahon said:

The objection has been fully stated, and we only rise now to enter it formally here.

In support of the objection Mr. Manager Elbridge G. Lapham said:

The respondent entered upon the trial without objection, upon the assumption that he was ready for trial. We are now in the midst of the trial; and a different rule, I submit, applies to this case from what would have been applicable if this application to postpone had been made before the trial commenced, upon the ground that Evans was not here in attendance. We have waited until the evidence on our side is completed, with the right to call this witness in case he comes, for we want him, I apprehend, much more than the defense. We have waited until the defense have exhausted in the main their evidence, according to the suggestion of the counsel. Now they propose to stop this trial midway, and postpone the further hearing by reason of the absence of this witness, without any suggestion as to what they propose to prove in respect to this case by him. I submit that an application now, pending the trial, is upon an entirely different footing from an application made before the trial is entered upon on the supposition and statement that the party is not ready for trial and can not properly commence it. The defendant did not ask to postpone this case on the ground that his witnesses were not here. He entered upon the trial on the 6th of the present month, the day assigned by the Senate for the trial, without objection that he was not prepared to go through with it. It was then the proper time, if his witnesses were not here, for him to have asked a postponement until their arrival. Having entered upon the trial, and having proceeded to the point we now have reached, I submit that the application to postpone is upon a different footing from what it would have been if made then.

Mr. Carpenter replied:

Mr. President, the reason for strictness against an application made to adjourn a cause after the trial of it has commenced in a court of law is that a jury is not a continuing institution. It is summoned for a term, and it never comes again. That particular body never comes a second time. That is the reason, and it is always stated so, why greater strictness is observed in regard to the postponement of a trial commenced before a jury. Everything that has been done must be lost. The testimony at the next term must be retaken, and the whole case proceed de novo. Here is a trial in the court of impeachment before the Senate of the United States, a body that can not die as long as the Government lives, a continuous institution, that is not to lose the benefit of what has been done. The strict attention which has been paid by every Senator here to this testimony shows that it will never fade from his recollection. There is not the slightest fear that when the Senate shall postpone this hearing for a week or

ten days to have this witness arrive any of the testimony will be even faintly fading away at all in the minds of the Senate. The argument, therefore, made by the managers as to a nisi prius trial before a jury has no application.

Again, he says we ought to have applied for a continuance before we commenced the trial. I have already stated to the Senate, and now repeat, that when we made our application to have this witness subpoenaed he was not subpoenaed in our behalf, because the Government had subpoenaed him themselves. The Government were here with their case, and Mr. Evans was one of their witnesses, and we have heard from first to last that he was one of their main and principal witnesses, the thought of whose absence makes their grief overflow. We had no doubt that the managers were acting in good faith. We had no doubt that they would not proceed to the trial until they knew their chief witnesses were at command.

Mr. Carpenter then presented this request:

The respondent's counsel ask for an order that the further trial of this cause be postponed until notice be given by the Senate to the House of Representatives of the United States and to the respondent.

Pending consideration of this application, the Senate sitting for the trial adjourned.

On July 13 the President pro tempore laid before the Senate a communication from the Sergeant-at-Arms of the Senate describing the efforts made to secure the attendance of the witness, and stating that the latter had started for Washington, but had been detained by bad roads.

Mr. Thomas F. Bayard, a Senator from Delaware, having propounded to counsel for the respondent a question which had not been answered, proposed the following:

That as a condition precedent to the order for postponement of this trial asked for on the 12th instant by the respondent it is

Ordered, That the respondent inform the Senate what in substance he proposes to prove by John S. Evans, the witness on the ground of whose absence postponement is asked.

Mr. Carpenter then said:

Mr. President and Senators, I desire in the first place to enter a respectful protest against being compelled in a criminal case to state what we expect to prove by a witness. I do that, not for its importance in this case so much as I hold that every lawyer defending a person accused in any court owes it to his profession to stand by the regular practice, and I understand that to be the regular practice almost without exception, that where a defendant in a criminal case is not in fault to the subpoenaing of a witness he is not compellable to state what he expects to prove by that witness.

In this case, however, one or two things I may state. In the first place, we expect to prove by Mr. Evans one reason why he was not appointed when he first applied for this position, and that was that he intended to form a partnership with Durfee * * * and that that was one important reason why he was not appointed at first.

In the next place, let me say that Mr. Evans is the man upon whose appointment these articles rest. We have never examined him nor had an opportunity to do so. He has sworn twice before a committee of the House, and the testimony presented by the managers is quite voluminous in manuscript. We have never read it; at least I have never read it; and I never supposed we should be called upon to read it, because we had the assurance of the Government that Mr. Evans was to be here. It seems now, from the statement of the Sergeant-at-Arms, that Mr. Evans was here and was released temporarily by the managers themselves without consultation with us. Our witness had been subpoenaed by the order of the Senate, has been here, has been discharged or released temporarily by the opposite party without consultation with us, and we desire to call and examine him.

Now we are asked, "Will you state what you expect to prove by him?" We can not, because we do not know what he will swear to in regard to certain points.

And, sir, in a trial like this where every word we utter goes upon the record to be called back in the summing up of this case to show that we were mistaken about what the witness would swear, we should be guarded and prudent. We know this man Evans has had intimate knowledge of the management of that tradership from first to last, for he has been the trader. We know from glancing through certain other testimony and from certain other facts within our knowledge that he must have knowledge of certain subjects which we think if he would swear one way will be important to us; if he would swear the other way it might not be so beneficial to us. We think he will swear in our favor; and yet we do not know what he will swear; and therefore we do not know what we expect to prove by him.

The Senate, without further action on the application, adjourned.

On July 14 the Senate sitting for the trial adjourned to Monday, the 17th, the following order being made:

Ordered, That when the Senate sitting for the trial of impeachment adjourns it be till Monday next and that the trial then proceed.

On Monday, the witness not having arrived, Mr. George F. Edmunds, a Senator from Vermont, proposed this order:

Ordered, That the respondent have leave to examine John S. Evans at any stage of the proceedings prior to the termination of the argument-in-chief to any matter material to his defense.

But on motion of Mr. William Pinkney Whyte, of Maryland, it was

Ordered, That the Senate sitting in this trial adjourn until Wednesday, the 19th instant.

On Wednesday Mr. Evans was present, and was sworn.

2158. The Senate sitting on impeachment trials is empowered by rule to compel the attendance of witnesses.

The Senate sitting on impeachment trials has authority to enforce obedience to its orders, writs, judgments, etc., punish contempts, and make lawful orders and rules.

The Sergeant-at-Arms is authorized by rule to employ necessary aid to enforce the lawful orders, writs, etc., of the Senate sitting on impeachment trials.

Discussion as to the power of the Senate sitting on impeachment trials to command assistance of the military, naval, or civil service of the United States.

Discussion as to the power of the Senate sitting on impeachments to enforce its final judgment.

Present form and history of Rule VI of the Senate sitting for impeachment trials.

Rule VI of the "Rules of procedure and practice in the Senate when sitting on impeachment trials" is as follows:

VI. The Senate shall have power to compel the attendance of witnesses, to enforce obedience to its orders, mandates, writs, precepts, and judgments, to preserve order, and to punish in a summary way contempts of, and disobedience to, its authority, orders, mandates, writs, precepts, or judgments, and to make all lawful orders, rules, and regulations which it may deem essential or conducive to the ends of justice. And the Sergeant-at-Arms, under the direction of the Senate, may employ such aid and assistance as may be necessary to enforce, execute, and carry into effect the lawful orders, mandates, writs, and precepts of the Senate.

This rule dates from the revision made in 1868, at the time of the impeachment proceedings against President Johnson. The committee,

of which Mr. Jacob M. Howard, of Michigan, was chairman, reported [10] the rule in this form:

VI. The court shall have power to compel the attendance of witnesses, to enforce obedience to its orders, mandates, writs, precepts, and judgments, to preserve order, and to punish in a summary way contempts of and disobedience to its authority, orders, mandates, writs, precepts, or judgments, and to make all lawful orders, rules, and regulations which it may deem essential or conducive to the ends of justice. And the presiding officer may, by the direction of the court, require the aid and assistance of any officer or person in the military, naval, or civil service of the United States, to enforce, execute, and carry into effect the lawful orders, mandates, writs, precepts, and judgments of said court.

The Senate having come to a conclusion which caused the word "court" to be discarded, the word "Senate" was substituted.[11] Before that was done, however, another question had been presented by the motion of Mr. Willard Saulsbury, of Delaware, who moved to strike out the lines—

And the Presiding Officer may, by the direction of the court, require the aid and assistance of any officer or person in the military, naval, or civil service of the United States, to enforce, execute, and carry into effect the lawful orders, mandates, writs, precepts, and judgments of said court.

Debate arose on this motion,[12] involving two points—one as to the power of the Senate to command such assistance for its incidental or interlocutory judgments, and the other as to the power to enforce by such means, or by any means, its final judgment.

In support of his motion Mr. Saulsbury said:

My reason for making this motion is that, in my judgment, it is not in the constitutional power of the Senate of the United States, when acting in the discharge of its ordinary duties or as a court, to command the services of the Army and Navy or of any officer of the Army and Navy; that if it is proper to clothe the court with such a power it is necessary to pass an act of Congress giving them the authority, if such an act itself could be constitutionally passed. Suppose that this provision of this article remained, and the court called upon the officers of the Army and Navy to assist the court in the discharge of its duties, and they should assist them either as officers or in company with men under their command, what power would the court have to compel their attendance and their assistance? They are already under the command, in the first instance, of the General of the Army, and, secondly and chiefly, under that of the President of the United States.

How, therefore, can the Senate, acting as a Senate, command the services of the Army and Navy or the officers of the Army and Navy? Suppose they refuse to obey the order of the court made upon them for any attendance or to assist the court, how can you enforce that order? I submit, Mr. President, if their services can be invoked by any agency whatever, it can only be done after the passage of an act by the two Houses of Congress; that the court then would be acting in pursuance of law; but that the orders of this body, this Senate, are not law, and that the words, if they remain, will be a nullity and inoperative.

Mr. George H. Williams, of Oregon, said:

Assuming that the Senate, when it proceeds to try an impeachment, is a court, I suppose it possesses those powers as to the execution of its judgments that other courts possess—no other or greater powers. I do not suppose that it can be contended that the Senate can make a rule which will have the force of law. True, the Senate may provide for its own government in the transaction of any particular kind of business; but I do not understand that the Senate can make a rule that will operate upon persons outside of the Senate, or that will operate like a legislative act.

Assuming, then, that the Senate, in making these rules, is confined to the creation of orders that regulate its own actions, it seems to me to follow neces-

[10] Second session Fortieth Congress, Senate Report No. 50.
[11] Globe, p. 1602.
[12] Senate Journal, pp. 238, 812; Globe, pp. 1526–1533.

sarily that the court has no power by the use of military force to execute its judgment. Take any court; if you please, the supreme court of the District of Columbia. Suppose a judgment is rendered by that court; it becomes the duty of the ministerial officer, the marshal or the sheriff, to execute that judgment. If resistance is made to the process in his hands, then he may summon the posse comitatus for the purpose of executing that process; and if the resistance is so strong as to defeat his proceedings, under such circumstances, if there be any law of the land which authorizes it, he may call upon the military to assist him in the execution of the process. But I submit that when judgment is rendered by the court the jurisdiction of the court is at an end, so far as enforcing its execution is concerned. Can the supreme court of the District of Columbia make an order and enter it upon its records that if any process of that court is resisted a military or naval force shall be employed in the execution of that process? * * * as to whether the court in session may make an order commanding the military or naval forces of the United States to do any act whatever, unless it may be to protect the court, to protect its dignity, to preserve decorum. That is an inherent power in the court. But can the court issue an order as a court and say to General Grant, "You marshal your army in such a place for such a purpose? Or can it issue an order to any admiral in the Navy to put his armed vessels in any particular position for any purpose? It seems to me that, if there is no law on the subject, there ought to be a law providing for the enforcement of judgments that are rendered in cases of this kind. If there be no law, then such a law ought to be enacted; but because there is no law the Senate has no power to assume to create such a law and exercise legislative power. I do not desire to have the Senate in making these rules go beyond its jurisdiction, though I am in favor, of course, of all rules that are necessary to enable the Senate to transact its business. But it does seem to me that if in a case of impeachment that may be tried before the Senate a judgment of guilty should be pronounced by the court it can make no subsequent order for the execution of that judgment. If the person who is to be removed from office by that judgment refuses to obey that judgment, then legislation will be necessary or some other power must be interposed.

Mr. John Sherman, of Ohio, concurred with Mr. Williams if the rule was intended to enforce the final decree of the court. But he conceived that the rule was intended to apply only to what might be called the interlocutory orders of the court, to compel the attendance of witnesses, or judgments finding recalcitrant witnesses in contempt.

Mr. Reverdy Johnson, of Maryland, said:

I concur with the honorable Member from Delaware and the honorable Member from Oregon that we have no power to adopt the rule which we are asked to adopt. The rule which we are asked to adopt is one which, when proposed in the committee, of which I had the honor to be a member, I resisted, and I have seen no reason to change the opinion which led me to that course.

The authority conferred upon the Senate is to try all cases of impeachment, and the Constitution provides that when the President is the party impeached the Chief Justice is to preside; and the judgment which the Senate, acting as a court of impeachment, may pronounce can not extend beyond a declaration that the party impeached shall be removed from office and be thereafter ineligible to any other office of trust or profit under the United States. The "judgment shall not," in the language of the Constitution, "extend further than" that; and upon that judgment being rendered in the case of a President—we are to look at that as a case which is really now before us with reference to this question—the Vice-President, if we have one, is to become President; and if the Vice-President is himself the President and is himself the party impeached, the President pro tempore of the Senate is to become President. No process, therefore, is necessary to enforce that judgment to that extent. The moment it has been pronounced the incumbent who has been impeached ceases to be President, and the party next in succession becomes at once the President. When he is the President he has precisely the same authority that he who is elected President and who takes his office at the termination of the term of his predecessor has.

Mr. George F. Edmunds, of Vermont, argued:

I should be sorry to see us strip ourselves, by refusing to adopt a rule of this kind, of the power which that rule confers. It is a power which inheres in a body

like this, as it does to the House of Commons and the House of Lords in England, from whence we derive our theory of trying impeachments. This rule only regulates and puts in force in the way of execution this existing power. We have to act as an organized body, whether sitting as a Senate or sitting as a court, because, as I said before, it is the same body exercising different functions, sitting for different purposes. Therefore, when the Constitution permits us to make rules and regulations for the government of the Senate, I think under the Constitution we can make a regulation for the government of the Senate when it is exercising any of the functions that the Constitution imposes upon it. Being of the opinion that this power to protect ourselves, and to enforce any order or mandate that the Constitution authorizes us to make, exists, while I agree that it ought to have the assistance of law in a great many respects, it being in my judgment an inherent power, we have a right to regulate and to name the cases in which it shall be put in exercise. As I have said before, if any question arises after we are sworn, and the Chief Justice takes the chair, as to the fact that the functions of the court are cramped by these general rules, it will be time enough then for the court to say that it will or will not (because it is the same body) change or execute them. Now, I should be sorry to see the Senate exercising the constitutional power of making rules and regulations in general, refuse to provide for putting in exercise a power of this kind, while I hope and believe it will not be necessary to make use of it; especially in view of the fact that it has been published to the world in another place (using parliamentary language), by a distinguished leader, that our orders, processes, and mandates will be resisted. * * *

The Constitution says that we are to try and adjudge, and there the Constitution stops; and hence, upon the logic of that proposition, inasmuch as the Constitution does not provide how we are to get the Chief Justice in here in a certain case, or how we are to be sworn in a certain other case, the law providing no oath, the Constitution providing no oath, merely stating that we are to be sworn, we are perfectly helpless. In short, the argument is that the Constitution is not a code of procedure; that it does not contain a set of rules and regulations. Mr. President, that is a mistake. It is a mistaken idea of the nature of the Constitution, of the idea of conferring constitutional power. Wherever there is a grant of power by a law or by a constitution to a tribunal or a body or a person, there is granted in that power, as a part of it, there is conferred as in it and of it and a part of it all the power that is necessary, justly and properly necessary, to the due exercise of the power conferred. So the Supreme Court frequently decided in the days of Marshall; and I challenge contradiction upon the proposition. * * *

The Senate gives itself the power, without having an endless debate on the subject, to direct its Presiding Officer, when we have a justice of the Supreme Court on trial or any other man accused, to apply to the President of the United States and ask of him the assistance that is necessary to protect us in the exercise of our functions. It does not assume the legislative power of imposing any penalty if that President should refuse. There is the distinction. If we were desiring to get a witness into court who refused to come, and force were needed to bring him upon attachment, it would be necessary, if he should bring action against one of the assistants of the Sergeant-at-Arms, for that assistant to defend on the authority of the Senate, and to prove that it was by our authority that he assisted the Sergeant-at-Arms in bringing in the witness. Now, what does this rule provide? It provides for all such cases in advance, without having a squabble over them at the time. By it our authority is given in advance, by a mere order to that effect on a single point, to call upon everybody to assist in the enforcement of our process.

Now, as to the final process, if you speak of it as process—it is not so spoken of in the report: it is spoken of as a judgment—it is said that the word "judgment" may include the final judgment. The term "judgment," of course, does in its natural meaning include final judgments as well as interlocutory ones: but we must always construe language in reference to the subject to which it is to be applied. As applied to interlocutory judgments, we all seem to agree that it is proper. When you come to final judgment, although there is no express exception made, the nature of the final judgment has been well stated by the Senator from Ohio: it is a judgment the very force and operation of the pronouncing of which is to change the office, speaking in the case of a President, from one person to another: so that the judgment in a certain sense may be said to execute itself. Therefore, if you say the word includes final judgment, and you may in that literal sense, it does no harm, because all that then you would call upon anybody to do would be to call upon the new and lawful President of the United States to assist the Senate in putting himself into possession of his own office.

The motion of Mr. Saulsbury, to strike out, was agreed to, yeas 25, nays 15.

Mr. Lyman Trumbull, of Illinois, said during the debate:

I will state that in the committee, as I was a member of it, I thought it better not to have this clause in, and I was in favor of the old rules as far as they could be made applicable to the present case. I thought the fewest changes made the best. Now, I submit to the Senate whether we shall not accomplish all we want by adopting the old rule on this point. I think the Senator from Indiana will be satisfied with that, and I think we ought all to be satisfied with it. The old rule provided that the Presiding Officer "shall also be authorized to direct the employment of the marshal of the District of Columbia, or any other person or persons during the trial, to discharge such duties as may be prescribed by him." The marshal has authority under the general laws to call a posse, if necessary, to call on the military if necessary. We have a marshal in the District of Columbia not acceptable I believe to everybody, but I think a marshal who will do his duty, whatever his duty is, as faithfully as anybody else. Why not strike out all of the words of this rule? After the word "court" strike out and insert what I have read, so as to read:

"The Presiding Officer may by the direction of the court direct the employment of the marshal of the District of Columbia, or any other person or persons, during the trial to discharge such duties as may be prescribed by him."

I think that would get us out of this difficulty.

Objection was made to this old rule—which dated from the trial of Judge Chase, in 1805—on the ground that the marshal of the District of Columbia had duties of his own prescribed by law, and might not be at the service of the Senate. There was discussion also as to his power, and the power of the Sergeant-at-Arms, to summon a posse comitatus to assist. Finally Mr. Trumbull's proposition was put in form as follows, and agreed to without division:

And the Sergeant-at-Arms, under the discretion of the court, may employ such aid and assistance as may be necessary to enforce, execute, and carry into effect the lawful orders, mandates, writs, and precepts of said court.

Subsequently, in accordance with the general principle agreed on, the final words "said court" were stricken out, and the "Senate" inserted.

So the rule was finally agreed to in the form in which it now exists.

2159. The Senate, sitting for the Belknap trial, declined to order process to compel the attendance of a witness who had been subpoenaed by telegraph merely.—On July 10, 1876,[13] in the Senate, sitting for the impeachment trial of William W. Belknap, late Secretary of War, Mr. Matt. H. Carpenter, of counsel for the respondent, asked for an attachment to compel the attendance as a witness of John S. Evans. Mr. Carpenter stated that Evans had been subpoenaed, but had not appeared. The following return was read:

WASHINGTON, *D.C., July 1, 1876.*

I made service of the within subpoena, telegraphing the same to the within-named John S. Evans, at Fort Sill, Ind. T., on the evening of the 22d day of June, 1876.

JOHN R. FRENCH,
Sergeant-at-Arms United States Senate.

Mr. Manager John A. McMahon also said:

I will state in addition that I have seen a dispatch in the Sergeant-at-Arm's room from John S. Evans acknowledging the receipt of this subpoena.

It was then

[13] First session Forty-fourth Congress, Senate Journal, p. 969; Record of trial, pp. 226–228.

Ordered, That an attachment issue for the said John S. Evans.

Presently Mr. George F. Edmunds, a Senator from Vermont, asked if there was proof that Evans had been served with the subpoena. It having been stated in reply that the proof being by telegraph, Mr. Edmunds moved to reconsider the vote on the order, and the motion was agreed to.

Then a discussion arose, in the course of which it was developed that the subpoena for this witness, as well as for other witnesses living at a distance, had been served by telegraph.

Mr. John W. Stevenson, a Senator from Kentucky, said he was not aware of any law permitting a witness to be subpoenaed by telegraph, and expressed a doubt as to the legality of an attachment based on a subpoena thus served. Mr. Roscoe Conkling, of New York, expressed the same doubt, and Mr. Edmunds said:

That is no service in point of law.

On motion of Mr. Edmunds the subject was laid on the table.

Then, on motion of Mr. Edmunds,

Ordered, That a subpoena issue commanding the said John S. Evans to appear forthwith before the Senate.

2160. The Senate, sitting for an impeachment trial, has commanded a reluctant witness to produce certain papers in its presence.—On July 8, 1876,[14] in the Senate, sitting for the impeachment trial of William W. Belknap, late Secretary of War, Leonard Whitney was sworn and examined as a witness on behalf of the United States. The witness was manager for the Western Union Telegraph Company and had been subpoenaed to produce telegrams passing between Caleb P. Marsh and the respondent.

Mr. John A. McMahon, of the managers for the House of Representatives, said to the witness:

Now open your package and see what dispatches you have from Washington to New York, passing between Mr. Marsh or R. G. Carey & Co. and W. W. Belknap.

The witness replied:

Before I do so I wish to state that I can not produce these telegrams unless I am required to do so by the court; and I respectfully submit to the court that they are privileged communications, and I ought not to be required to produce them.

The President pro tempore [15] thereupon submitted the question to the Senate, Shall the witness produce the telegrams? and it was decided in the affirmative without division.

2161. In impeachment trials before the House of Lords it is the practice to swear and examine the witnesses in open house. Under the parliamentary law witnesses in an impeachment trial may be examined by a committee.

In Chapter LIII of Jefferson's Manual the following is given in the "sketch of some of the principles and practices of England," on the subject of impeachments:

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[14] First session Forty-fourth Congress, Record of trial, p. 216. The Senate Journal (p. 966) indicates that Mr. Matt. H. Carpenter, of counsel for the respondent, made the objection instead of the witness, but the verbatim account in the Record of trial seems conclusive.

[15] T. W. Ferry, of Michigan, President pro tempore.

Witnesses. The practice is to swear the witnesses in open house, and then examine them there; or a committee may be named who shall examine them in committee, either on interrogatories agreed on in the House or such as the committee in their discretion shall demand. (Seld. Jud., 120, 123.)

2162. Form of oath administered to witnesses in impeachment trials.

Form of subpoena issued to witnesses in impeachment trials.

In impeachment trials subpoenas are issued on application of managers or the respondent or his counsel.

Form of direction for service of subpoenas to witnesses in impeachment trials.

Discussion as to the competency of the Senate to empower one of its officers to administer oaths.

Present form and history of Rule XXIV [16] of the Senate sitting for impeachment trials.

Rule XXIV of the "rules of procedure and practice for the Senate when sitting in impeachment trials" provides:

Witnesses shall be sworn in the following for, viz: "You, ——— ———, do swear (or affirm, as the case may be) that the evidence you shall give in the case now pending between the United States and ——— ——— shall be the truth, the whole truth, and nothing but the truth, so help you God," which oath shall be administered by the Secretary or any other duly authorized person.

FORM OF A SUBPOENA TO BE ISSUED ON THE APPLICATION OF THE MANAGERS OF THE IMPEACHMENT OR OF THE PARTY IMPEACHED OR OF HIS COUNSEL.

To ——— ———, *greeting:*

You and each of you are hereby commanded to appear before the Senate of the United States, on the ——— day of ———, at the Senate Chamber in the city of Washington, then and there to testify your knowledge in the cause which is before the Senate, in which the House of Representatives have impeached ——— ———.

Fail not.

Witness ——— ———, and Presiding Officer of the Senate, at the city of Washington, this ——— day of ———, in the year of our Lord ———, and of the Independence of the United States the ———,

——— ———,

Presiding Officer of the Senate.

FORM OF DIRECTION FOR THE SERVICE OF SAID SUBPOENA.

The Senate of the United States to ——— ———, *greeting:*

You are hereby commanded to serve and return the within subpoena according to law.

Dated at Washington, this ——— day of ———, in the year of our Lord ———, and of the Independence of the United States the ———.

——— ———,

Secretary of the Senate.

These forms were agreed to in 1868 [17] on report from a committee of which Mr. Jacob M. Howard, of Michigan, was chairman. They were adopted, with slight variations of phraseology from the forms used in the impeachments of Blount and Chase, in 1797 and 1805. The words "high court of impeachment," which had been introduced in the

[16] See also section 2080 of this volume for other portions of this rule.

[17] Second session Fortieth Congress, Senate Report No. 59; Senate Journal, pp. 244–246; Globe, pp. 1590–1593.

forms as reported, were stricken out in accordance with a general conclusion of the Senate as to its functions.

As reported, the rule provided simply that the oath to witnesses should be administered by the Secretary. The words "or any other person duly authorized" were added on motion of Mr. Roscoe Conkling, of New York. A difference of opinion had arisen as to the power of the Senate to confer on anyone the authority to administer an oath.

Mr. John Sherman, of Ohio, argued [18] that it could only be done by law, because if perjury should arise, the oath must be shown to be administered by an officer authorized by law to administer an oath. The Secretary had power to do so. Mr. Howard held that the Senate had the power, as belonging to its judicial function in trying the case, to provide for the administration of the oath.

2163. In impeachments a Senator called as a witness is sworn and testifies standing in his place.

Present form and history of Rule XVII of the Senate in impeachment trials.

Rule XVII of the "rules of procedure and practice for the Senate when sitting in impeachment trials" is as follows:

If a Senator is called as a witness, he shall be sworn, and give his testimony standing in his place.

This rule dates from 1797,[19] when it was adopted for the trial of William Blount. In 1805,[20] at the time of the trial of Judge Chase, it received verbal changes merely.

2164. During the Belknap trial Senators were called as witnesses and were sworn, and testified standing in their places.— On July 12, 1876,[21] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, Mr. Matt. H. Carpenter, of counsel for the respondent, said:

Mr. President, I desire to call Senator Allison, of Iowa.

The President pro tempore [22] said:

The Senator will stand in his place and be sworn.

Hon. William B. Allison was sworn and examined, standing in his place.

Similarly, George G. Wright, a Senator, was called, sworn, and examined.

2165. In an impeachment trial testimony is presented generally and is not classified according to the article to which it applies.— On February 11, 1805,[23] in the high court of impeachments during the trial of the case of the United States *v.* Samuel Chase, an associate justice of the Supreme Court of the United States, a witness was called, in behalf of the managers, when Mr. Robert G. Harper, counsel for the respondent, stated that this witness was called on an article subsequent to that on which the witnesses already examined had testified. He would submit a proposition to the honorable managers to go

[18] Globe, p. 1593.
[19] First session Fifth Congress, Senate Journal, p. 566; Annals, p. 2197.
[20] Second session Eighth Congress, Senate Journal, pp. 511–513; Annals, pp. 89–92.
[21] First session Forty-fourth Congress, Senate Journal, p. 977; Record of trial, p. 267.
[22] T. W. Ferry, of Michigan, President pro tempore.
[23] Second session Eighth Congress, Annals, p. 198.

through at one time the whole of the testimony on each article. It might not be the regular course, but if gentlemen assent to it, said Mr. Harper, we shall prefer it; it will be convenient to the witnesses, many of whom may be discharged before the whole of the testimony is gone through.

Mr. John Randolph, jr., of Virginia, chairman of the managers, said:

Though this mode may have its advantages, it is attended with its difficulties. A witness may be found to support more than one article. With regard to the first article, I have no objection to this course; but with regard to the subsequent articles I have.

The President [24] said:

If the gentlemen are agreed, I will take the sense of the Senate on the course to be pursued.

Mr. Randolph said:

It is the wish of the managers not to depart from the usual course.

Mr. Harper said:

We do not claim it as a right.

2166. In the Johnson trial the Chief Justice held that evidence might be introduced during final arguments only by order of the Senate.—On April 20, 1868,[25] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, after the testimony had been nearly closed on both sides, Mr. Manager John A. Bingham suggested that it might be the desire of the managers later to examine one or more witnesses. This caused a discussion as to the admission of testimony after the beginning of the final arguments. Mr. Reverdy Johnson, a Senator from Maryland, express the opinion that such a course would not be in accordance with the American practice. Mr. Manager Bingham suggested that it had been done in the trial of Judge Chase, although he could not speak positively.

The Chief Justice [26] said:

In case the honorable managers desire to put in further evidence after the argument it will be necessary to obtain an order of the Senate; at least it would be proper to obtain such order before the argument proceeds.

2167. The proposition that evidence in an impeachment trial may be admitted or excluded by a majority vote has not been questioned seriously.—On July 21, 1876,[27] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, Mr. Jeremiah S. Black, of counsel for the respondent, was making his argument in the final summing up, and was holding that, as two-thirds of the Senate were required to convict, so also two-thirds were required on a vote determining jurisdiction.

Mr. Allen G. Thurman, a Senator from Ohio, propounded this question:

If it requires two-thirds of the Senators present to overrule the respondent's plea to the jurisdiction, does it not follow that two-thirds are necessary to overrule any objections to testimony made by the respondent or to sustain an objection to testimony made by the managers?

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[24] Aaron Burr, of New York, Vice-President, and President of the Senate.
[25] Second session Fortieth Congress, Globe supplement, p. 289.
[26] Salmon P. Chase, of Ohio, Chief Justice.
[27] First session Forty-fourth Congress, Record of trial, p. 315.

Mr. Black replied:

No; clearly not. I admit that is a very fair attempt at the reductio ad absurdum of our proposition, but it does not succeed. What I say is that two-thirds are required to establish any fact which is an essential element in the conviction. Every other fact may be established and every other order may be made by a bare majority. I do not say that, because this is a court of impeachment and two-thirds of the Senate are required to concur in a final conviction, therefore every time an adjournment is moved it can not succeed with a majority of two-thirds.[28]

2168. Witnesses in an impeachment trial are examined by one person on either side.

Present form and history of Rule XVI of the Senate sitting for impeachments.

Rule XVI of the "Rules of procedure and practice for the Senate when sitting in impeachment trials" is as follows:

Witnesses shall be examined by one person on behalf of the party producing them, and then cross-examined by one person on the other side.

This rule was first drafted in 1805 [29] for the trial of Judge Chase. In the revision of 1868,[30] preparatory to the trial of President Johnson, it was amended by striking out the words "cross-examined in the usual form," and inserting "cross-examined by one person on the other side."

2169. The managers in the Swayne trial having offered to prove a statement made by respondent before the House committee, counsel successfully resisted the reading of the statement as part of the offer.

An argument by counsel for respondent against the "offer of proof" method of presenting evidence in an impeachment trial.

Instance wherein counsel for respondent in the Swayne trial was called to order for language reflecting on the conduct of the managers.

On February 14, 1905,[31] in the Senate sitting for the impeachment trial of Judge Charles Swayne, Mr. Manager Henry W. Palmer, of Pennsylvania, offered to prove that the respondent on the 28th day of November, 1904, at the city of Washington, D.C., voluntarily appeared before a subcommitte of the House Judiciary Committee, not having been summoned as a witness or otherwise, and voluntarily made the following statement.

At this point Mr. John M. Thurston, of counsel for the respondent, objected to the reading of the statement, saying:

Mr. President, standing here as objecting to this offer, I repeat what I said a few days since about this attempt to present to this court the statements made by Judge Swayne while he was a witness before a committee of the House of Representatives. The offer to prove what he said before that committee is all that, under any rule of practice that has ever prevailed in any court, can be made. It has never been held that in offering to prove what a witness had said somewhere else a statement could be made in the offer of what he had said somewhere else, because that would, by indirection and by pettifog-

[28] During the trial of President Johnson a suggestion was made by Mr. Garrett Davis, of Kentucky, that the two-thirds rule should prevail as to ruling questions of evidence or law against the respondent, and he introduced an order to that effect; but it was not acted on. Second session Fortieth Congress, Senate Journal, p. 382.

[29] Second session Eighth Congress, Senate Journal, pp. 511-513; Annals, pp. 89-92.

[30] Second session Fortieth Congress, Senate Report No. 59, Senate Journal, p. 813; Globe, p. 1568.

[31] Third session Fifty-eighth Congress, Record, pp. 2536, 2537.

ging, Mr. President, present to the court, the judge, or the jury the statement of what the evidence would show when it was really admitted, if at all, and evidently in the expectation——

At this point Mr. Edmund W. Pettus, of Alabama, intervened and said:

Mr. President, I object to the word "pettifogging" being used in this court.

The Presiding Officer [32] said:

The Presiding Officer thinks that the word ought not to have been used.

Mr. Thurston then continued:

I apologize for the use of that word. I was not using it with reference to this offer. I was saying that it was a common custom in some courts to attempt to show by a statement of this kind what a witness had said somewhere else, when the attorneys making the offer knew and understood perfectly well that the statement itself would not be proper evidence to be introduced in the case, and that an offer of this kind was and is an attempt to present to a court evidence known to be improper, prohibited by the statutes of the United States, and its reading to the court in an offer must necessarily be, and can only be, an attempt by indirection to place in the record and before the judges testimony that they know is not legal testimony and ought not to be considered.

Now, Mr. President, I do not wish to reflect—and if I have made any reflections upon these honorable managers I withdraw them—I do not wish to reflect upon them in this case, but I do say that in other cases and in other courts where offers of this kind have been made they have been necessarily made with the express desire to place in the record and before the court and the jury a line of evidence that is prohibited by the law of the land from being presented. We object both to the offer to introduce the testimony and to the offer to read the proposed testimony to this court. Mr. President, we also protest against this manner of presenting evidence by an offer to prove something.

The only proper way, in our judgment, if the managers wish to produce this testimony and have this court pass upon its competency, is to put a witness on the stand or to offer the record, to ask the question, or let the record be objected to, and pass upon that. I do not think it is proper for us, Mr. President—and the occasion may arise in this case where it would be most desirable for us, if it were proper—to offer to prove a certain statement of fact that we do not believe can be introduced in evidence if objected to upon the other side. But, sir, feeling our responsibility here, we will not attempt to offer before this court a statement of anything, nor will we attempt to offer in this court to prove facts setting it forth. What facts we have to prove we will prove by records, or we will prove them by questions directed to the witnesses presented in the court, and let the objections, if any there be, be taken in the regular way and upon legal lines.

Mr. Manager Palmer announced that he would hand the statement to the court and let the court pass upon it:

Mr. Joseph W. Bailey, of Texas, said:

Mr. President, while the Presiding Officer passes on such questions in the first instance, Senators must pass upon it finally, and they know what is offered before they can vote intelligently upon the question. It is unprecedented to say that the court shall not be permitted to hear what is offered before passing upon the admissibility of it. * * * for my own guidance, I would like to know exactly the question before the court.

The Presiding Officer said:

It is in writing. The managers offer to prove that the respondent on the 28th day of November, 1904, in the city of Washington, D.C., voluntarily appeared before a subcommittee of the House Judiciary Committee, not having been

[32] Orville H. Platt, of Connecticut, Presiding Officer.

summoned as a witness or otherwise, and voluntarily made the following statement. Then the statement is recited.

No further demand was made for the reading of the statement, and it was not read.

2170. Managers and counsel disagreeing as to method of direct and cross examination of a delayed witness the Senate ordered examination in accordance with the regular practice.—On July 12, 1876,[33] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, the managers announced:

We desire to state to the Senate that we are through with our case in chief for the United States with this exception, that if Mr. Evans arrives in the usual course of the trial of this case, we desire to put him on the stand, or if he is put upon the stand by the defense we desire permission to put to him such questions as would be competent and proper if he were examined by us in chief; but we do not ask the delay of this case one hour for the arrival of Mr. Evans. On the contrary, we ask that it proceed.

The President pro tempore said:

Is there objection to this privilege of examination being reserved?

Mr. Matt. H. Carpenter, of counsel for the respondent, objected.

On July 19 [34] John S. Evans appeared, and was called as a witness on behalf of the respondent.

Mr. Carpenter said:

Mr. President, I desire to say to the managers that Mr. Evans is now upon the stand. If they wish to examine him as a witness on the part of the prosecution, we make no objection to their doing so. If they do not, we give them notice that we shall insist on their being held to a proper cross-examination.

Mr. Manager John A. McMahon said:

Mr. President, we desire to state to the Senate that we shall claim the right to call out on cross-examination whatever is legitimate and proper in this case. I think, after having waited for nearly a whole week for the witness to come to accommodate the defense, that the Senate will endeavor to expedite matters by enabling us to put our questions to the witness upon cross-examination with the full privilege of the gentlemen in rebutting to ask him to explain all those matters about which we may inquire, which will make one examination answer all the purposes of this case, whereas if we now examine him the gentlemen on their side will have a right only to cross-examine him as to what we examined into, and then they must put him on the stand, we cross-examine him, and so on, making really a double examination, and upon the good sense of the Senate on that question we rely now. The gentlemen may examine Mr. Evans.

Mr. Carpenter rejoined:

It will be recollected that the manager stated to the Senate that Mr. Evans was one of his most important witnesses. When he closed his case, he closed it reserving the right to call Mr. Evans if he should appear at any time during the trial. Mr. Evans is now present. We waive all objection to his being examined in chief on the part of the Government if they wish to examine him. If they do not, we shall insist, as far as we can insist, that when they come to the cross-examination they shall be restricted to the proper rules of cross-examination.

Thereupon, on motion of Mr. Roscoe Conkling, a Senator from New York, it was—

Ordered, That the managers proceed to examine the witness Evans in chief; or, should they decline to do so, the respondent may proceed to examine the witness in chief, with the right of the managers to cross-examine him like any other witness.

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[33] First session Forty-fourth Congress, Record of trial, p. 255.
[34] Senate Journal, p. 981; Record of trial, p. 278.

2171. The Senate prefers that managers and counsel, in examining witnesses in an impeachment trial, shall stand in the center aisle.—On February 15, 1905,[35] in the Senate sitting for the impeachment trial of Judge Charles Swayne, it was directed that the managers in examining witnesses should stand in the center aisle of the Senate Chamber, near the rear row of seats, so that the answers of witnesses might be heard readily by the Senators.

Later, however, Mr. Anthony Higgins, of counsel for the respondent, urged that he must stand by the table in examining witnesses, as he needed to consult certain documents.

But generally managers and counsel stood in the central aisle when conducting the examinations.

2172. Witnesses in an impeachment trial give their testimony standing unless specially permitted to sit.—On February 14, 1905,[36] in the Senate sitting for the trial of Judge Charles Swayne, a witness, Joseph H. Durkee, had been sworn, when the Presiding Officer [37] said:

The witness asks that he may be allowed to be seated. He may sit if there is no objection. The witness will please raise his voice and answer all questions so as to be heard all over the Chamber.

2173. The Senate assigns the place to be occupied by witnesses testifying in an impeachment trial.—On July 6, 1876,[38] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, the testimony was about to begin, when the President pro tempore [39] suggested that witnesses take a place at the right of the Chair, on a level with the Secretary's desk; but at the suggestion of the managers and several Senators a place on the floor in front of the Secretary's desk was assigned to the witnesses.

Later [40] Mr. Theodore F. Randolph, a Senator from New Jersey, said:

Mr. President, is there any objection on the part of the Senate and counsel to have the witness stand at your right or left? So far as I am concerned, it is utterly impossible for me to hear one word out of three that is spoken. It has been so during the whole time. If I take the seat of another Senator, it is at his inconvenience. This is my seat. I have no right to another, but I have a right to hear what is said.

The President pro tempore said:

The Chair will state to the Senator that he designated a little higher place for the witnesses, but the managers and counsel thought it would be preferable to have the witness in front of the desk, and the Chair submitted that to the Senate, and, as there was no objection, the witnesses were placed there.

Then the President pro tempore put the request to the Senate, and it was ordered that the witnesses stand on the right of the Chair on a level with the Secretary's desk.

2174. During the trial of Judge Chase one of the counsel for the respondent was sworn and examined as a witness.—On February 15, 1805,[41] in the high court of impeachments during the trial of the case of the United States *v.* Samuel Chase, one of the associate

[35] Third session Fifty-eighth Congress, Record, pp. 2615, 2620.
[36] Third session Fifty-eighth Congress, Record, p. 2535.
[37] Orville H. Platt, of Connecticut, Presiding Officer.
[38] First session Forty-fourth Congress, Record of trial, p. 179.
[39] T. W. Ferry, of Michigan, President pro tempore.
[40] Record of trial, p. 182.
[41] Second session Eighth Congress, Senate Impeachment Journal, p. 520; Annals, p. 246.

justices of the Supreme Court of the United States, Luther Martin, one of the counsel for the respondent, was sworn and examined as a witness in behalf of the respondent.

2175. The order of taking testimony in an impeachment trial is sometimes waived by consent of both parties.—On February 16, 1905,[42] in the Senate sitting for the impeachment trial of Judge Charles Swayne, Mr. Manager David A. De Armond, of Missouri, said:

Mr. President, the witness Belden, of New Orleans, has not yet arrived, and with the exception of that one witness, so far as we know now, our case is complete, and we are willing that the respondent may go on with his testimony, with the privilege to us of calling General Belden when he arrives.

Mr. John M. Thurston, of counsel for the respondent, said:

Mr. President, this suggestion was made to me this morning by the managers, and we have no objection to their proposed arrangement, it being, as I understand, that they have closed their case in chief, except as to the testimony of Judge Belden, who is to be produced by them and examined upon his arrival. We make no objection to that request. We should like, however, that they place Judge Belden upon the stand as soon as he does arrive, in order that as far as possible we may have their entire case in before we present our own witnesses.

2176. A question put by a Senator to a witness in an impeachment trial is reduced to writing and put by the Presiding Officer.

All orders and motions, except to adjourn, are reduced to writing when offered by Senators in impeachment trials.

The Presiding Officer in an impeachment trial is the medium for putting questions to witnesses and motions and orders to the Senate.

Present form and history of Rule XVIII of the Senate sitting for impeachments.

Rule XVIII of the "Rules of procedure and practice for the Senate when sitting in impeachment trials" is as follows:

If a Senator wishes a question to be put to a witness, or to offer a motion or order (except a motion to adjourn), it shall be reduced to writing, and put by the Presiding Officer.

This rule dates from the Chase trial in 1805.[43] In the revision of 1868,[44] preparatory to the trial of President Johnson, the form was modified by the insertion of the parenthetical clause and the use of the words "Presiding Officer" for "President."

2177. In defiance of Rule XVIII for impeachment trials, the Senate has established the practice that Senators may interrogate managers or counsel for respondent.

Instance of an appeal from a ruling of the President pro tempore in the Senate sitting for an impeachment trial.

While the Senate was sitting for the impeachment trial of William W. Belknap, late Secretary of War, arguments, continuing from May 4 to May 8, 1876, were offered by the managers on the part of the House of Representatives and the counsel for the respondent on the question of the jurisdiction of the Senate to try a citizen not in civil office at the time of the presentation of articles of impeachment. In the course of these arguments, members of the Senate frequently interrupted the

[42] Third session Fifty-eighth Congress, Record, pp. 2719, 2720.
[43] Second session Eighth Congress, Senate Journal, pp. 511–513; annals pp. 89–92.
[44] Second session Fortieth Congress, Senate Report No. 59; Senate Journal, pp. 813, 814; Globe, p. 1568.

managers and counsel for respondent with questions [45] relating to various points touched in the argument. These questions were generally presented in writing.

2178. On July 20, 1876,[46] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, Mr. Manager William P. Lynde was submitting an argument in the final summing up of the case, when Mr. William W. Eaton, a Senator from Connecticut, interrupting, said:

Mr. President, is it proper that I should ask the manager a question?

The President pro tempore [47] said:

It has been so ruled by the Senate.

And thereafter, during the trial, both the managers and counsel for respondent were interrupted by questions.[48]

2179. On July 12, 1876,[49] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, Mr. George F. Edmunds, a Senator from Vermont, following a custom that had existed during the trial, proposed a question to counsel for the respondent.

Mr. Roscoe Conkling, a Senator from New York, raised a question of order as to the right of a Senator to interrogate counsel.

The President pro tempore [50] said:

The Senator from New York calls the attention of the Chair to the fact that the rule does not authorize the questioning of counsel, but of witnesses. * * * The rule will be read.

"XVIII. If a Senator wishes a question to be put to a witness, or to offer a motion or order (except a motion to adjourn), it shall be reduced to writing and put by the Presiding Officer."

*** * * The Chair will state that in administering the rule he would not feel authorized to permit a question to be put to the counsel or the managers, for the rule provides only for Senators to question witnesses, and not counsel or managers to be questioned by them. * * * The Senator from New York has stated the point of order, and the Chair simply holds that under the rule No. 18, and which is the only one bearing upon the subject and upon which he rules, the Chair sustains the point of order.**

Mr. Edmunds appealed, and on the question, "Shall the decision of the Chair stand as the judgment of the Senate?" There appeared yeas 18, nays 21. So the Chair was overruled, and the question proposed by Mr. Edmunds was put to counsel.

2180. Questions asked by Senators in an impeachment trial, whether of managers, counsel, or witnesses, must be in writing.—On July 11, 1876,[51] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, several Senators had addressed verbal questions to the managers and to counsel for the respondent. Mr. Roscoe Conkling, a Senator from New York, having called attention to the rule, which he condemned as absurd, the President pro tempore [51a] said:

As the Senator from New York has alluded to the fact that the question was not put in writing, the Chair will say that it has not been done in order to facili-

[45] First session Forty-fourth Congress, Record of trial, pp. 33, 42, 43, 47, 60.
[46] First session Forty-fourth Congress, Record of trial, p. 296.
[47] T. W. Ferry, of Michigan, President pro tempore.
[48] Pages 297, 315 of Record of trial.
[49] First session Forty-fourth Congress, Senate Journal, pp. 976, 977; Record of trial, pp. 258, 259.
[50] T. W. Ferry, of Michigan, President pro tempore.
[51] First session Forty-fourth Congress, Record of trial, pp. 248, 249.
[51a] T. W. Ferry, of Michigan, President pro tempore.

tate business, and a moment ago one of the Senators was about to reduce a question to writing and the Senator from New York stated that the practice had been otherwise. * * *

The Chair to facilitate business has allowed questions to be put without being reduced to writing by their propounders.

Later, colloquies and objection having arisen, the President pro tempore ruled:

The Chair will enforce the rule. Colloquies must cease. Objection has been made, and the Chair must enforce the rule. He will state that on the part of Senators, to guard against any breach of the rules and unpleasantness, he will require all questions to be reduced to writing; and then certainly there can be no debate. The counsel will proceed.

Mr. Richard J. Oglesby, a Senator from Illinois, asked:

Does the decision of the Chair, that no questions can be put hereafter without being reduced to writing, cover questions put by the court to one of the counsel?

The President pro tempore said:

It covers all questions put by members of the Senate. The rule does not require the questions on the part of the parties to be reduced to writing unless so required by the Chair or a Senator; but all questions put by members of the Senate the rule requires shall be put in writing.

2181. On July 19, 1876,[52] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, John S. Evans, a witness on behalf of the respondent, was on the stand, when Mr. Theodore F. Randolph, a Senator from New Jersey, proposed to ask orally a question. The suggestion being made that the question should be reduced to writing, Mr. Randolph urged that such had not been the practice.

The President pro tempore [53] said:

The Chair will observe at this time that so far as questions have been put to witnesses by Senators the rule in the recollection of the Chair has been observed until this time, and the Chair called the attention of the Senator from California, who put a question just now without reducing it to writing, to the fact that the rule required it to be done. The question having been put and it having been reduced to writing, by calling the attention of the Senator to the rule the Chair did his duty. Heretofore no questions have been put to witnesses, as the Chair recollects, without having been first reduced to writing.

2182. Chief Justice Chase finally held, in the Johnson trial, that the managers might object to a witness answering a question put by a Senator.—On April 13, 1868,[54] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, Gen. William T. Sherman was examined as a witness, and Mr. Reverdy Johnson, a Senator from Maryland, presented in writing a question for the witness to answer.

To this question Mr. Manager John A. Bingham, in behalf of the House of Representatives, objected.

Mr. Garrett Davis, a Senator from Kentucky, thereupon raised the question that one of the managers had no right to object to a question propounded by a member of the court.

The Chief Justice [55] said:

When a member of the court propounds a question, it seems to the Chief Justice that it is clearly within the competency of the managers to object to the question

[52] First session Forty-fourth Congress, Record of trial, p. 275.
[53] T. W. Ferry, of Michigan, President pro tempore.
[54] Second session Fortieth Congress, Senate Journal, p. 894; Globe Supplement, pp. 169, 170.
[55] Salmon P. Chase, of Ohio, Chief Justice.

being put and state the grounds for that objection, as a legal question. It is not competent for the managers to object to a member of the court asking a question; but after the question is asked, it seems to the Chief Justice that it is clearly competent for the managers to state their objections to the questions being answered.

2183. On April 13, 1868,[56] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, Gen. William T. Sherman had been called as a witness on behalf of the respondent. In the course of the examination, Mr. Reverdy Johnson, a Senator from Maryland, propounded this question:

Did you at any time, and when, before the President gave the order for the removal of Mr. Stanton as Secretary of War, advise the President to appoint some other person in the place of Mr. Stanton?

Mr. Benjamin F. Butler, one of the managers for the House of Representatives, at once objected to the question as leading in form, and also as being incompetent according to the decisions of the Senate as to this line of inquiry.

Mr. Garrett Davis, a Senator from Kentucky, raised a question as to whether or not the managers or the counsel for the defense could interpose any objection to a question by a member of the court.

The Chief Justice [57] said:

The Chief Justice thinks that any objection to the putting of a question by a member of the court must come from the court itself.

Thereupon Mr. Charles D. Drake, a Senator from Missouri, objected to the question.

The Chief Justice said:

The only mode in which an objection to the question can be decided properly is to rule the question admissible or inadmissible; and that is for the Senate. The question of the Senator from Maryland has been proposed unquestionably in good faith, and it addresses itself to the witness in the first instance, and it is for the Senate to determine whether it shall be answered by the witness or not. Senators, the question is whether the question propounded by the Senator from Maryland is admissible.

And the question being taken, there appeared yeas 18, nays 32. So the question was excluded.

2184. Either managers or counsel in an impeachment trial may object to an answer to a question propounded to a witness by a Senator.—On February 11, 1905,[58] in the Senate sitting for the trial of Judge Charles Swayne, a witness A. H. D'Alemberte, was sworn and examined. In the course of the examination a Senator, Mr. Augustus O. Bacon, of Georgia, proposed this question:

Q. Does the law of Florida require the payment of a poll tax from each male citizen of the State who is over 21 and under 55 years of age, without reference to the question whether or not he votes?

Mr. Manager Henry W. Palmer, of Pennsylvania, objected, saying:

In the opinion of the managers, that is a question of law, not of fact. I suppose we have a right to object to a question by a Senator, under the rule and we object to that question. It is a matter of law, and I do not suppose the witness is a lawyer.

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[56] Second session Fortieth Congress, Senate Journal, p. 892; Globe Supplement, p. 166.
[57] Salmon P. Chase, of Ohio, Chief Justice.
[58] Third session Fifty-eighth Congress, Record, pp. 2393, 2397, 2399.

The Presiding Officer [59] said:

If the objection is insisted upon, the Presiding Officer thinks that the question is improper, for the reason that it relates to a matter of law; but the Presiding Officer would suggest that this examination has so far proceeded upon questions of law very largely.

Mr. Henry Cabot Lodge, a Senator from Massachusetts, raised a question as to whether or not the managers might object to a question propounded by a Senator.

The Presiding Officer said:

Perhaps not in the technical way in which objections are made in court, but the Presiding Officer thinks that either the managers on the part of the House or the counsel for the respondent have a right to raise the question, to be decided by the Presiding Officer, as to whether evidence is admissible. * * * The Presiding Officer does not at this time desire to make any binding or irreversible rule, but if such a case can be supposed as that a Senator should put an improper or inadmissible question to a witness the Presiding Officer thinks that that question being raised he would have a right to rule upon it.

Later Mr. Manager Palmer said:

While the witness is coming I wish to submit to the President the authority on which I objected to the question asked by the Senator from Illinois [Mr. Hopkins]. It is a ruling made by Chief Justice Chase in the trial of Andrew Johnson, and is to be found in the second volume of the Congressional Globe, at pages 166, 169, and 170, where it was decided that the managers had a right to object to a question asked by a Senator.

I merely call attention to the authority to show that I was not objecting without some reason.

A little later Mr. Joseph B. Foraker, a Senator from Ohio, said:

I deem it my duty to call attention to the fact that on page 310 of Extracts from Journals of the Senate of the United States of America in Cases of Impeachment I find the following ruling by the Chief Justice.

Mr. Johnson, Senator, having asked a question, objection was made by the managers.

"Mr. Manager Bingham having commenced an argument in support of the objection,

"Mr. Davis raised the question of order that it was not in order for the managers to object to a question propounded by a Member of the Senate.

"The Chief Justice ruled that neither the managers nor the counsel had a right to object to a question being put by a Member of the Senate, but might discuss the admissibility of the evidence to be given in answer to such question."

The ruling by the Chief Justice was submitted to the Senate and was sustained by the Senate, the rule on that subject being Rule XVIII, Governing Impeachment Trials, which reads as follows:

"XVIII. If a Senator wishes a question to be put to a witness, or to offer a motion or order (except a motion to adjourn), it shall be reduced to writing, and put by the Presiding Officer."

In other words, the rule is without qualification; and this is the first time I ever heard it suggested that a court conducting a trial did not have a right to put any question the court might see fit to ask. If there be any ruling such as managers have stated there is, made by the Chief Justice in the course of that trial, I have overlooked it.

Later Mr. Manager Palmer said:

Mr. President, the managers have been asked for the particular authority for making objection to a question asked by a Senator. I refer the Senator from Ohio [Mr. Foraker] to the Congressional Globe, volume 40, trial of Andrew Johnson, page 169, in which the Chief Justice made this ruling. * * * The 13th of April, 1868, page 169. The ruling was as follows:

"The CHIEF JUSTICE. The honorable manager will wait one moment. When a member of the court propounds a question, it seems to the Chief Justice that it

[59] Orville H. Platt, of Connecticut, Presiding Officer.

is clearly within the competency of the managers to object to the question being put and state the grounds for that objection as a legal question. It is not competent for the managers to object to a member of the court asking a question; but after the question is asked it seems to the Chief Justice that it is clearly competent for the managers to state their objections to the questions being answered.

The Presiding Officer said:

The manager will allow the Presiding Officer to refer to the ruling which was cited by Senator Foraker. It is in these words:

"The Chief Justice ruled that neither the managers nor the counsel had a right to object to a question being put by a Member of the Senate, but might discuss the admissibility of the evidence to be given in answer to such question."

The ruling seems to be that an objection can not be made to a Senator putting a question, but that the admissibility of the evidence to be given might be objected to and discussed.

Mr. Manager Palmer said:

That is right. That is what we understood. We objected to the admissibility of the answer to such a question, because we did not think it was a legal question.

The Presiding Officer continued:

That is what the Chair understood; not that the managers objected to a question being put by a Senator, but objected to the question being answered.

Mr. Manager Palmer added:

Yes; we objected to its being answered, not to its being asked.

2185. The Senate decided that it might, in an impeachment trial, permit a Senator to interrogate a witness, although both managers and counsel for the respondent objected.—On July 11, 1876,[60] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, Caleb P. Marsh, a witness for the United States, had been examined by the managers, cross-examined by counsel for the respondent, and had responded to questions put by Members of the Senate. Thereupon Mr. John A. Logan, a Senator from Illinois, proposed another question.

Mr. Matt H. Carpenter, of counsel for the respondent, objected to the question, and Mr. Manager John A. McMahon, on the part of the House of Representatives seconded the objection.

Mr. Allen G. Thurman, a Senator from Ohio, asked what business the court had to ask a question to which both parties objected.

Mr. Logan said:

I presume that members of the court here stand upon an equality, and that one has as good a right to ask a question as another, provided it is a proper question, couched in proper language. I asked a question a while ago of the witness what the understanding was between him and Mrs. Bower. I did not use the name, but that was it, and he gave the understanding, and in that answer he incidentally remarked that he had an understanding with the former Mrs. Belknap. The question was argued by the managers and counsel for the respondent; the vote was taken by yeas and nays, and the Senate voted that the question should be answered; and the witness did answer the question. In furtherance of that question, I have asked what the understanding was with the former Mrs. Belknap.

Mr. Thurman said:

The House of Representatives here is represented by its managers; the defendant is represented by his counsel; and when both sides agree as to what are the issues upon which they will put in evidence, I really do not see, with entire

[60] First session Forty-fourth Congress, Senate Journal, p. 973; Record of trial, pp. 241, 242.

respect to the Senator from Illinois and every other Senator, that it is any part of the duty of the Senate which is to sit here as impartial judges to introduce a new line either of prosecution or of defense. I see no reason for it; and if the Senate has erred once, it is no reason why it should err again. If neither the managers on the part of the House nor the counsel for the defendant have seen fit to go into the arrangements, if there were any, between the witness and this deceased lady or this living lady, it is no business of ours to go into them. If it is necessary for the purposes of public justice that they should be gone into and the testimony would be legitimate, it is to be presumed that the House of Representatives, through its managers, would have asked us to hear the testimony. If it were necessary for the defense that the matter should be gone into, it is to be presumed that the counsel for the defense would have introduced it as a defense. It is not for us to supply any deficiency of the prosecution or to supply any deficiency of the defense.

Mr. Oliver P. Morton, of Indiana, said:

I simply want to state that I regard it as the absolute right of this court or any member of it, with the consent of his brother judges or a majority of them, to ask any question; and the idea that the court can be overruled by the counsel on either side agreeing that the question shall not be asked is something entirely new.

The Senate decided, by a vote of yeas 23, nays 17, that the question should be admitted.

2186. Instance wherein both managers and counsel for respondent were permitted to object to questions proposed by Senators.—On April 18, 1868,[61] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, Alexander W. Randall, Postmaster-General, was sworn as a witness on behalf of the respondent. In the course of the examination, Mr. John Sherman, a Senator from Ohio, proposed in writing this question:

State if, after the 2d of March, 1867, the date of the passage of the tenure-of-office act, the question whether the Secretaries appointed by President Lincoln were included within the provisions of that act came before the Cabinet for discussion; and if so, what opinion was given on this question by members of the Cabinet to the President.

Mr. Manager John A. Bingham objected that the evidence sought to be obtained was incompetent under the decisions of the Senate already made.

The question being taken, there appeared in favor of admitting the testimony 20 yeas, and against 26 nays. So the testimony was not admitted.

2187. On July 11, 1876,[62] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, Caleb P. Marsh, a witness on behalf of the United States, had been examined and cross-examined, when Mr. John H. Mitchell, a Senator from Oregon, proposed in writing this question:

Q. Why did you send to W. W. Belknap, Secretary of War, the one-half of the various sums of money received by you from Evans at Fort Sill?

Mr. Matt H. Carpenter, of counsel for the respondent, objected, saying:

Mr. President, the celebrated Jeremiah Mason in the trial of a very important case once said, when a judge put a question to a witness, he being counsel for the defense, that if the question was put on the part of the plaintiff, he objected to it; if it was put on behalf of the defendant, he withdrew it. * * * The Gov-

[61] Second session Fortieth Congress, Senate Journal, p. 913; Globe supplement, p. 238.
[62] First session Forty-fourth Congress, Senate Journal, p. 971; Record of trial, pp. 237, 238.

ernment have gone through the examination of this witness; we have cross-examined him; the court has allowed them to go partially into a redirect examination, and they have concluded it. This question put by the managers now would certainly be objectionable, and I presume that we have the same right to object to a question put by the court that we would have if it were put by the managers. * * * They have had one redirect examination, the court overruling our objection to it, to give it to them. Now after this will this court permit the managers to return to that subject and open the examination of this witness? And if they will not permit the managers to do it, will the court do it themselves? If a question can not be objected to when put by one of the court which would be ruled out if put by the counsel, then this is a strange proceeding and we are in a singular situation. I say this of course with entire respect to the Senator who asks the question; but we must have a right to object to the question, and for the purpose of testing whether it is proper or improper, it must be considered as a question put by the managers, and put by the managers at this time, is there the slightest doubt that the Senate would rule it out?

The Senate, without division, determined that the question should be admitted.

The witness replied to it:

Simply because I felt like doing it. It gave me pleasure to do it. I sent him the money as a present always, gratuitously. That is the only reason I had.

Thereupon Mr. George F. Edmunds, a Senator from Vermont, asked:

I should like to ask the witness, in connection with his last answer, whether General Belknap knew, in advance of these remittances from time to time, how large the present was going to be that was to be sent?

Mr. Carpenter said:

Mr. President, I object to that question upon the ground that one man can not swear what another man knows. It is physically and intellectually impossible. If he could say that he told Mr. Belknap a thing, if he could prove any fact, that fact may be proved; but could I be put on the stand to swear what the Senator from Vermont knows upon any subject? I should say he knows all about it, but any particular knowledge on a particular subject I could not be called to swear to. Nobody can.

Mr. Montgomery Blair, also of counsel for respondent, said:

Mr. President and Senators, there is another objection to this question that I hope the Senate will consider before voting that this question shall be admitted, and that is that this witness is a Government witness, and that the interrogatory of the Senator is to impeach the witness on the part of the prosecution. It implies that he has not stated the truth.

The question being submitted, the Senate, without division, decided that the interrogatory should be admitted.

2188. While managers or counsel may argue in objection to a question put to a witness by a Senator in an impeachment trial, the Senator may not reply.—On July 19, 1876,[63] in the Senate sitting for the impeachment trial of William W. Belknap, John S. Evans, post trader at Fort Sill, was called as a witness on behalf of the respondent. It was alleged that Evans had been appointed by respondent through improper influence by one Marsh, who had shared by the terms of a contract in Evans's profits and divided them with respondent.

Mr. Theodore F. Randolph, a Senator from New Jersey, proposed this question to witness:

[63] First session Forty-fourth Congress, Record of trial, p. 275.

The question is this: What amount of goods did Mr. Evans sell at Fort Sill during any one year pending this contract?

Mr. Matt. H. Carpenter, of counsel for respondent, objected:

The object of that question seems to be to show that he made an improvident contract with Marsh and paid him too much. I submit that that can have no materiality to this case. If the managers trace $500 home to Belknap in the form of a bribe, it is just as complete a case as $50,000. If he paid him an unreasonable bribe, it is no worse than to pay ten cents.

Mr. Randolph said:

I am unfortunately placed to argue the question with the counsel—

The President pro tempore [64] said:

Debate is not in order. The question will be put.

Thereupon, without division, the Senate decided that the question should be admitted.

2189. Rule of the Senate in the Swayne trial permitting managers or counsel to offer motions or raise questions as to evidence and prescribing the manner thereof.—On January 27, 1905,[65] in the Senate sitting for the impeachment of Judge Charles Swayne, Mr. Henry W. Palmer, of Pennsylvania, of the managers for the House of Representatives, offered the following:

Ordered, That lists of witnesses be furnished the Sergeant-at-Arms by the managers and the respondent, who shall be subpoenaed by him to appear on the 10th day of February, at 1 o'clock p.m.

Later Mr. Charles W. Fairbanks, a Senator from Indiana, said:

We understand that the order which the managers of the House have asked for can not properly be put by them, and I suppose it is the proper practice to regard the order offered as a request. I offer, upon the request of the managers of the House, for present consideration, the order which I send to the desk.

Later, after the Senate had resumed its legislative sessions, Mr. Joseph W. Bailey, of Texas, said:

Mr. President, a moment ago, when the Senate was sitting as a court, it was doubted if the managers on the part of the House are permitted under the rules to make a motion. My own opinion is that nobody but a Senator can make a motion to be voted on by the Senate, but it would be a most anomalous situation if an attorney in any kind of a court could not make motions before that court to be acted on by that court. And for my own guidance—I am sure that other Senators are in much the same frame of mind—I should like to have that question settled. If it would be proper, I should like to have the Judiciary Committee report, or if the Senate prefers, a special committee, what have been the practice and the precedents in that respect.

It was pointed out that the Senate already had appointed a select committee to examine such questions, and that they would consider this question.

On February 3 [66] Mr. Augustus O. Bacon, of Georgia, offered, and the Senate sitting for the trial agreed to, an order as follows:

Ordered, That in all matters relating to the procedure of the Senate sitting in the trial of the impeachment of Charles Swayne, judge of the district court of the United States in and for the northern district of Florida, whether as to form or otherwise the managers on the part of the House or the counsel representing the respondent may submit a request or application orally to the

[64] T. W. Ferry, of Michigan, President pro tempore.
[65] Third session Fifty-eighth Congress, Record, pp. 1450, 1451.
[66] Record, p. 1819.

Presiding Officer, or, if required by him or requested by any Senator, shall submit the same in writing.

In all matters relating immediately to the trial, such as the admission, rejection, or striking out of evidence, or other questions usually arising in the trial of causes in courts of justice, if the managers or counsel for the respondent desire to make any application, request, or objection, the same shall be directly addressed to the Presiding Officer and not otherwise.

2190. During final argument in the Chase trial the managers claimed and obtained the right to introduce testimony to justify evidence of an impeached witness.—On February 25, 1805,[67] in the high court of impeachments, during the trial of the case of United States *v.* Samuel Chase, an associate justice of the Supreme Court of the United States, the testimony had been closed, the beginning on behalf of the managers in the final argument had been made, and two of the counsel for the respondent had submitted arguments, when Mr. John Randolph, Jr., of Virginia, chairman of the managers, moved the examination of Hugh Holmes, who would testify in corrobation of the testimony of John Heath, a witness for the managers, whose evidence had been attacked. Mr. Randolph explained that Mr. Holmes did not attend until the evidence for the managers had been concluded. Mr. Randolph further said:

I only state this circumstance in tenderness to the character of the witness, and that Mr. Holmes is ready to prove that, pending the trial of Callender, Mr. Heath did declare to him as having passed in his presence such a conversation as the witness has stated. It is not our wish to press his evidence, because we know that the evidence of a witness thus rebutted can establish nothing material to the prosecution. But we are ready, if the court and counsel for the respondent agree, to receive his testimony.

Mr. Robert G. Harper, counsel for the respondent, said:

It is not for us to say how the honorable managers shall proceed in conducting this prosecution. We have no objection to Mr. Holmes being examined, and we feel perfectly indifferent whether Mr. Heath be abandoned or not. Should Mr. Holmes not be examined, I presume it will be understood that he was offered to support the declaration of Mr. Heath.

Mr. Randolph said it was not intended to abandon Mr. Heath.

Mr. Harper inquired how long Mr. Holmes had been in the city. If correctly informed he had been here three days, and if so, his testimony might have been adduced before the defense on the part of the respondent was made.

Mr. Randolph said the delay in offering Mr. Holmes to the court arose solely from an indisposition to interrupt the counsel for the defendant. The character of Mr. Holmes stood to high to be impeached. It was only when they heard the correctness of Mr. Heath's testimony questioned that the managers deemed it necessary to do that, for the not doing of which they had received the censure of the counsel for the respondent. Mr. Randolph then moved that Hugh Holmes should be sworn.

The President [68] said the reasons assigned for the admission of Mr. Holmes's testimony, so far as they arose from tenderness to the character of Mr. Heath, could have no weight with the court. The only question for them to decide was whether his testimony was or was not material.

[67] Second session Eighth Congress, Senate Impeachment Journal, p. 523; Annals, p. 541.
[68] Aaron Burr, of New York, Vice-President, and President of the Senate.

Mr. Joseph H. Nicholson, of Maryland, one of the managers, said he held it to be the right of either party, at any stage of the trial, when the evidence of a witness was impeached, to justify it by the testimony of another witness. He asked the receiving, therefore, of Mr. Holmes's testimony as a matter of right, not of favor.

The yeas and nays were taken on examining Mr. Holmes, and were yeas 21, nays 11.

2191. Instance of a suggestion by the Presiding Officer in the Swayne trial as to the form of a question.—On February 20, 1905,[69] in the Senate sitting for the impeachment trial of Judge Charles Swayne, a witness on behalf of the managers was questioned by Mr. Manager David A. De Armond, of Missouri:

Q. Now, then, as to the matter of that newspaper article. I understood you to say that you knew nothing whatever about it and that you so stated during the hearing of these contempt proceedings?—A. Yes, sir.

Q. And that Mr. Davis made a similar statement concerning himself?—A. I heard it; yes, sir.

Q. In the court, during the contempt proceedings?—A. Yes, sir.

Q. I will ask you whether there was anything else offered in testimony by those supporting the complaint against you than these two matters?—A. Nothing whatever.

Q. Then I will ask you whether there was anything upon which testimony could have borne in the matter brought out against you?

Mr. John M. Thurston, of counsel for the respondent, objected to this question.

The Presiding Officer[70] said:

In that form the question is hardly admissible. * * * The witness might be asked if he supposed there was anything which was important which was overlooked.

2192. Decision as to the limits within which counsel in an impeachment trial may criticise a witness.—On February 18, 1805,[71] in the high court of impeachments, during the trial of the case of The United States *v.* Samuel Chase, one of the associate justices of the Supreme Court of the United States, a witness, John Montgomery, was called and in the course of cross-examination Mr. Robert G. Harper, counsel for the respondent, said:

I will now proceed to show that Mr. Montgomery, in his strong anxiety to get Judge Chase impeached, has remembered things which nobody else remembers, and has heard things which nobody else heard.

Mr. John Randolph, jr., of Virginia, chairman of the managers, said:

I will ask of this court whether the witnesses we have called are not under their protection?

The President said:

If the counsel, in the testimony they adduce, come up to what they state they can prove, they will not be subject to reproach; if they do not, they merit it.

Mr. Randolph said:

I have no objection to the counsel impugning the veracity of one witness by the evidence of another and descanting upon it, but I think they take an improper liberty when they undertake to say, before it is proved, that what is deposed by a witness never passed.

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[69] Third session Fifty-eighth Congress, Record, pp. 2905, 2906.
[70] Orville H. Platt, of Connecticut, Presiding Officer.
[71] Second session Eighth Congress, Annals, p. 291.

The President [72] said:

I understand the gentleman to say that he will prove by another witness that what has been deposed never did pass.

Mr. Harper said:

Precisely so, sir.

2193. In the Swayne trial the Presiding Officer generally ruled on questions of evidence instead of submitting them directly to the Senate.—On February 21, 1905,[73] in the Senate sitting for the impeachment trial of Judge Charles Swayne, the Presiding Officer submitted a question relating to the admissibility of evidence, to the Senate directly, without ruling himself. Generally, in the course of this trial the Presiding Officer ruled, and very rarely indeed was the judgment of the Senate asked. The cases wherein the Presiding Officer submitted the question at once to the Senate without ruling himself were rare and exceptional. On February 23 [74] occur several instances when the Presiding Officer submitted the decision at once to the Senate, and thereafter on the few succeeding days he submitted questions with more frequency.

2194. When the judgment of the Senate is asked after the Presiding Officer has ruled on a question of evidence, the form of question is, "Is the evidence admissible?"—On February 14, 1905,[75] in the Senate sitting for the impeachment trial of Judge Charles Swayne a question arose as to an offer of evidence, and the judgment of the Senate was asked by Mr. Joseph W. Bailey, a Senator from Texas. The Presiding Officer said:

Objection was made to the introduction of certain evidence. The offer on the part of the managers of the House to prove what Judge Swayne stated before a committee of the House when he appeared voluntarily before that committee was objected to by counsel for the respondent. The Presiding Officer ruled that without inquiring technically whether it was testimony which Judge Swayne gave, or technically whether this was a criminal court, that the intention of the statute referred to was such as made it proper to exclude the testimony; and from that the Senator from Texas took an appeal.

Mr. Joseph B. Foraker, a Senator from Ohio, raised a question:

Mr. President, I submit it is not technically correct to call it an appeal. The rule provides when the Chair has ruled, it may, if any Senator so requests, submit the question to the Senate. I understand this is simply a request that the question be submitted to the Senate. * * * The question submitted to the Senate should be whether or not the objection of counsel for the respondent shall be sustained. So an affirmative vote would sustain the objection.

Mr. Albert J. Hopkins, a Senator from Illinois, said:

Would not the form under the rule then be as to whether the decision of the Chair shall stand as the judgment of the court?

Mr. Shelby M. Cullom, a Senator from Illinois, said:

I desire to read a paragraph from the trial of the President of the United States years ago:

"The CHIEF JUSTICE. Senators, the Chief Justice is unable to determine the precise extent to which the Senate regards its own decisions as applicable. He has understood the decision to be that, for the purpose of showing intent, evidence may be given of conversation, with the President at or near the time of the

[72] Aaron Burr, of New York, Vice-President, and President of the Senate.
[73] Third session Fifty-eighth Congress, Record, p. 2079.
[74] Record, pp. 3147, 3167.
[75] Third session Fifty-eighth Congress, Record, p. 2540.

transaction. It is said that this evidence it distinguishable from that which has been already introduced. The Chief Justice is not able to distinguish it, but he will submit directly to the Senate the question whether it is admissible or not."

The Presiding Officer [76] said:

This is the rule:

"And the presiding officer on the trial may rule [on] all questions of evidence and incidental questions, which ruling shall stand as the judgment of the Senate, unless some Member of the Senate shall ask that a formal vote be taken thereon, in which case it shall be submitted to the Senate for decision; or he may, at his option, in the first instance, submit any such question to a vote of the Members of the Senate."

The presiding officer was of opinion that the question was whether the evidence was admissible. * * * The presiding officer then submits to the Senate the question whether the evidence offered by the managers on the part of the House is admissible.

2195. The right to ask a decision of the Senate after the Presiding Officer has ruled preliminarily on evidence belongs to a Senator, but not to counsel.—On July 7, 1876,[77] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, a question by counsel for the respondent to a witness was objected to by Mr. Manager John A. McMahon.

The President pro tempore [78] said:

The Chair sustains the objection.

Mr. Matt. H. Carpenter, of counsel for respondent, asked if he might appeal to the Senate.

The President pro tempore [78] held that he might not, but said that a Senator might have the point submitted to the Senate.

2196. The Senate finally decided in the Swayne trial that under the rule debate on the admission of evidence might not take place in open Senate.—On February 14, 1905,[79] in the Senate sitting for the impeachment trial of Judge Charles Swayne, the decision of the Senate was asked on a question relating to the admissibility of evidence. Mr. Joseph W. Bailey, a Senator from Texas, proposed to debate the question, when a question as to debate arose, and the Presiding Officer [80] said:

In the opinion of the Presiding Officer, the matter can be discussed in the Senate upon the appeal and the vote be taken here, or the Senate can, if it so desires, retire to its conference chamber for discussion. Either course may be pursued, according to the wish of the Senate.

After Mr. Bailey had proceeded in debate for some time, Mr. Augustus O. Bacon, a Senator from Georgia, cited Rules VII and XXIII, saying:

The rule is peremptory that except when the doors are closed there must be no debate, short or long. * * * I read Rule VII to show that Rule XXIII does not in any manner modify the provision of Rule VII as to debate except when the Senate is in secret session; "when the doors shall have been closed," in the language of the rule. I do not think that debate upon any question which may arise is in order. Senators will perceive necessarily that a contrary rule would in its operations protract the session of a court of impeachment beyond the possibility of any practical termination.

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[76] Orville H. Platt, of Connecticut, Presiding Officer.
[77] First session Forty-fourth Congress, Record of trial, p. 192.
[78] T. W. Ferry, of Michigan, President pro tempore.
[79] Third session Fifty-eighth Congress, Record, pp. 2538, 2539.
[80] Orville H. Platt, of Connecticut, Presiding Officer.

The Presiding Officer said:

The Presiding Officer is of opinion that the point of order taken by the Senator from Georgia is well taken, and that the only exception is that contained in Rule VII. Rule XXIII provides:

"All orders and decisions shall be made and had by yeas and nays, which shall be entered on the record, and without debate, subject, however, to the operation of Rule VII, except when the doors shall be closed for deliberation."

The exception in Rule VII is that upon all such questions the vote shall be without a division. But Rule XXIII provides that all orders and decisions shall be by yeas and nays. The exception referred to in Rule VII is upon questions relating to the introduction of evidence and incidental questions; if the vote of the Senate is asked, it may be decided without a division, unless the yeas and nays are demanded.

The Presiding Officer thinks the point is well taken.

2197. In an argument as to the admissibility of evidence, it is not proper to read the very evidence objected to.—On February 23, 1905,[81] in the Senate sitting for the impeachment trial of Judge Charles Swayne, Mr. John M. Thurston, of counsel for the respondent, proposed to submit as evidence certain extracts from the official record of Congressional debates.

Mr. Manager Marlin E. Olmsted, of Pennsylvania, having objected, Mr. Thurston said:

I am offering the proceedings. They directly bear upon the construction of this act, and I have a right to refer to the Congressional Record in the debates, at least; for instance, Mr. Allen, in the Senate, when this provision was under consideration, offered the following——

Mr. Manager Olmsted said:

I object to the gentleman putting in an argument the evidence to which we object. I understand he was about to read from the debates.

The Presiding Officer [82] said:

The Presiding Officer thinks that counsel can make the argument that he desires to make without reading the Congressional debates. He desires to show the nature of the evidence which he proposes to introduce by introducing these debates. They are something more than debates. They are action upon amendments and various motions that were made. The Presiding Officer thinks that that can be done without any actual reading of the debates. There can be statements by counsel as to the particular matter to which he wishes to call the attention of the Senate without reading the debates.

2198. The Chief Justice held, in the Johnson trial, that the offering of evidence might not be interrupted by a question relating to business incident to the trial or to legislative sessions.—On April 3, 1868,[83] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, the managers on behalf of the House of Representatives were engaged in offering certain documentary evidence, when Mr. Henry B. Anthony, a Senator from Rhode Island, proposed to call up for consideration a matter of business pending in a legislative session of the Senate.

The Chief Justice [84] said:

It is not in order to call up any business transacted in legislative session.

2199. In the Belknap trial, by consent of both sides, a statement of what would be proven by an absent witness was admitted,

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[81] Third session Fifty-eighth Congress, Record, pp. 3165, 3166.
[82] Orville H. Platt, of Connecticut, Presiding Officer.
[83] Second session Fortieth Congress, Globe supplement, p. 99.
[84] Salmon P. Chase, of Ohio, Chief Justice.

subject to objection as to its relevancy.—On July 10, 1876,[85] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, Mr. Matt. H. Carpenter, of counsel for the respondent, asked for the reading of two telegrams, one from Gen. W. T. Sherman and the other from Gen. P. H. Sheridan, setting forth that urgent military necessity rendered it desirable that the latter should not leave his post to testify before the Senate in this case. The telegrams having been read, Mr. Carpenter said:

In consequence of those telegrams, and not wishing to interrupt the public service unnecessarily, we have agreed, if the court will permit us, to let it go upon the record, as follows:

I. It is admitted that Lieut. Gen. Phil Sheridan would, if present, testify to the good official character of the respondent while Secretary of War.

II. That in regard to all the applications made for leave to sell liquors at the military posts the matter was referred by the Secretary of War to him, and by him investigated and reported on, and his report in all cases was adopted by the Secretary of War.

III. And that a part of a letter from him, Sheridan, to the Secretary of War, dated March 29, 1872, may be read in evidence and that the same, and said admission, shall be taken and regarded as testimony in this cause with the same effect as though General Sheridan had appeared and testified to the same effect.

It is understood, of course, that all these different points are subject to the objection that they are irrelevant or incompetent if the counsel on the other side chooses to raise that objection.

Mr. Manager John A. McMahon said:

We admit that he would be asked these questions and would answer in that way, provided they were competent or material.

2200. The presentation and reading of a document during introduction of evidence in an impeachment trial was held not to preclude an objection as to its admissibility.—On April 2, 1868,[86] in the Senate sitting for the trial of Andrew Johnson, President of the United States, Mr. Manager James F. Wilson, of Iowa, offered in evidence a certain letter from President Johnson to Gen. U.S. Grant.

The letter having been read, Mr. Henry Stanbery, of counsel for the President, asked that certain documents referred to by the letter as accompanying it be read. The managers having announced that they did not propose to offer the accompanying documents, Mr. Stanbery entered an objection to the admission of the letter without the accompanying documents.

Mr. Manager Wilson raised the point that the objection came too late, since the letter had been submitted and read and was in evidence.

The Chief Justice[87] said:

The Chief Justice is of the opinion that objection may now be taken.

2201. In the Belknap trial the Presiding Officer, on request of respondent's counsel, required the reading in full of letters presented in evidence.—On July 8, 1876,[88] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, Mr. Manager John A. McMahon, in the course of the introduction of testimony, offered a series of letters, the reading of which began.

Mr. George G. Wright, a Senator from Iowa, while admitting that the counsel had the right to have the letters read at length, asked if, in order to save time, they might not be regarded as read.

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[85] First session Forty-fourth Congress, Senate Journal, p. 968; Record of trial, p. 219.
[86] Second session Fortieth Congress, Globe Supplement, pp. 81, 82.
[87] Salmon P. Chase, of Ohio, Chief Justice.
[88] First session Forty-fourth Congress, Record of trial, p. 206.

Mr. Matt. H. Carpenter, of counsel for the respondent, objected and demanded that the letters be read in full.

The President pro tempore [89] directed the reading to proceed.

2202. The Chief Justice held, in the Johnson trial, that offer of documentary proof should state its nature only, but that the Senate might order it to be read in full before acting on the objection.—On April 18, 1868,[90] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, Alexander W. Randall, Postmaster-General, was sworn as a witness on behalf of the respondent, and testified that Foster Blodgett, postmaster at Augusta, Ga., had been suspended from office on complaints both written and verbal. Certified copies of the official papers relating to the removal were then offered in evidence by Mr. William M. Evarts, of counsel for the respondent.

Mr. Manager Benjamin F. Butler, having intimated that there might be objection, the Chief Justice [91] said:

The counsel for the President will state what they propose to prove in writing. * * * It will be necessary to state what the order and letters are; otherwise the court will be unable to judge of their admissibility.

Thereupon Mr. John Sherman, a Senator from Ohio, said:

I think we have a right to ask for the reading of the letters to know what we are called upon to vote.

The Chief Justice said:

The Senate undoubtedly have a right to order the letters to be read. * * * The usual mode of proposing to prove is by stating the nature of the proof proposed to be offered, and then, upon an objection, the Senate decides whether proof of that description can be introduced. It is not usual to read the proof itself. Undoubtedly it is competent for the Senate to order it to be read.

Mr. Evarts thereupon made this offer in writing:

We offer in evidence the official action of the Post-Office Department in the removal of Mr. Blodgett, which removal was put in evidence by oral testimony by the managers.

Mr. Butler having withdrawn all objection, the papers were then offered and read.

2203. Decisions as to the extent to which a witness in an impeachment trial may use memoranda to refresh his memory.—On February 11, 1805,[92] in the high court of impeachments during the trial of the case of United States *v.* Samuel Chase, one of the associate justices of the Supreme Court of the United States, George Hay was sworn as a witness, and made this statement:

The greater part of the evidence I am to deliver relates to what was said by me as counsel for J. T. Callender, who was indicted for a libel on the President of the United States, and what was said by one of the judges; for I do not recollect to have heard the voice of Judge Griffin at any time during the trial. In order to make this statement as accurate as possible, as my memory is not strong, it is necessary to resort to a statement made by myself and the counsel associated with me in the defense of J. T. Callender, which I now hold in my hand, and every part of which, according to my best recollection, is correct.

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[89] T. W. Ferry, of Michigan, President pro tempore.
[90] Second session Fortieth Congress, Globe Supplement, p. 236.
[91] Salmon P. Chase, of Ohio, Chief Justice.
[92] Second session Eighth Congress, Annals, pp. 193–195; Senate Impeachment Journal, p. 518.

Mr. Robert G. Harper, counsel for the respondent, here interrupted Mr. Hay and said:

The witness may refer to anything done by himself at the time the occurrences happened which he relates. But I submit it to the court how correct it is to refer to what was not done by him, or done at the time.

The President asked Mr. Hay whether the notes were taken by him.

Mr. Hay said:

The statement was made by different persons. Some parts were made by myself, perhaps the greater part; the rest by Mr. Nicholas and Mr. Wirt. I believe I shall be able to state from it every material occurrence which took place at the time. With regard to those parts of the statement not made by me, a reference to them will call to my recollection the facts mentioned in such parts. If I state anything which I do not distinctly recollect, upon adverting to the statement, I will explain the actual situation of my mind on that point.

Mr. Joseph H. Nicholson, of Maryland, one of the managers, said:

If I understand the witness, it is not his intention to give the paper in his hand as evidence, but merely to refer to it for the purpose of refreshing his memory.

Mr. Harper said:

I do not understand the way in which it is meant to use the paper. I apprehend that it is a rule of evidence that nothing but notes made at the time of the transactions related can be received as evidence. I therefore am of opinion that a reference to this statement is inadmissible, because a part of it is made by others, and none of it made at the time.

Mr. Caesar A. Rodney, of Delaware, one of the managers, said:

When we advert to what has been stated by the witness, who says he does not mean to state in evidence anything in the paper of which he has not, independently of it, a distinct recollection, I think it is within the law to admit him to avail himself of it. I apprehend that had I attended the trial of Callender and taken minutes, and others had attended and not taken notes, if by recurring to my notes there should be recalled to their recollection facts so distinctly that they could swear to them before the court, it would be competent to admit their reference to such notes.

Mr. George W. Campbell, of Tennessee, one of the managers, inquired whether the objection was not confined to that part of the statement not made by the witness?

Mr. Harper said the objection related to the whole of it.

Mr. Campbell believed that a witness might use any memorandum to refresh his memory; and that it was not necessary that it should be made at the point of time when the events happened. It is sufficient if made at a time when his remembrance of the facts was correct. With regard to that part not taken by himself, if he perused it at a time so shortly after the events related, as to be able to determine it accurate, and now recognize the memorandum to be the same, it was sufficient.

Mr. Luther Martin, counsel for the respondent, said he had been many years in the practice of the law. The rules of evidence were probably different in different States. But he had always supposed that a witness could not be permitted to use any memorandum not made by himself, or at the time of the events related, or near it. He may, before he comes into court, consult any memorandum for the purpose of refreshing his memory, but not in court.

The President [93] said:

The witness proposes to make use of a memorandum under the circumstances which he has stated. The question is, shall the witness be permitted to make use of it?

[93] Aaron Burr, of New York, Vice-President, and President of the Senate.

Mr. John Quincy Adams, of Massachusetts, a Senator, said:

I am not prepared to answer that question at present, not knowing the nature of the minutes the witness proposes to use. I therefore move that the Senate retire before the question is taken.

The question on retiring was taken, and on division lost.

Mr. Adams said he wished to see the papers before he voted.

The President asked Mr. Hay whether it was in his own handwriting.

Mr. Hay replied that it was not; but that it was written by a clerk from a printed statement.

The President asked:

Have you the parts made by yourself separate?

Mr. Hay said he had not.

The President then put the question:

Shall the witness be permitted to make use of, as a memorandum, a paper containing a statement of facts, composed by himself and other gentlemen, in relation to the trial of James T. Callender, sometime after the trial, the paper proposed to be made use of being a copy made by his clerk from a printed paper which contained the said statement.

And there appeared yeas 16, nays 18.

2204. On April 3, 1868,[94] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, William N. Hudson was sworn and examined by the managers for the House of Representatives as to a certain speech of the President which he assisted in reporting at Cleveland, Ohio. Being questioned as to certain interruptions which the President experienced while speaking, the witness was told by Mr. Manager Butler that he might refresh his memory from any memorandum or copy of a memorandum. Witness then proceeded to use a copy of the newspaper in which the report was printed.

Mr. William M. Evarts, of counsel for the President, objected that the witness should speak by his recollection if he could. If he could not, he might refresh it by the presence of a memorandum which he made at the time.

The Chief Justice [95] having drawn from the witness that the memorandum made by him at the time was lost, and that the newspaper contained a copy of that memorandum, ruled as follows:

It is inquired on the part of the managers what interruptions there were, and the witness is requested to look at a memorandum made at the time in order to refresh his memory. Of that memorandum he has no copy, but he made one at the time, and it is lost. The Chief Justice rules that he is entitled to look at a paper which he knows to be a true copy of that memorandum. If there is any objection to that ruling, the question will be put to the Senate.

2205. It was held in the Peck trial that a witness might correct orally testimony already given by himself.

In correcting testimony previously given in an impeachment trial a witness was not permitted to put in a paper made up in part from the recollections of other persons.

On January 17, 1931,[96] in the high court of impeachment, during the trial of the cause of The United States *v.* James H. Peck, William C.

[94] Second session Fortieth Congress, Globe Supplement, pp. 102, 103.
[95] Salmon P. Chase, of Ohio, Chief Justice.
[96] Second session Twenty-first Congress, Report of the trial of James H. Peck, pp. 286, 287.

Carr presented himself before the court and stated that since the evidence had been closed a written statement of the testimony had been shown to him, from which he perceived that the evidence which he had given was in one point defective, from want of remembrance of certain circumstances. He now therefore prayed leave of the court to present a condensed statement of the facts which had been omitted. He had reduced them to writing under the solemnity of an oath. In doing so he had not chosen to rely altogether upon his own recollection, but had referred to that of two other witnesses in this cause, and also had consulted two other gentlemen concerned in the matter. He hoped that the court would deem this paper admissible. If not, he wished to be subjected to oral examination.

Objection being made by the managers on behalf of the House of Representatives, the paper was withdrawn and the witness was examined orally.

On January 11,[97] B. C. Lucas had presented himself and addressed the court as follows:

I find it incumbent upon me to suggest to the court that since I gave my testimony some facts have occurred to my recollection which then escaped my memory.

Mr. Jonathan Meredith, counsel for the respondent, said:

The witness appears with a view of explaining or supplying a defect in his testimony as before delivered.

The President of the court [98] said:

The witness has a right to make an explanation of his testimony.

2206. Instance wherein depositions offered in an impeachment trial were purged of matters in conflict with the rule laid down as to evidence.—On January 10, 1831,[99] in the high court of impeachment, during the trial of the cause of The United States *v.* James H. Peck, Mr. Jonathan Meredith, counsel for the respondent, offered in evidence and read certain depositions. He stated that in consequence of decisions just made by the court of impeachment, relative to the admissibility of evidence, he had stricken from the depositions, which had been taken in Missouri, all those portions which were covered by the principles of the decision. The depositions, he said, had been examined jointly by the managers for the House of Representatives and himself, and the portions to be expunged had been mutually agreed upon.

2207. The Senate struck from the record of an impeachment trial certain statements of fact introduced by a manager in argument, without support of evidence.

On an order presented by a Senator in the course of an impeachment trial it was held that Senators might debate only in secret session.

An order affecting the conduct of a manager being presented during an impeachment trial, he was permitted to explain.

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[97] Report of trial of James H. Peck, p. 279.

[98] John C. Calhoun, of South Carolina, Vice-President and President of the Senate.

[99] Second session Twenty-first Congress, Senate Impeachment Journal, p. 332; Report of trial of James H. Peck, p. 239.

On April 16, 1868,[100] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, Mr. Manager Benjamin F. Butler, in the course of a speech of protest against the delays of the proceedings, introduced certain tabular statements of the sales of gold by the Government, with the object of supporting his claim that the delay in the trial of the President was reacting unfavorably on the country. These statements were printed in the Globe for that day.

On April 17, the Senate having convened for the trial, Mr. Orris S. Ferry, a Senator from Connecticut, offered the following:

Whereas there appear in the proceedings of the Senate of yesterday as published in the Globe of this morning certain tabular statements incorporated in the remarks of Mr. Manager Butler upon the question of adjournment, which tabular statements were neither spoken of in the discussion nor offered or received in evidence: Therefore,

Ordered, That such tabular statements be omitted from the proceedings of the trial as published by rule of the Senate.

Mr. Thomas A. Hendricks, of Indiana, asked if it would be in order for a Senator to defend the Secretary of the Treasury against the attacks of the manager.

The Chief Justice [1] said that the rules positively prohibited debate. He said, however:

The question of order is made by the resolution proposed by the Senator from Connecticut. Upon that question of order, if the Senate desire to debate, it will be proper that it should retire for consultation. If no Senator moves that order, the Chair conceives that it is proper that the honorable manager should be heard in explanation.

Mr. Manager Butler thereupon made a brief explanation.

The order proposed by Mr. Ferry was then agreed to without division or debate.

2208. Having ascertained that certain testimony was within the scope of the articles of impeachment, the Senate reversed a decision that the testimony was immaterial.

Discussion as to whether or not the cross-examination in an impeachment trial may go beyond the scope of the direct examination.

Instance wherein a President pro tempore presiding at an impeachment trial made a decision as to evidence.

On July 7, 1876,[2] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, General Irvin McDowell, a witness for the Managers, was cross-examined by Mr. Matt H. Carpenter, of counsel for the respondent. It had been charged against the respondent that he had appointed one Marsh to be post trader at Fort Sill, but that the name of one Evans had been substituted, said Evans having contracted with Marsh to share with him the profits, while Marsh remained away from Fort Sill and at his home in New York, and, it was charged, shared the money sent by Evans with the respond-

[100] Second session Fortieth Congress, Senate Journal, pp. 907, 908; Globe supplement, pp. 209, 210.

[1] Salmon P. Chase, of Ohio, Chief Justice.

[2] First session Forty-fourth Congress, Senate Journal, pp. 962, 963; Record of trial, pp. 190–192.

ent. The witness, by direction of the Secretary of War, had drawn an order relating to absentee post traders. The examination proceeded thus:

Q. (By Mr. Carpenter). In regard to the post trader residing at the post, was there any object in that except to keep him at all times subject to military regulation and bring him more nearly within the control of the men who ought to control—the military officers?—A. My own view in drawing up that order was aimed at the question in hand of there being what I supposed to be a post trader at Fort Sill residing in New York.

Q. Would it make any difference whether he resided in New York or any other place, provided the rates at which he must sell were fixed?—A. I do not know whether it would or not.

Q. Can you conceive any difference?—A. I will only say what was in my mind at the time I drew the order up, that it was with reference to correcting an admitted abuse.

Q. The abuse, as you understood it, was sales at extravagant prices, was it not?—A. No; it was a man holding a place and exacting or receiving a large sum of money for it, having no capital, and doing no service for the money he received.

Q. Is there any way that that could injure the soldier or the country, unless he charged higher prices in consequence of that arrangement?

Mr. Manager John A. McMahon objected to this question, saying:

The objection we make to the question is that it is an endeavor to exculpate the accused by simply proving that he did not hurt the soldiers, although he may have hurt Evans. It seems to me that in the trial of a person for official malfeasance in an impeachment case, if we prove that the Secretary of War is in a corrupt combination with a person who has procured an appointment, by which the person who gets the appointment, for example—and I will give the example, Evans—is to divide the money that Evans may be able to force out of this person, to say that that is innocent simply because it does not raise the price of provisions at the garrison or the price of thread or cotton or whatever else may be wanted there, is certainly to the managers something new in the development of this case and of the theory of the defense. We do not care whether he raised the price of provisions a copper, from our standpoint.

Mr. Montgomery Blair, of council for the respondent, argued:

Mr. President and Senators, I beg to call the attention of the court to the fact that the gentleman in the close of his speech, and his colleague in the opening of his, assumed here as proved and established before this court the very thing that they have yet to prove, of which there is not a scintilla of proof before the court. He says, of course, if they prove that this defendant received this money it is an impeachable offense, and it does not make any difference what this order was drawn for. He goes back constantly harping on that and repeating it as the substance of the thing proved, when it remains yet to be proved, and when the question before this court bears directly upon that question, to show that by the course of conduct adopted by this defendant he could not have known that there was any such contract in existence between these parties.

The effort which we are here now making and the effect of this proof is as positive as it can be made to negative the assumption upon which these gentlemen are asking these questions. Is it not legitimate for us to ask this witness—an experienced officer of the Army, who himself did call upon the Secretary to inform him of this evil in existence and to suggest remedies for it—whether or not the remedy which he himself suggested was not adequate to the evil which he undertook to meet? The question whether the trader lived at the post or anywhere else is, as we expect to show, utterly immaterial; and yet we see that that circumstance was made to figure in the opening of this argument, and is continued to this moment, as the only way of escape from the conclusion and weight of this testimony that the defendant misrepresented to the officer who drew this order the fact that the trader resided not at the post but in New York.

The witness has not said any such thing; he has not said at all that this defendant represented to him any such thing. He has not said that, to begin with. Those are words put into his mouth by these gentlemen. He has not asserted at any time that the defendant told him that the trader lived in New York and that this was carried on for that purpose. He says, to be sure, that, as he now re-

collects it, he understood the fact to be that he did reside somewhere else; but we will show him and show this court before we get through that in that his recollection is mistaken. We will show him that he knew then, at the time, that the trader did not live in New York, but lived at the post. Hence this totally immaterial circumstance in its bearing upon this order is utterly swept out of the way, and the testimony will be left to bear with its whole force upon the fact that this defendant did not know and could not know of the existence of this contract which is the basis of the proceedings.

I therefore insist that this is a principal material question to be answered by the witness, and the fact of the resistance to it makes it manifest to the court that it is a pretty material question.

The question being submitted to the Senate, the question was excluded; yeas 20, nays 31. So the Senate sustained the objection.

Before the above vote had been taken Mr. Samuel J. R. McMillan, a Senator from Minnesota, had briefly called attention to the fact that in one of the articles of impeachment it was charged that Evans was retained in office by the Secretary of War not only corruptly, but that his retention there was "to the great injury and damage of the officers and soldiers of the Army of the United States stationed at said post, as well as of emigrants, freighters, and other citizens of the United States," etc., and suggested that although that issue might not be the only issue in the case, it was an issue that might be a material one, and upon which the Senate would have to pass in their finding.

Soon after the vote,[3] the same witness being under cross-examination, Mr. Carpenter asked:

It is charged in the third article of impeachment that the things alleged to have been done there—that is, the making of this agreement between Evans and Marsh—had been to the great injury and damage of the officers and soldiers of the Army of the United States stationed at that post. In what way could such contract injure the officers of the United States?

Mr. Manager McMahon having objected, the President pro tempore[4] sustained the objection on the ground that a similar question had already been ruled out.

Mr. Carpenter having protested and asked for a hearing, Mr. A. S. Merrimon, a Senator from North Carolina, asked for a vote on the ruling of the Chair, and the President pro tempore submitted the question:

Shall this interrogatory be admitted?

In arguing, Mr. Manager McMahon said:

We have yet offered no proof in this case to show that this has been detrimental to the service of the United States in the view in which the ethics of the gentleman seem to indicate to him may be important. It is a matter really for him in the defense if there is anything in it; and he has no right when we put a witness upon the stand to go into his substantive defense on that point.

The second objection we have in this case is the one which the Senate has already decided. Suppose that we should, taking an indictment, find in that indictment that the offense charged was alleged to be against the peace and dignity of the State of Ohio, or the State of New York, or against the commonwealth; and you were to put a witness on the stand and attempt to prove that it was not against the peace and dignity of the State of Ohio or the State of New York, because it was done in a corner where the State did not see it or had nothing to do with it, and would not know it unless one of the parties told it. It seems to me that it is entirely irrelevant, and it certainly strikes me as a new argument in morals that it is not improper, not an impeachable offense, for a Secretary of War

[3] Senate Journal, p. 963; Record of trial, pp. 192–194.
[4] T. W. Ferry, President pro tempore.

or a Secretary of the Navy to dole out his offices to the men that will make the best bargain with him, without reference to the question whether it may be injurious to the public service or not.

Mr. Carpenter argued—

there is, as every lawyer knows, a conflict in the decisions in England and in some of the States of this country in regard to the extent which a cross-examination may go. The rule in England, I understand to be, and in many of the States, that when a witness is called upon the stand, the other party may cross-examine him as to anything pertinent to the issue. The rule in other States is the reverse, and the rule I am bound to say in the Supreme Court of the United States is that you can only cross-examine as to matters referred to by the direct examination. But I submit to the Senate that in this trial, circumstanced as we are, with many army officers in attendance here whose public duties, as important as the duties of any officer, require their immediate return, and who are staying here every day to the prejudice of the public service, that rule, which after all is one in the discretion of the court, should in this case be, as I understand the English rule to be, that we may ask any witness called to the stand any question pertinent to the issue. There are many advantages in this. In the first place, it will place before the Senate in a compact form most of the testimony upon a particular subject.

In the next place, it will be a great convenience to all these witnesses. I do not understand, however, that I am now going at all beyond the scope of the direct examination. I make this remark because the question will undoubtedly arise hereafter as to other witnesses.

Now the managers say they have not as yet introduced any proof to show that this arrangement was detrimental to anybody. If they admit that it was not, then I do not wish to take a moment of your time in proving that it was not. If they concede that not a soldier paid one cent more for any article that was sold at that post in consequence of this arrangement between Marsh and Evans, that is the end of it. That is all I want to show by this testimony; but we are able to show, and shall if permitted, that notwithstanding this arrangement between Evans and Marsh, Evans never increased his prices on a single article. He has, as he has sworn elsewhere, upon the general average of his prices, charged less than he did before the arrangement made with Marsh.

The question being put on admitting the interrogatory, it was decided in the negative without division.

A little later,[5] the same witness having testified to his official relations with the respondent Mr. Carpenter asked, on cross-examination:

What has been his character as Secretary of War?

Mr. Manager McMahon said:

We object to this question, and will state our objection to the Senate. I think this is clearly substantive matter of defense, and must come into the trial of this case when the defendant opens his side of the case; but I will say to the gentleman here, though it may not waive the proof upon his part, that the managers upon their part, as I understand, are perfectly willing to concede that up to the time of the development of these matters his character was as good as could be desired or wished.

Mr. Carpenter said:

This question, Mr. President and Senators, falls within the class of questions to which I before referred. Of course it is not a cross-examination, but if not answered now, it may make it necessary to keep General McDowell here for several days before it can be put in. I therefore offer it now and let the Senate rule upon it, and then, of course, we shall know exactly what course to take in regard to other evidence from other witnesses.

The Senate, without division, decided that the question should be admitted.

[5] Senate Journal, p. 963; Record of trial, p. 195.

On July 19 [6] John S. Evans, the post trader at Fort Sill, was a witness and was asked this question by Mr. Carpenter:

After you returned to Fort Sill and after that contract made between you and Mr. Marsh, by which you bound yourself to pay him sums of money on dates fixed in the contract, did you put up the prices of your goods at the fort?

Mr. Manager McMahon objected that the Senate had already decided that this line of inquiry was not permissible.

Mr. Carpenter argued:

The fourth article, if I remember the number rightly, charges that in consequence of this arrangement between Marsh and Evans the soldiers and officers of the Union Army were defrauded and compelled to pay extravagant and exorbitant prices. Now we offer to show that that is not true. Let the managers strike it out of the articles and we do not care for the proof. If it remains in the articles, we offer to disprove it and will prove by this witness that he not only did not increase his prices, but that they were absolutely lower from that time out until he was removed than they had ever been before, and not, as he expresses it, the one-tenth part of 1 cent was added to the price of goods sold to the soldiers in consequence of that arrangement.

The Senate, by a vote of yeas 26, nays 13, decided that the question should be admitted.

2209. In the Belknap trial the Senate permitted a redirect examination which was not responsive to the facts elicited in cross-examination.—On July 11, 1876,[7] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, Caleb P. Marsh, a witness on behalf of the United States, was, after the direct examination, cross-examined by Mr. Matt. H. Carpenter, of counsel for the respondent.

At the conclusion of this cross-examination, Mr. John A. McMahon, of the managers on the part of the House of Representatives, resumed examination, which proceeded:

Do you remember upon any occasion when Evans & Co. made payment in a check of Northrop & Chick to you for $500?

Mr. Montgomery Blair, of counsel for the respondent, objected to the question, for reasons stated by Mr. Carpenter:

We have simply cross-examined this witness. We have shown nothing whatever, nor have we attempted to show anything whatever, except what is legitimate matter of cross-examination. They may reexamine in regard to the new matters we have called out in cross-examination, but nothing else. They can not go on now and by this witness attempt to show any consideration or anything of that kind, because that is a part of their case; they have examined the witness upon that subject and called out from him such evidence as they could and passed him over for cross-examination, and they can not return to it now.

Mr. Allen G. Thurman, a Senator from Ohio, suggested:

I wish to suggest that even if the question is not strictly responsive to the cross-examination it is in the discretion of the court to permit it to be answered.

The question being put to the Senate, "Shall said interrogatory be allowed," it was decided in the affirmative without division.

2210. In the Swayne trial it was held that cross-examination should be responsive to the examination in chief.—On February 20, 1905,[8] in the Senate sitting for the impeachment trial of Judge

[6] Senate Journal, p. 982; Record of trial, pp. 279, 280.
[7] First session Forty-fourth Congress, Senate Journal, p. 971; Record of trial, p. 237.
[8] Third session Fifty-eighth Congress, Record, p. 2900.

Charles Swayne, a witness, Simeon Belden, was under cross-examination by Mr. John M. Thurston, of counsel for the respondent, and the following occurred:

Q. As your associate, did he have authority to sign your name, together with his own, as counsel in the matter of these proceedings?—A. He had not—not that I recollect.

Mr. THURSTON (handing paper to Mr. Manager Olmsted). As a part of our cross-examination we offer this paper in evidence.

The paper, which was afterwards read, was as follows:

LAW NO. 72, IN THE UNITED STATES CIRCUIT COURT FOR THE NORTHERN DISTRICT OF FLORIDA, MRS. FLORIDA M'GUIRE V. PENSACOLA CITY COMPANY ET AL.

Hon. F. W. MARSH,
Clerk United States Circuit Court, Northern District of Florida.

DEAR SIR: Please enter the above cause on the trial or call docket for trial at the coming term of court.

LOUIS P. PAQUET,
SIMEON BELDEN,
Attorneys for Plaintiff

PENSACOLA, FLA., *October 28, 1901.*

The Manager David A. De Armond, of Missouri, suggested an objection.

Mr. Thurston said:

If I understand evidence, a paper which is a legitimate part of the res gestæ, of the transaction upon which the witness was examined in chief, may be offered when identified as a part of the cross-examination. We may never desire to present any case on our side, but we can not tell until we have the evidence on the other side in.

Mr. Manager De Armond said:

Mr. President, we do not want to be understood as conceding the proposition which the counsel for the respondent has just stated. The question of the admissibility of a paper is a question that will have to be determined when it is offered; and, of course, if a paper could be introduced as a matter of cross-examination, the question of its competency could not be considered, or there would have to be delay to consider the admissibility of something offered by the opposite side when we are offering our testimony. But as to this paper, and only as to this paper, we do not care.

The Presiding Officer [9] said:

The Presiding Officer understands it is offered merely as a part of the cross-examination. * * * Whether it becomes admissible or pertinent in any other view of the case is a matter to be determined afterwards.

Later, on the same day,[10] and during the cross-examination of the same witness, the following occurred:

Q. You afterwards tried that same case, after it was rebrought, in that same court?—A. Yes, sir.

Q. And there you had every opportunity to secure your witnesses, did you not?—A. We had all facilities on that trial.

Q. You got all the witnesses you wanted?—A. I think we did.

Q. I will ask you to examine this paper [handing paper to witness] and see if it is the præcipe for witnesses filed by you as the witnesses you desire subpœnaed for that trial of the case when it did come on?—A. I suppose this is the list. I did not make it out; neither did I sign it.

Q. Signed by your associate, Mr. Davis, for himself and yourself?—A. I think so.

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[9] Orville H. Platt, of Connecticut, Presiding Officer.
[10] Record, pp. 2901, 2902.

Mr. Thurston said:

Mr. President, it is not necessary to introduce this original paper in evidence, as it already constitutes a part of the record that the other side has put in. Possibly I may be mistaken; the whole record may not have gone in. I ask to have read the names of these witnesses and their residences as showing that all their witnesses, very few in number, resided immediately in and about the court-house at Pensacola.

The Presiding Officer said:

The Presiding Officer has some trouble about having these documents read by the Secretary. Counsel undoubtedly have a right to ask the witness on cross-examination, the witness having testified that there were forty or fifty witnesses, how many witnesses were used when the case came to trial. But the Presiding Officer can not see how it is proper at this time to have this part of the record read. The cross-examination can proceed without the introduction of the paper.

Mr. Thurston said:

Mr. President, we submit to the ruling. We will offer the paper in our own time, when that comes.

2211. On February 20, 1905,[11] in the Senate sitting for the impeachment trial of Judge Charles Swayne, a witness, Simeon Belden, was under cross-examination by Mr. John M. Thurston, of counsel for the respondent, when the following occurred:

Q. This contempt proceeding was brought jointly against you, Davis, and Paquet, was it not?—A. Yes, sir.

Q. At the time you have spoken of it was only tried as to Davis and yourself?—A. Yes, sir.

Q. Further proceedings were thereafter had in that case against your associate, Mr. Paquet, were they not?—A. Other proceedings were had later on.

Q. And those resulted in his making and filing a written apology, did they not?

Mr. Manager David A. De Armond, of Missouri, said:

Mr. President, we are about to object to that. There is a better way of proving that, if it is true, and then it has nothing to do with the case, anyhow. There is no proceeding against Judge Swayne here regarding what he did or did not do with respect to Judge Paquet, and even if it is important to ask what he did or did not, or why he did or did not do it, there is a better way of showing it.

Mr. Thurston said:

I offered it as a part of the res gestæ.

The Presiding Officer[12] said:

The Presiding Officer does not see how that is a part of the cross-examination of this witness upon anything he said. * * * It may become admissible when counsel for the respondent take up the case. The Presiding Officer does not see how it is cross-examination.

2212. Rulings in the Swayne trial as to right of counsel of respondent to introduce documents in evidence during their cross-examination of witnesses for the managers.—On February 15, 1905,[13] in the Senate sitting for the impeachment trial of Judge Charles Swayne, a witness for the managers, Elza T. Davis, was under cross-examination by Mr. Anthony Higgins, of counsel for the respondent, when these questions were asked and answered:

Q. (Producing paper.) Mr. Davis, will you kindly look at the paper I hand you and say whether or not that is your signature?

A. (After examining paper.) Yes, sir; that is my signature.

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[11] Third session Fifty-eighth Congress, Record, p. 2905.
[12] Orville H. Platt, of Connecticut, Presiding Officer.
[13] Third session Fifty-eighth Congress, Record, p. 2622.

Q. Is that a paper presented for you in the United States circuit court for the fifth judicial circuit, relating to the habeas corpus?

A. I do not think it was presented in my case. I think that is an affidavit which was prepared in New Orleans, which Judge Paquet had prepared, and which I signed.

Mr. HIGGINS. If the court please, this is an original paper, and I offer in evidence.

Mr. Manager David A. De Armond, of Missouri, objected that the paper might not thus be introduced in evidence.

The Presiding Officer [12] said:

The Presiding Officer thinks that it is hardly proper to offer this document in evidence on the part of counsel at this time. If they desire to cross-examine the witness upon anything contained in this document, they can do so without offering it formally as evidence now. * * * The Presiding Officer understands that the witness under cross-examination has been asked if a certain document bears his signature, and he says that it does. The Presiding Officer supposes that it is entirely proper for counsel upon cross-examination to ask him any proper question relating to what is in the document, but that this is not the time to offer it in evidence.

2213. Instance wherein during cross-examination in an impeachment trial the Senate sustained objection to evidence on a point not touched in direct examination and of doubtful pertinency.—On July 10, 1876,[14] in the Senate sitting for the impeachment of William W. Belknap, late Secretary of War, Gen. William B. Hazen, a witness on behalf of the United States, was cross-examined by Mr. Matt. H. Carpenter, of counsel for the respondent. A question arose as to whether or not respondent had ordered witness to a Dakota station as a punishment for testimony given before a committee of the House of Representatives in relation to the post tradership at Fort Sill, and Mr. Carpenter offered, in this connection, as follows:

The offer is to show that the President ordered Mr. Belknap as Secretary of War to send a regiment of infantry to Dakota; that Belknap ordered General Sherman to send a regiment of infantry to Dakota; that Sherman ordered General Sheridan to send a regiment of infantry to Dakota; that Sheridan ordered General Pope to send a regiment of infantry to Dakota, and Pope designated the Sixth Infantry, of which Colonel Hazen happened to be colonel. That is all the connection Belknap had with that transaction, and there is the proof of it. [Holding up a bundle of papers.] We offer these papers.

Mr. Manager McMahon said:

We object, and I will state the ground of our objection. We have given no evidence on this point. We concluded the examination of General Hazen without asking him when or where he was ordered after he had given the testimony before the House committee. We did so because we did not desire to encumber this record or this case with any other question except the one legitimately before the Senate. We did it because we were aware of General Hazen's own letter from which we might have drawn our own conclusions, but we care to draw none now and have made nothing upon it; and, as I repeat to the gentleman, he is endeavoring in this case to try a side issue, that side issue being in the first instance whether General Hazen had told the truth about a particular matter; and in the second instance (which has no connection with this case) whether General Belknap sent him to the frozen country because General Hazen testified before the Military Committee.

The question being submitted to the Senate, the evidence was excluded without division.

[14] First session Fifty-fourth Congress, Senate Journal, p. 970; Record of trial, p. 234.

2214. The Chief Justice held, in the Johnson trial, that a witness recalled to answer a question by a Senator might be reexamined by counsel for respondent.

The Chief Justice declined to rule finally that cross-examination of a witness in an impeachment trial should be concluded before his dismissal.

On April 13, 1868,[15] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, Gen. William T. Sherman was recalled as witness at the request of Mr. Reverdy Johnson, a Senator from Maryland, and was asked a certain question submitted in writing by Mr. Johnson, and admitted, after objection, by vote of the Senate.

The witness having answered the question, Mr. Henry Stanbery, of counsel for the respondent (in whose behalf General Sherman had been called originally as a witness), proposed another question.

Mr. Manager Benjamin F. Butler objected that, as counsel for respondent had dismissed the witness, he might not be examined again by counsel for respondent when brought back by a question of the court.

The Chief Justice[16] said:

The Chief Justice thinks it is entirely competent for the Senate to recall any witness. The Senate has decided that the question shall be put to the witness. That amounts to a recalling of him, and the Chief Justice is of opinion that the witness is bound to answer the questions. Does any Senator object?

A little later Mr. Stanbery proposed another question to the witness, and Mr. Manager Butler objected again to the renewal of the examination by the counsel for the President.

The Chief Justice said:

Nothing is more usual in courts of justice than to recall witnesses for further examination, especially at the instance of one of the members of the court. It is very often done at the instance of counsel. It is, however, a matter wholly within the discretion of the court, and if any Senator desires it the Chief Justice will be happy to put it to the court, whether the witness shall be further examined.

Argument arising, Mr. William M. Evarts, of counsel for the President, said:

The question, Senators, whether a witness may be recalled is a question of the practice of courts. It is a practice almost universal, unless there is a suspicion of bad faith, to permit it to be done, and it is always in the discretion of the court. In special circumstances, where collusion is suspected between the witness and counsel for wrong purposes adverse to the administration of justice, a strict rule may be laid down. Whatever rule this court in the future shall lay down as peremptory, if it be that neither party shall recall a witness that has been once dismissed from the stand, of course, will be obligatory upon us, but we are not aware that anything has occurred in the progress of this trail to intimate to counsel that any such rule had been adopted, or would be applied by this court.

Mr. Manager Butler said:

Mr. President, on Saturday this took place. This question was asked:

"In that interview"—

That is, when the offer was made—

"what conversation took place between the President and you in regard to the removal of Mr. Stanton?"

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[15] Second session Fortieth Congress, Globe supplement, p. 169.

[16] Salmon P. Chase, of Ohio, Chief Justice.

That question was offered to be put, and after argument, and upon a solemn ruling, twenty-eight gentlemen of the Senate decided that it could not be put. That was exactly the same question as this, asking for the same conversation at the same time. Then certain other proceedings were had, and after those were had the counsel waited some considerable time at the table in consultation, and then got up and asked leave to recall this witness this morning for the purpose of putting questions. The Senate gave that leave and adjourned. This morning they recalled the witness and put such questions as they pleased, and we spent as many hours, as you remember, in doing that. On Saturday they had got through with him, except that they wanted a little time to consider whether they would recall him; they did recall him this morning, and after getting through with him the witness was sent away. Then he was again recalled to enable one of the judges to put a question to satisfy his mind. Having put his question and satisfied his mind of something that he wanted satisfied, something that he wanted to know, how can it be that that opens the case to allow the President's counsel to go into a new examination of the witness? How do they know, if he is not acting as counsel for the President, and there is not some understanding between them, which I do not charge—how can the President's counsel know that his mind is not satisfied? He recalled the witness for the purpose of satisfying his own mind, and only for that reason. I agree it is common to recall witnesses for something that has been overlooked or forgotten, but I appeal to the Presiding Officer that while—and I never have said otherwise—a member of the court who wants to satisfy himself by putting some question may recall a witness for that purpose, it never is understood that that having been done the case was opened to the counsel on either side to go on and put other questions. The court is allowed to put the question, because it is supposed that the judge wants to satisfy his mind on a particular point. After the judge has satisfied his mind on that particular point then there is to be an end, and it is not to open the case anew. I trust I have answered the honorable Senator from Maryland that I meant no imputation. I was putting it right the other way.

After further argument, the Chief Justice said:

The Chief Justice will explain the position of the matter to the Senate. The Senator from Maryland desired that the following question should be put to the witness (General Sherman): "When the President tendered to you the office of Secretary of War ad interim on the 27th of January, 1868, and on the 31st of the same month and year, did he, at the very time of making such tender, state to you what his purpose in so doing was?" To that question the witness replied, "he did" or "yes." That answer having been given, the Senator from Maryland propounded the further question, "The witness having answered yes, will he state what he said his purpose was?" The witness having made an answer to that question, either partial or full, the Chief Justice is unable to decide which, the counsel for the President propose this question: "Have you answered as to both occasions?" That is the same question which the Senator from Kentucky now proposes to the Chief Justice, and which he is unable to answer. The Senator from Oregon [Mr. Williams] objects to the question proposed by the counsel for the President upon the ground that General Sherman, having been recalled at the instance of a Senator, and having been examined by him, he can not be examined by counsel for the President. The Chief Justice thinks that that is a matter entirely within the discretion of the Senate, but that it is usual, under such circumstances, to allow counsel to proceed with their inquiries relating to the same subject-matter.

The question was then put to the witness.

Later, as the witness had concluded, Mr. Manager Bingham stated that the managers might desire to recall him on the morrow.

Mr. William M. Evarts, of counsel for the President, then said:

We must insist, Mr. Chief Justice, that the cross-examination must be finished before the witness is allowed to leave the stand.

After brief discussion the Chief Justice said:

Undoubtedly the general rule is that if the managers desire to cross-examine they must cross-examine before dismissing the witness, but that will be a question for the Senate when General Sherman is recalled.

2215. The Senate decided in the Belknap trial that a witness recalled, after direct and cross examination, to answer a question by a Senator might not be again subjected to direct examination.

On July 11, 1876,[17] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, Caleb P. Marsh, a witness for the United States, had been examined by the managers, cross-examined by counsel for the respondent, and had responded to questions put by Members of the Senate. Then Mr. Manager John A. McMahon proposed a question.

To this Mr. Matt. H. Carpenter, of counsel for the respondent, objected, saying:

Both parties have made this case to the Senate as they have chosen to make it; and the court has gone through in its own way, seaching for facts, and, I understand, has rested also. Now, is it possible that the parties are to take this case up again and have any rights they would not have, arising from the examination as it took place on their part respectively? They can not go back with such a question certainly, unless it be on account of some questions that the court has put; and that certainly can not renew their right. They put this witness on the stand and exhausted him as far as they thought it was safe to do so; then we cross-examined him; both parties rested; and now the court has rested. Now we protest that the managers can not ask any more questions of this witness.

Mr. McMahon argued:

I understand even the order in which a witness is examined in a court of justice to be always a matter within the discretion of a court. A witness who has been fully discharged and gone may be called back and asked a question because something new has been developed in the case; and often—it is so laid down in the elementary books—you may recall a witness who has been absolutely discharged to ask him whether upon a certain occasion at a certain place he did not say so and so to A B, for the purpose of calling A B right there to contradict him. That is a very common practice.

Now, after the Senate has in the exercise of its discretion put further questions to this witness and eliminated a part of the truth from his bossom, what we want now is directly in the same line to put a question throwing light upon the very questions that have been put.

Mr. Montgomery Blair, of counsel for the respondent, replied:

I know what the gentleman says to be true that a witness may be recalled at any time at the discretion of the court; but the court presides over the trial and looks after the interests of justice, and therefore it is within the competency of the court, as every lawyer knows, to allow a witness to be recalled. But I appeal to this court and to its discretion and ask this court to consider whether it is just to allow this witness to be recalled and reexamined in the manner that it is now sought to do when the gentlemen have made their case, exhausted the witness, turned him over to us and we make a very brief cross-examination, and now when the manager seeks to have the last word of this witness and to reiterate and ding-dong in the ears of the Senate every time he makes a speech denunciations of our client as if he was appealing on the last argument of the case? I appeal to the Senate and to the justice of the Senate to know whether such a course of examination ought to be tolerated.

The point having been raised that the question had been already asked in practically the same form, Mr. McMahon withdrew it.

But soon thereafter, the witness in the meanwhile having answered questions put by Senators, Mr. Manager McMahon proposed another question.

Mr. Carpenter said:

[17] First session Forty-fourth Congress, Senate Journal, p. 973; Record of trial, pp. 240, 241, 243.

That we object to. Unless the court mean to say that the whole case may now be opened by the managers, that is an improper question. It is their direct proof, and they have gone over that.

The Senate, without division, sustained the objection and excluded the question.

2216. In the Johnson trial the Senate declined to admit as rebutting evidence a document not responsive to any evidence offered on the other side.—On April 20, 1868,[18] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, after the defense had concluded their testimony, Mr. Manager Benjamin F. Butler proposed to put in evidence the nomination sent by the President to the Senate on the 13th of February, 1868, of Lieutenant-General Sherman to be general by brevet, and the nomination of Maj. Gen. George H. Thomas, sent to the Senate on the 21st of February, 1868, to be lieutenant-general by brevet and general by brevet.

Mr. William M. Evarts, of counsel for the respondent, objected:

It does not seem to us, Mr. Chief Justice and Senators, to be relevant, and it certainly is not rebutting. We have offered no evidence bearing upon the only evidence you offered under the eleventh article, which was the telegrams between Governor Parsons and the President on the subject of reconstruction. We have offered no evidence on that subject. * * * It is very apparent that this does not rebut any evidence we have offered. It is then offered as evidence in chief that the conferring of brevets on these two officers is in some way within the evil intents that are alleged in these articles. We submit that on that question there is nothing in this evidence that imports any such evil intent.

To this Mr. Manager Butler replied:

I only wish to say upon this that we do not understand that this case is to be tried upon the question of whether evidence is rebutting evidence or otherwise, because we understand that to-day the House of Representatives may bring in a new article of impeachment if they choose, and go on with it; but we have a right to put in any evidence which would be competent at any stage of the cause anywhere. * * * In many of the States—I can instance the State of New Hampshire—I am sure the rule of rebutting evidence does not obtain in their courts at all. Each party calls such pertinent and competent evidence as he has up to the hour when he says he has got through from time to time; and in some other of the States it is so applicable, and no injustice is done to anybody.

The Chief Justice having submitted the case to the Senate, there appeared in favor of receiving the evidence, yeas 14, nays 35. So the evidence was not received.

2217. The question as to whether or not testimony in an impeachment trial might be taken by a committee of the Senate.—On March 25, 1904,[19] in the Senate, Mr. George F. Hoar, of Massachusetts, submitted the following resolution, which was considered by unanimous consent and agreed to:

Resolved, That the Committee on Rules be directed to consider and report whether any amendment be desirable in the Senate rules relating to impeachments, and especially whether the rules may properly and lawfully provide for taking testimony in such cases by a committee in accordance with the practice of the English House of Lords in such cases, questions of the admission of material testimony and the final argument being reserved for the full Senate.

[18] Second session Fortieth Congress, Senate Journal, p. 915; Globe Supplement, p. 247.
[19] Second session Fifty-eighth Congress, Record, p. 3660.

Rules of Evidence in an Impeachment Trial*

2218. After discussion of English precedents, the Senate ruled decisively in the Peck trial that the strict rules of evidence in force in the courts should be applied.

Witnesses in an impeachment trial are required to state facts and not opinions.

Decision as to the limits within which expert testimony may be admitted in an impeachment trial.

On January 7, 1831,[2] in the high court of impeachment during the trial of the case of The United States *v.* James H. Peck, a witness, Robert Walsh, was examined on behalf of the respondent, and Mr. William Wirt, counsel for the respondent, asked this question:

When you read the strictures signed "A Citizen," did they strike you as misrepresenting the opinion of the court in a manner calculated to awaken the contempt and indignation of the people of Missouri, and to impair the confidence of the suitors in that court in the intelligence and integrity of the tribunal?

Judge Peck was impeached for punishing for contempt the author of a letter signed "A Citizen" and published in a St. Louis paper, criticising an opinion delivered by Judge Peck in the case of Goulard's heirs.

Mr. Henry R. Storrs, of New York, one of the managers for the House of Representatives, objected to this question, on the ground that the witness was asked for an opinion instead of a fact. The question for the court to settle in this trial was this: Did the strictures misrepresent the opinion? That was a question which must be decided on facts. The witness was now asked his conclusion, but was that an evidence of fact?

Mr. Jonathan Meredith, counsel for the respondent, argued that the question at issue involved a knowledge of the obscure and intricate

* Hinds' Precedents, vol. 3, p. 537 (1907).

[1] Under parliamentary law the Lords are governed by the legal rules of evidence. Section 2155 of this volume. Legal rules of evidence insisted on in trial of Humphreys. Section 2395. As to necessity of proof of intent to secure judgment for that fact. Sections 2381, 2382.

[2] Second session Twenty-first Congress. Senate Impeachment Journal, p. 331; Report of the trial of James H. Peck, pp. 229–239.

subject of Spanish titles and the application of Spanish laws in Louisiana Territory. The witness, from his familiarity with those subjects, was able to assist the court in forming its opinion. The managers had denied that professional knowledge was needed to show whether or not one paper misrepresented another; but Mr. Meredith held that in this case the court of impeachment could not be presumed to possess the requisite knowledge to enable it to form a correct judgment, unassisted by the opinions and conclusions of others. Therefore the proposed testimony was competent. Furthermore, the intention of the respondent in punishing the author of the strictures was a question of importance, and the proposed testimony would be pertinent to that branch of the discussion.

Mr. William Wirt, also counsel for respondent, elaborated the points outlined by his associate, but before doing so made remarks on the law of evidence as applied to impeachments:

In the well-known case of Warren Hastings, which occupied England so long, a most able and masterly protest was entered by Mr. Burke and the managers on the part of the House of Commons against the application of the rigid rules of evidence which governed the practice of the courts of law. It was contended before that tribunal that instead of the strict and iron rules of a law court, the field was broad and liberal, and to be controlled by no rule but the Lex et consuetudo Parliamenti. The protest is extended, very learned, and rests on numerous authorities; and if this court could have an opportunity to review it, they would not feel the least hesitation as to the fact that they are not to be trammeled and hemmed in by the rigid rules of evidence. I find that in the remarks of the Federalist respecting the high court of impeachment erected by the Constitution of this country, the writer lays it down as a conceded point that the strictness which prevails in the ordinary criminal courts does not apply here, nor is it required that the article of impeachment should be drawn up with all the rigid precision of an indictment. The proceedings in this highest court are to be more liberal and free, and nearer substantially to the course pursued by courts conversant with the civil than the criminal law. Mr. Rawle has the same idea. And the question would be, if the original view could now be before this court, whether this tribunal, which is not an appellate court on all questions of law, and is not, therefore, conversant with the strict rules of law, but whose whole jurisdiction has respect to impeachments alone, should or should not open itself to all lights which can be brought to bear on this decision, and whether more injustice would not accrue from narrowing the apertures through which light is to be received, than from opening them in all directions from whence a single ray can touch them.

In reply, Mr. James Buchanan, of Pennsylvania, chairman of the managers, argued at length in support of the objection, saying in the course of his remarks:

This question in four lines embraces the very essence of the respondent's defense—the very question to be decided by the court, and asks the witness to substitute his opinion for the judgment of the tribunal. I ask, Is there a court in the United States, however inferior its grade, which, on the trial of an indictment for a libel, would not, without an argument, overrule the opinion of a witness as to whether the matter charged to be libellous was or was not a libel, and what would be its effect on the public mind? Does it not strike everyone at the first blush that no such court could be found in any portion of this country?

The gentleman who last addressed the court has argued the question with very great ingenuity, and has presented a variety of topics introductory to the new doctrine which he has advanced concerning the law of evidence. He at first contended (though he afterwards waived the point) that the rules of evidence, by which all other courts of the United States are bound, ought not to be applied in their strictness to this high court of impeachment; and to sustain this proposition, he cited the celebrated protest of Mr. Burke upon the trial of Warren Hastings. But the gentleman seems to have forgotten that in that far-famed trial this very question was fairly made and decided; and it was held that the House of Lords, when sitting as a high court of impeachment, was bound by the same

rules of evidence which regulated the proceedings of the most inferior courts of the kingdom. The whole trial of Judge Chase proceeded upon the same principle.

But even without such a precedent, could there be a reasonable doubt upon this question? What, sir? Against whom is it that this tremendous power of impeachment is invoked? Is it not against high state criminals? Men of standing and influence and character? And when the House of Representatives bring a culprit of this description to trial, are they to be told that in crimes affecting the whole nation, and which, in their consequences, may bring ruin upon the people, that the accused shall enjoy rights and privileges and immunities which are denied to any ordinary citizen, when arraigned before the most inferior court in the land? We deny the existence of any power, even in this high court, to dispense with the rules of evidence. When the House of Representatives become accusers, it is their right to have these rules administered here as they are administered by the Supreme Court and the other tribunals of the country.

There is another point of view in which the doctrine for which we contend will appear peculiarly proper and necessary. Will not the proceedings upon this trial be regarded as a precedent? And if this court shall decide questions of evidence against the law of the land will not such decisions bring the law of evidence into doubt and confusion throughout the United States?

The gentleman has also invoked the Federalist to his aid; and what does it say? Does it declare that on the trial of impeachments there is to be a departure from the established rules of proceeding, and that testimony is to be admitted here which ought to be rejected in a court of law? By no means. It merely recognizes the principle of the English law, that "in the delineation of the offense" in the form of the article of impeachment the same rigid exactness is not required which is necessary in framing an indictment. There is not the least intimation that this court, in the progress of the trial, ought to depart from the ordinary rules of evidence.

In further argument Mr. Storrs said:

I confess I feel alarmed to hear it gravely urged here that an impeachment is to be governed by other rules than the well-known and long-established rules of evidence. Rules of evidence are as much a part of the law of the land as any other part of it, and they constitute the security of every man. A more dangerous principle could not be broached, or a more alarming principle established than that, in the trial of an impeachment, the ordinary rules of evidence are to be relaxed; and I was, I confess, surprised that the respondent should seek to unsettle a principle the overturning of which might easily lead to the most unjust and oppressive proceedings. If this is to be done in favor of the respondent, will it be done in favor of him alone, or may not State favorites be shielded or State victims be destroyed by the same process?

On the question, "Shall this interrogatory be put to the witness?" there appeared yeas 7, nays 35.

Again, on January 10,[3] the same witness being under examination, Mr. Merredith asked this question, which on objection was excluded by a vote of yeas 1, nays 39:

Do you think that the publication signed "A Citizen" was calculated to incense the claimants against the court, and to impair, in their minds, their confidence and respect for the court?

2219. In the Johnson trial the Senate declined to agree to a declaration modifying the strictness of the ordinary rules of evidence.—On April 16, 1868,[4] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, Mr. Charles Sumner, of Massachusetts, proposed the following as a declaration of opinion to be adopted as an answer to the constantly recurring questions on the admissibility of testimony:

Considering the character of this proceeding, that it is a trial of impeachment before the Senate of the United States, and not a proceeding by indictment in an inferior court;

[3] Journal, p. 382; Report of trial, p. 239.
[4] Second session Fortieth Congress, Senate Journal, p. 902; Globe supplement, p. 195.

Considering that Senators are, from beginning to end, judges of law as well as fact, and that they are judges from whom there is no appeal;

Considering that the reasons for the exclusion of evidence on an ordinary trial where the judge responds to the law and the jury to the fact are not applicable to such a proceeding;

Considering that, according to parliamentary usage, which is the guide in all such cases, there is on trials of impeachment a certain latitude of inquiry and a freedom from technicality;

And considering, finally, that already in the course of this trial there have been differences of opinion as to the admissibility of evidence;

Therefore, in order to remove all such differences and to hasten the dispatch of business, it is deemed advisable that all evidence offered on either side not trivial or obviously irrelevant in nature shall be received without objection, it being understood that the same when admitted shall be open to question and comparison at the bar in order to determine its competency and value, and shall be carefully sifted and weighted by Senators in the final judgment.

Mr. John Conness, of California, moved that the paper lie on the table, and the question being taken, there appeared yeas 33, nays 11. So the paper was laid on the table.

2220. In an impeachment trial testimony that can be construed as fairly within the purport of the articles is admitted.—On April 2, 1868,[5] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, Charles A. Tinker was called and sworn as a witness on behalf of the managers, to prove the following dispatches:

MONTGOMERY, ALA.,
January 17, 1867.

Legislature in session. Efforts making to reconsider vote on constitutional amendment. Report from Washington says it is probable an enabling act will pass. We do not know what to believe. I find nothing here.

LEWIS E. PARSONS,
Exchange Hotel.

His Excellency ANDREW JOHNSON, *President.*

UNITED STATES MILITARY TELEGRAPH,
EXECUTIVE OFFICE, WASHINGTON, D.C.,
January 17, 1867.

What possible good can be obtained by reconsidering the constitutional amendment? I know of none in the present posture of affairs; and I do not believe the people of the whole country will sustain any set of individuals in attempts to change the whole character of our Government by enabling acts or otherwise. I believe, on the contrary, that they will eventually uphold all who have patriotism and courage to stand by the Constitution and who place their confidence in the people. There should be no faltering on the part of those who are honest in their determination to sustain the several coordinate departments of the Government in accordance with its original design.

ANDREW JOHNSON.

Hon. LEWIS E. PARSONS, *Montgomery, Ala.*

Mr. Butler stated that he introduced this evidence under the tenth and eleventh articles of impeachment to show how President Johnson had endeavored to oppose the reconstruction legislation of Congress, of which the defeated amendment referred to in the dispatches was a part. Lewis E. Parsons was provisional governor of Alabama, and a man of influence.

The counsel for the President objected to the evidence because it did not refer to acts charged in the articles of impeachment. The tenth article referred to the President's speeches, and not to telegrams; and the eleventh charged him with trying to remove Secretary of War

[5] Second session Fortieth Congress, Senate Journal, p. 377; Globe supplement, pp. 90–92.

Stanton and with trying to prevent the execution of the reconstruction laws. Mr. William M. Evarts, of counsel for the President, said:

"Designing and intending to set aside the rightful authority and powers of Congress, did attempt to bring into disgrace, ridicule, hatred, contempt, and reproach the Congress of the United States and the several branches thereof, to impair and destroy the regard and respect of all the good people of the United States for the Congress and legislative power thereof (which all officers of the Government ought inviolably to preserve and maintain), and to excite the odium and resentment of all the good people of the United States against Congress and the laws by it duly and constitutionally enacted."

That is the entire purview of the intent. Now, the only acts charged as done with this intent are the delivery of a speech at the Executive Mansion in August, 1866, and two speeches, one at St. Louis and the other at Cleveland, in September, 1866. The article concludes that by means of these utterances—

"Said Andrew Johnson has brought the high office of the President of the United States into contempt, ridicule, and disgrace, to the great scandal of all good citizens, whereby said Andrew Johnson, President of the United States, did commit and was then and there guilty of a high misdemeanor in office."

That is the gravamen of the crime; that he brought the presidential office into scandal by these speeches made with this intent. Senators will judge from the reading of this telegram, dated in January, 1867, whether that supports the principal charge or intent of his derogating from the credit of Congress or bringing the presidential office into discredit.

The eleventh article has for its substantive charge nothing but the making of speech of the 18th of August, 1866, saying that by that speech he declared and affirmed—

"In substance, that the Thirty-ninth Congress of the United States was not a Congress of the United States authorized by the Constitution to exercise legislative power under the same, but, on the contrary, was a Congress of only part of the States, thereby denying, and intending to deny, that the legislation of said Congress was valid or obligatory upon him, the said Andrew Johnson, except in so far as he saw fit to approve the same, and, also, thereby denying, and intending to deny, the power of the said Thirty-ninth Congress to propose amendments to the Constitution of the United States; and in pursuance of said declaration"—

That is, in pursuance of the speech made at the Executive Mansion on the 18th of August, 1866—

"The said Andrew Johnson, President of the United States, afterwards, to wit, on the 21st day of February, A. D. 1868, at the city of Washington, in the District of Columbia, did, unlawfully, and in disregard of the requirement of the Constitution that he should take care that the laws be faithfully executed, attempt to prevent the execution of an act entitled, 'An act regulating the tenure of certain civil offices,' passed March 2, 1867"—

Which was after the date of this dispatch—

"By unlawfully devising and contriving, and attempting to devise and contrive, means by which he should prevent Edwin M. Stanton from forthwith resuming the functions of the office of Secretary for the Department of War."

The court will consider whether this dispatch touches that subject.

"And also by further unlawfully devising and contriving, and attempting to devise and contrive, means, then and there, to prevent the execution of an act entitled, 'An act making appropriations for the support of the Army for the fiscal year ending June 30, 1868, and for other purposes,' approved March 2, 1867; and also to prevent the execution of an act entitled, 'An act to provide for the more efficient government of the rebel States,' passed March 2, 1867."

Also, after the date of this dispatch. It is under one or the other of these two articles that this dispatch is, in its date and in its substance, supposed to be relevant.

Mr. Evarts concluded by contending that there was nothing in the telegram that showed the President guilty of crime or misdemeanor in opposing legislation of Congress or in doing anything mentioned in the articles.

Mr. Manager George S. Boutwell specifically cited the concluding words of the eleventh article, wherein the President was charged with "attempting to devise and contrive, means then and there * * * to

prevent the execution of an act" known as the reconstruction act. The adoption of the constitutional amendment was part of the reconstruction system, and the telegram to Governor Parsons was an act hostile to reconstruction.

The question being taken, the Senate decided, yeas 27, nays 17, that the evidence should be admitted.

2221. In the Johnson trial the Senate held inadmissible as evidence of an intent specified in the articles an act not specified in the articles.—On April 2, 1868,[6] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, William E. Chandler, formerly Assistant Secretary of the Treasury, was called by the managers and sworn. The question "Do you know Edmund Cooper?", asked by Mr. Manager Benjamin F. Butler, caused Mr. Henry Stanbery, of counsel for the President, to ask what was the object of eliciting testimony concerning Mr. Cooper. After discussion, Mr. Butler offered the following in writing:

We offer to prove that after the President had determined on the removal of Mr. Stanton, Secretary of War, in spite of the action of the Senate, there being no vacancy in the office of Assistant Secretary of the Treasury, the President unlawfully appointed his friend and theretofore private secretary, Edmund Cooper, to that position as one of the means by which he intended to defeat the tenure-of-civil-office act and other laws of Congress.

Mr. Manager Butler further stated that the proof was offered under the eighth and eleventh articles of impeachment.

Objecting to the testimony offered, Mr. William M. Evarts, of counsel for the President, quoted the eighth article's charge against the President:

"With intent unlawfully to control the disbursement of the moneys appropriated for the military service and for the Department of War, on the 21st day of February, in the year of our Lord 1868, did unlawfully and contrary to the provisions of an act entitled 'An act regulating the tenure of certain civil offices,' passed March 2, 1868, and in violation of the Constitution of the United States, there being no vacancy in the office of Secretary for the Department of War, and with intent to violate and disregard the act aforesaid, then and there issue and deliver to one Lorenzo Thomas a letter of authority in writing, in substance as follows; that is to say:"

Having quoted the article, Mr. Evarts continued:

Now, you propose to prove under that, that there being no vacancy in the office of Assistant Secretary of the Treasury, he proposed to appoint his private secretary, Edmund Cooper, Assistant Secretary of the Treasury. That is the idea, is it, under the eighth article? We object to this as not admissible under the eighth article. As by reference it will be perceived it charges nothing but an intent to violate the civil-tenure act, and no mode of violating that except, in the want of a vacancy in the War Department, the appointment of General Thomas contrary to that act.

As for the eleventh article, the honorable court will remember that in our answer we stated that there was in that article no such description, designation of ways or means, or attempt at ways and means, whereby we could answer definitely; and the only allegations there are, that in pursuance of a speech that the President made on the 18th of August, 1866, he—

"Afterwards, to wit, on the 21st day of February, A.D., 1868, at the city of Washington, in the District of Columbia, did unlawfully, and in disregard of the requirement of the Constitution that he should take care that the laws be faithfully executed, attempt to prevent the execution of an act entitled 'An act regulating the tenure of certain civil offices,' passed March 2, 1867, by unlawfully devising and contriving and attempting to devise and contrive means by which

[6] Second session Fortieth Congress, Senate Journal, pp. 875, 876; Globe Supplement, pp. 86–89.

he should prevent Edwin M. Stanton from forthwith resuming the functions of the office of Secretary for the Department of War, notwithstanding the refusal of the Senate to concur in the suspension therefore made by said Andrew Johnson of said Edwin M. Stanton from said office of Secretary for the Department of War; and also by further unlawfully devising and contriving and attempting to devise and contrive means, then and there, to prevent the execution of an act entitled "An act making appropriations for the support of the Army for the fiscal year ending June 30, 1868, and for other purposes," approved March 2, 1867; and also to prevent the execution of an act entitled 'An act to provide for the more efficient government of the rebel States,' passed March 2, 1867, whereby," etc.

The only allegation here as to time and principal action, in reference to which all these unnamed and undescribed ways and means were used, is that on the 21st of February, 1868, at the city of Washington, he did unlawfully and in disregard of the Constitution attempt to prevent the execution of the civil tenure-of-office act by unlawfully devising and contriving and attempting to devise and contrive means by which he should prevent Edwin M. Stanton from resuming his place in the War Department. And now proof is offered here, substantively, of efforts in November, 1867, to appoint, in the want of a vacancy in the office of Assistant Secretary of the Treasury, Mr. Edmund Cooper. We object to that evidence.

Mr. Butler urged that the appointment of Cooper was one of the means whereby the President sought to so arrange in the Treasury Department that General Thomas's requisitions from the War Department should be honored.

Mr. John A. Bingham, of the managers, also urged that the appointment of Cooper was intended as a means of illegally drawing money from the Treasury on requisitions of an illegal acting Secretary of War. Mr. Bingham further said on the question of evidence:

We consider the law to be well settled and accepted everywhere in this country and England to-day that where an intent is the subject-matter of injury in a criminal prosecution, other and independent acts on the part of the accused, looking to the same result, are admissible in evidence for the purpose of establishing that fact. And we go further than that. We undertake to say, upon very high and commanding authority, not to be challenged here or elsewhere, that it is settled that such other and independent acts showing the purpose to bring about the same general result, although at the time of the inquiry the subject-matter of a separate indictment, are nevertheless admissible. I doubt not that it will occur to the recollection of honorable Senators that among other cases illustrative of the rule which I have just cited it has been stated in the books—the cases have been ruled first and then incorporated into books of standard authorities—that where a party, for example, was charged with shooting with intent to kill a person named, it was competent, in order to show the malice, the malicious intent of the act, to show that at another time and place he laid poison. A party is charged with passing a counterfeit note; it is competent, in order to prove the scienter, to show that he was in possession of other counterfeit notes of a different denomination; and the rule, as stated in the books, is that what is competent to prove the scienter, as a general principle, is competent to prove the intent.

Before deciding the question several Senators propounded questions tending to show whether or not an Assistant Secretary of the Treasury could, in defiance of his chief, the Secretary of the Treasury, or without a special designation from him, or after his removal, honor requisitions for money from the Treasury. The response of witnesses and the reading of the law did not make plain that the Assistant Secretary would have the power, and rather suggested that he would not have it.

The question being taken as to the admissibility of the evidence, the yeas were 22, the nays 27. So the evidence was not admitted.

2222. In the Johnson trial the Senate declined to admit evidence of a fact bearing on the question of intent, no issue having been accepted in the pleadings on this point.

The Senate refused, in the Johnson trial, to admit as evidence in mitigation testimony held otherwise inadmissible.

Instances in the Johnson trial wherein the decisions of the Chief Justice on questions of evidence were overruled.

Instances wherein Senators propounded questions to counsel during arguments as to admissibility of evidence.

On April 17, 1868,[7] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, Gideon Welles, Secretary of the Navy, was sworn and examined as a witness on behalf of the respondent. Mr. Welles testified that he was present at a Cabinet meeting on Friday, February 26, 1867, and thereupon Mr. Willian M. Evarts, of counsel for the respondent, submitted the following offer of proof:

We offer to prove that the President, at a meeting of the Cabinet while the bill was before the President for his approval, laid before the Cabinet the tenure-of-civil-office bill for their consideration and advice to the President respecting his approval of the bill; and thereupon the members of the Cabinet then present gave their advice to the President that the bill was unconstitutional and should be returned to Congress with his objections, and that the duty of preparing a message, setting forth the objection to the constitutionality of the bill, was devolved on Mr. Seward and Mr. Stanton; to be followed by proof as to what was done by the President and Cabinet up to the time of sending in the message.

Mr. Manager Benjamin F. Butler at once objected to the admission of the proposed testimony.

The arguments on this question of evidence were made principally on April 18.

Mr. Manager James F. Wilson, in arguing against the admissibility of the testimony, pointed out that the House of Representatives had, in their replication, made no issue on the question whether or not the President had been advised by his Cabinet that the tenure-of-office act was unconstitutional. Whether the President was so advised or not they held to be immaterial to this case, and hence objected to the testimony on that point as irrelevant.

Mr. Manager Wilson continued:

The respondent is arraigned for a violation of and a refusal to execute the law. He offers to prove that his Cabinet advised him that a certain bill presented for his approval was in violation of the Constitution; that he accepted their advice and vetoed the bill; and upon that, and such additional advice as they may have given him, claims the right to resist and defy the provisions of the bill, notwithstanding its enactment into a law by two-thirds of both Houses over his objections. In other words, he claims, substantially, that he may determine for himself what laws he will obey and execute, and what laws he will disregard and refuse to enforce. In support of this claim he offers the testimony which, for the time being, is excluded by the objection now under discussion. If I am correct in this, then I was not mistaken when I asserted that this objection confronts one of the most important questions involved in this case. It may be said that this testimony is offered merely to disprove the intent alleged and charged in the articles; but it goes beyond this and reaches the main question, as will clearly appear to the mind of anyone who will read with care the answer to the first article. The testimony is improper for any purpose and in every view of the case.

[7] Second session Fortieth Congress, Senate Journal, pp. 909–911; Globe supplement, pp. 225–231.

Mr. Manager Wilson next preceded to examine the constitutional provisions relating to the executive power, and the punishment of impeachment, and then said:

The executive power was created to enforce the will of the nation; the will of the nation appears in its laws; the two Houses of Congress are intrusted with the power to enact laws, the objections of the Executive to the contrary notwithstanding; laws thus enacted, as well as those which receive the executive sanction, are the voice of the people. If the person clothed for the time being with the executive power—the only power which can give effect to the people's will—refuses or neglects to enforce the legislative decrees of the nation, or willfully violates the same, what constituent elements of governmental power could be more properly charged with the right to present and the means to try and remove the contumacious Executive than those intrusted with the power to enact the laws of the people, guided by the checks and balances to which I have directed the attention of the Senate? What other constituent parts of the Government could so well understand and adjudge of a perverse and criminal refusal to obey, or a willful declination to execute, the national will, than those joining in its expression? There can be but one answer to these questions. The provisions of the Constitution are wise and just beyond the power of disputation in leaving the entire subject of the responsibility of the Executive to faithfully execute his office and enforce the laws to the charge, trial, and judgment of the two several branches of the legislative department, regardless of the opinions of Cabinet officers or of the decisions of the judicial department. The respondent has placed himself within this power of impeachment by trampling on the constitutional duty of the Executive and violating the penal laws of the land.

After contrasting the constitutions of the United States and England, the manager quoted an opinion given by Attorney-General Black, dated November 20, 1860, wherein it was stated that "to the Chief Executive Magistrate of the Union is confided the solemn duty of seeing the laws faithfully executed," and proceeded:

A departure from this view of the character of the executive power, and from the nature of the duty and obligation resting upon the officer charged therewith, would surround this nation with perils of the most fearful proportions. Such a departure would not only justify the respondent in his refusal to obey and execute the law, but also approve his usurpation of the judicial power when he resolved that he would not observe the legislative will, because in his judgment, it did not conform to the provisions of the Constitution of the United States touching the subjects embraced in the articles of impeachment on which he is now being tried at your bar. Concede this to him, and when and where may we look for the end? To what result shall we arrive? Will it not naturally and inevitably lead to a consolidation of the several powers of the Government in the executive department? And would this be the end? Would it not rather be but the beginning? If the President may defy and usurp the powers of the legislative and judicial departments of the Government, as his caprices or the advice of his cabinet may incline him, why may not his subordinates, each for himself, and touching his own sphere of action, determine how far the directions of his superior accord with the Constitution of the United States, and reject and refuse to obey all that come short of the standard erected by his judgment?

In conclusion, Mr. Manager Wilson said:

Concede to the President immunity through the advice of his Cabinet officers and you reverse, by your decision, the theory of our Constitution.

Mr. Benjamin R. Curtis, of counsel for the respondent, in arguing said that he should not consume time to reply to those matters which seemed to touch the merits of the case. This was simply a question as to the admissibility of proofs. Continuing, Mr. Curtis said:

The honorable manager has read a portion of the answer of the President, and has stated that the House of Representatives has taken no issue upon that part of the answer. As to that, and as to the effect of that admission by the honorable manager, I shall have a word or two to say presently. But the honor-

able manager has told you that the House of Representatives, when the honorable manager brought to your bar these articles, did not intend to assert and prove the allegations in them which are matters of fact. One of these allegations, Mr. Chief Justice, as you will find by reference to the first article and to the second article and to the third article, is that the President of the United States in removing Mr. Stanton and in appointing General Thomas intentionally violated the Constitution of the United States; that he did these acts with the intention of violating the Constitution of the United States. Instead of saying, "it is wholly immaterial what intention the President had; it is wholly immaterial whether he honestly believed that this act of Congress was unconstitutional; it is wholly immaterial whether he believed that he was acting in accordance with his oath of office, to preserve, protect, and defend the Constitution when he did this act"—instead of averring that, they aver that he acted with an intention to violate the Constitution of the United States.

Now, when we introduce evidence here, or offer to introduce evidence here, bearing on this intent, evidence that before forming any opinion upon this subject he resorted to proper advice to enable him to form a correct one, and that when he did form and fix opinions on this subject it was under the influence of this proper advice, and that consequently when he did this act, whether it was lawful or unlawful, it was not done with the intention to violate the Constitution—when we offer evidence of that character, the honorable manager gets up here and argues an hour by the clock that it is wholly immaterial what his intention was, what his opinion was, what advice he had received and in conformity with which he acted in this matter.

* * * * * * *

I therefore say when the question of his intention comes to be considered by the Senate, when the question arises in their minds whether the President honestly believed that this was an unconstitutional law, when the particular emergency arose, when if he carried out or obeyed that law he must quit one of the powers which he believed were conferred upon him by the Constitution, and not be able to carry on one of the departments of the Government in the manner the public interests required—when that question arises for the consideration of the Senate, then they ought to have before them the fact that he acted by the advice of the usual and proper advisers; that he resorted to the best means within his reach to form a safe opinion upon this subject, and that, therefore, it is a fair conclusion that when he did form that opinion it was an honest and fixed opinion which he felt he must carry out in practice if the proper occasion should arise. It is in this point of view, and this point of view only, that we offer this evidence.

In the course of the discussion Mr. Jacob M. Howard, a Senator from Michigan, had proposed this inquiry:

Do the counsel for the accused not consider that the validity of the tenure of office bill was purely a question of law, to be determined on this trial by the Senate: and, if so, do they claim that the opinion of Cabinet officers touching that question is competent evidence by which the judgment of the Senate ought to be influenced?

To this Mr. Curtis answered:

The constitutional validity of any bill is, of course, a question of law which depends upon a comparison of the provisions of the bill with the law enacted by the people for the government of their agents. It depends upon whether those agents have transcended the authority which the people gave them, and that comparison of the Constitution with the law is, in the sense that was intended undoubtedly by the honorable Senator, a question of law.

The next branch of the question is "whether that question is to be determined on this trial by the Senate."

That is a question I can not answer. That is a question that can be determined only by the Senate themselves. If the Senate should find that Mr. Stanton's case was not within this law, then no such question arises, then there is no question in this particular case of a conflict between the law and the Constitution. If the Senate should find that these articles have so charged the President that it is necessary for the Senate to believe that there was some act of turpitude on his part connected with this matter, some mala fides, some bad intent, and that he did honestly believe, as he states in his answer, that this was an unconstitutional law, that an occasion had arisen when he must act accordingly under his oath of

office, then it is immaterial whether this was a constitutional or unconstitutional law; be it the one or be it the other, be it true or false that the President has committed a legal offense by an infraction of the law, he has not committed the impeachable offense with which he is charged by the House of Representatives. And, therefore, we must advance beyond these two questions before we reach the third branch of the question which the honorable Senator from Michigan propounds, whether the question of the constitutionality of this law must be determined on this trial by the Senate. In the view of the President's counsel there is no necessity for the Senate to determine that question. The residue of the inquiry is:

"Do the counsel claim that the opinion of the Cabinet officers touching that question"—

That is, the constitutionality of the law—

"is competent evidence by which the judgment of the Senate might be influenced?"

Certainly not. We do not put them on the stand as experts on questions of constitutional law. The judges will determine that out of their own breasts. We put them on the stand as advisers of the President to state what advice, in point of fact, they gave him, with a view to show that he was guilty of no improper intent to violate the Constitution.

Mr. Curtis next read a question propounded by Mr. Reverdy Johnson, a Senator from Maryland:

"Do the counsel for the President understand that the managers deny the statement made by the President in his message of December 12, 1867, to the Senate, as given in evidence by the managers at page 45 of the official report of the trial that the members of the Cabinet gave him"—

That is, the President—

"the opinion there stated as to the tenure of office act; and is the evidence offered to corroborate that statement, or for what other object is it offered?"

To this Mr. Curtis replied:

We now understand, from what the honorable manager has said this morning, that the House of Representatives has taken no issue on that part of our answer; that the honorable managers do not understand that they have traversed or denied that part of our answer. We did also understand before this question was proposed to us that the honorable managers had themselves put in evidence the message of the President of the 12th of December, 1867, to the Senate, in which he states that he was advised by the members of the Cabinet unanimously, including Mr. Stanton, that this law would be unconstitutional if enacted. They have put that in evidence themselves.

Nevertheless, Senators, this is an affair, as you perceive, of the utmost gravity in any possible aspect of it; and we did not feel at liberty to avoid or abstain from the offering of the members of the President's Cabinet that they might state to you, under the sanction of their oaths, what advice was given. I suppose all that the managers would be prepared to admit might be—certainly they have made no broader admission—that the President said these things in a message to the Senate; but from the experience we have had thus far in this trial we thought it not impossible that the managers, or some one of them speaking in behalf of himself and the others, might say that the President had told a falsehood, and we wish, therefore, to place ourselves right before the Senate on this subject. We desire to examine these gentlemen to show what passed on this subject, and we wish to do it for the purposes I have stated.

Mr. George H. Williams, a Senator from Oregon, proposed this question:

Is the advice given to the President by his Cabinet with a view of preparing a veto message pertinent to prove the right of the President to disregard the law after it was passed over his veto?

To this Mr. Curtis replied:

It is not of itself sufficient; it is not enough that the President received such advice: he must show that an occasion arose for him to act upon it which in the judgment of the Senate was such an occasion that you could not impute to him wrong intention in acting. But the first step is to show that he honestly believed that this was an unconstitutional law. Whether he should treat it as such in a particular instance is a matter depending upon his own personal responsibility

without advice. That is the answer which I suppose is consistent with the views we have of this case.

The arguments being closed, the Chief Justice [8] said:

Senators, the question now before the Senate, as the Chief Justice conceives, respects not the weight but the admissibility of the evidence offered. To determine that question it is necessary to see what is charged in the articles of impeachment. The first article charges that on the 21st day of February, 1868, the President issued an order for the removal of Mr. Stanton from the office of Secretary of War; that this order was made unlawfully, and that it was made with intent to violate the tenure of office act and in violation of the Constitution of the United States. The same charge in substance is repeated in the articles which relate to the appointment of Mr. Thomas, which was necessarily connected with the transaction. The intent, then, is the subject to which much of the evidence on both sides has been directed; and the Chief Justice conceives that this testimony is admissible for the purpose of showing the intent with which the President has acted in this transaction. He will submit the question to the Senate if any Senator desires it.

The question being taken, there appeared yeas 20, nays 29. So the evidence was decided to be inadmissible.

Immediately thereafter [9] a question asked of the same witness by Mr. Evarts was challenged, thereby bringing from the counsel for the respondent this offer:

We offer to prove that at the meetings of the Cabinet at which Mr. Stanton was present, held while the tenure of office bill was before the President for approval, the advice of the Cabinet in regard to the same was asked by the President and given by the Cabinet; and thereupon the question whether Mr. Stanton and the other Secretaries who had received their appointment from Mr. Lincoln were within the restrictions upon the President's power of removal from office created by said act was considered, and the opinion expressed that the Secretaries appointed by Mr. Lincoln were not within such restrictions.

Mr. Manager Butler objected that this question related to the construction of a law, while the other related to its constitutionality; and that both questions fell under the same principle.

After argument, the Chief Justice said:

The Chief Justice is of opinion that this testimony is proper to be taken into consideration by the Senate sitting as a court of impeachment; but he is unable to determine what extent the Senate is disposed to give to its previous ruling, or how far they consider that ruling applicable to the present question.

The question being submitted to the Senate, it was decided, yeas 22, nays 26, that the evidence was inadmissible.

Very soon thereafter [10] another question asked of the same witness was objected to, whereat the counsel for the respondent presented this offer:

We offer to prove that at the Cabinet meetings between the passage of the tenure of civil office bill and the order of the 21st of February, 1868, for the removal of Mr. Stanton upon occasions when the condition of the public service was affected by the operation of that bill came up for the consideration and advice of the Cabinet, it was considered by the President and Cabinet that a proper regard to the public service made it desirable that upon some proper case a judicial determination on the constitutionality of the law should be obtained.

To this Mr. Manager Butler objected:

Mr. President and Senators, we, of the managers, object, and we should like to have this question determined in the minds of the Senators upon this principle. We understand here that the determination of the Senate is, that Cabinet discussions, of whatever nature, shall not be put in as a shield to the President.

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[8] Salmon P. Chase, of Ohio, Chief Justice.
[9] Senate Journal, pp. 911, 912; Globe supplement, pp. 230, 231.
[10] Senate Journal, p. 912; Globe supplement, p. 233.

That I understand, for one, to be the broad principle upon which this class of questions stand and upon which the Senate has voted; and, therefore, these attempts to get around it, to get in by detail and at retail—if I may use that expression—evidence which in its wholesale character can not be admitted, are simply tiring out and wearing out the patience of the Senate. I should like to have it settled, once for all, if it can be, whether the Cabinet consultations upon any subject are to be a shield.

In reply, Mr. Evarts argued:

By decisive determinations upon certain questions of evidence arising in this cause you have decided that, at least, what in point of time is so near to this action of the President as may fairly import to show that in his action he was governed by a desire to raise a question for judicial determination shall be admitted. About that there can be no question that the record will confirm my statement. Now, my present inquiry is to show that within this period, thus extensively and comprehensively named for the present, in his official duty and in his consultations concerning his official duty with the heads of Departments, it became apparent that the operation of this law raised embarrassments in the public service and rendered it important as a practical matter that there should be a determination concerning the constitutionality of the law, and that it was desirable that upon a proper case such a determination should be had.

Mr. John B. Henderson, a Senator from Missouri, proposed this question to the managers:

If the President shall be convicted, he must be removed from office.
If his guilt should be so great as to demand such punishment, he may be disqualified to hold and enjoy any office under the United States.
Is not the evidence now offered competent to go before the court in mitigation?

To this Mr. Manager Butler replied that usually evidence in mitigation should be submitted after verdict and before judgment. Therefore, he said:

There is an appreciable time in this tribunal, as in all others, between a verdict of guilty and the act of judgment; and if any such evidence can be given at all, it must, in my judgment, be given at that time. It certainly can not be given for any other purpose.

The Chief Justice having submitted the question of admissibility to the Senate there appeared yeas 19, nays 30. So the evidence was not admitted.

Immediately thereupon [11] Mr. Evarts asked of the same witness this question:

Was there, within the period embraced in the inquiry in the last question, and at any discussions or deliberations of the Cabinet concerning the operation of the tenure of civil office act and the requirements of the public service in regard to the same, any suggestion or intimation whatever touching or looking to the vacation of any office by force or getting possession of the same by force?

To this Mr. Manager Butler objected as wholly immaterial and excluded under the principles of the last ruling. He said, in response to a question by the Chief Justice, that it was not worth while to object to the question as leading.

The Chief Justice having submitted the question of admissibility to the Senate, there appeared yeas 18, nays 26. So the question was excluded.

2223. Evidence that from the nature of the charge was immaterial was ruled out during the Swayne trial, although respondent's answer had seemed to lay a foundation for it.—On February 14, 1905,[12] in the Senate sitting for the trial of Judge Charles

[11] Senate Journal, p. 918; Globe supplement, p. 234.
[12] Third session Fifty-eighth Congress, Record, pp. 2532, 2533.

Swayne, a witness, Elza T. Davis, was under examination, when Mr. Porter J. McCumber, a Senator from North Dakota, said:

Mr. President, I want to direct the attention of the Presiding Officer to a matter in the way of an inquiry for information. I understand that the pleadings of this case do make an issuable fact possibly of the question of inconvenience; but what I wish to ask the Chair is this: When the law itself provides that it shall be unlawful for a judge to reside outside of his district, with no question whatever of convenience or inconvenience, whether the time of the Senate could properly be taken up upon an issue which, to my mind, is in no wise involved in the case, I call the Chair's attention to the law, which is very specific.

"Every judge shall reside in the district for which he is appointed, and for offending against this provision shall be deemed guilty of a high misdemeanor."

If the question, it seems to me, Mr. President, of convenience or inconvenience is a question at all, it is precluded by the state itself, which presumes that it will be convenient, or more convenient, if the judge resides there, or less convenient if he does not.

I do not know how many witnesses the managers on the part of the House may have on this subject, but it seems to me that the Chair, sitting as a judge, would necessarily have to rule that all this matter was wholly immaterial. The simple question is, Was he or was he not a resident? And I submit to the Chair whether it should be gone into, and, if so, the limit that should be allowed, taking the position myself that under the statute it can not be an issuable fact.

I may say to the Chair that we might take up a week on this subject, and then every Senator and attorney might concur in the opinion that the question of convenience or inconvenience would not affect it in the least.

Mr. Manager James B. Perkins, of New York, said:

Mr. President, if I may make a suggestion to the Presiding Officer in reference to the suggestion made by the Senator from North Dakota, I will say that the suggestion just made entirely corresponds with what I suggested yesterday, when I asked a somewhat similar question of one of the witnesses. It is the view of the managers, as it is of the Senator, that this evidence is immaterial. The statute says, as the Senator has properly stated, that if the judge does not reside within his district it shall be a high misdemeanor, and whether convenience or inconvenience resulted is, in our judgment, wholly immaterial.

However, in the answer of the respondent, it is alleged that in his belief his absence from his district caused no inconvenience to suitors. To meet that, not knowing what the views of the Senate might be; not knowing but that some one might say, "Ah, well, this judge was absent, but it did no harm, and there was no inconvenience and no suitors suffered," we thought it might be well to offer some evidence on this subject.

But we are entirely content to take the ruling of the Chair that the evidence is immaterial and to offer no more of it, although we have other witnesses whom we could call. As the Senator has suggested, this is a branch on which indefinite evidence might be given if we saw fit to subpoena a sufficient number of lawyers.

Mr. John M. Thurston, of counsel for respondent, said:

Mr. President, counsel for the respondent fully agree with the position stated by the Senator from North Dakota [Mr. McCumber] and also the position as acquiesced in by the managers. We do not believe this testimony is material or relevant. We did, however, in framing our answer have in mind the fact before the committee of the House great stress had apparently been laid in the examination of witnesses upon testimony which they claimed tended to show that Judge Swayne's temporary absences from Florida had caused inconvenience to suitors and attorneys. Therefore we thought we were compelled to meet what had appeared in a previous investigation to be, in the theory of the managers, material. We do not believe it is.

We believe that the question of fact before the court is this, and only this: Did Judge Swayne have a residence in the district for which he was appointed? And that question of fact is in no wise changed or modified by reason of any further situation which may involve the convenience or the inconvenience of suitors or of attorneys.

After further argument the Presiding Officer [12] said:

Unless some Senator desires to have the matter submitted to the Senate, the Presiding Officer thinks that this testimony has some bearing upon the question of residence; that so far as the question of inconvenience is concerned, that is not material to the issue.

And later, during cross-examination of the witness, the Presiding Officer said:

The Presiding Officer does not think that the evidence in relation to the inconvenience of this witness by reason of the absence of Judge Swayne from Florida or Pensacola is material or even admissible, but that so much of his testimony as proves the fact that the judge was absent from Florida at Guyencourt, Del., at certain times is admissible for what it is worth.

2224. A question being raised in the Swayne trial that certain evidence was immaterial, the pleadings were examined to determine whether or not the issue involved was raised.—On February 10, 1905,[14] in the Senate sitting for the trial of Judge Charles Swayne, Mr. Marlin E. Olmsted, of Pennsylvania, one of the managers, called Payne W. Chase, a witness, to prove the charge that the respondent had made false certificates of expenses.

Mr. Joseph W. Bailey, a Senator from Texas, said:

Mr. President, I may be mistaken as to the pleadings, but my understanding is that there is no issue as to the receipt and expenditure as alleged by the House, and that at most all that remains for the Senate to do is to determine the effect of the respondent having drawn the maximum allowance, and to determine, upon the state of the pleadings—it being alleged that he drew the money and did not expend it—what the law in that case is.

If I am right about that, I suggest that the calling of witnesses upon this charge, which involves the question of expense and receipt, would be a useless consumption of the time of the Senate.

Mr. Olmsted replied that an examination of the pleadings would show that the proposed testimony was necessary.

The Presiding Officer [13] said:

A cursory examination of the pleadings leads the Presiding Officer to the conclusion that there is no direct admission in the answer of the respondent that the expenses were actually less than the sum charged, and it seems that evidence may be introduced to show that they were less.

2225. A certified paper, bearing only indirectly on a question at issue, was ruled out in the Swayne trial.—On February 22, 1905,[15] in the Senate sitting for the impeachment trail of Judge Charles Swayne, Mr. Anthony Higgins, of counsel for the respondent, offered testimony in the following words:

Mr. President, on behalf of the respondent, I make the offer of a certified copy of the proceedings of the meeting of the board of county commissioners of Leon County, Fla., December 10, 1904. It is the board which was spoken of by a witness yesterday—Milton Jackson. I have presented the paper to the learned chairman of the managers, and would ask if there is any objection to it. * * * It is that the county commissioners of Leon County, Fla., in which is situated the city of Tallahassee, adopted a resolution at that time extending to Judge Swayne as the judge of the northern district of Florida, having to make a residence within his district, an invitation to reside in the city of Tallahassee. That evidence is before the court. The matter was brought to the attention of a witness (who has been examined here) by the Judge, who told him, the

[12] Orville H. Platt, of Connecticut, Presiding Officer.
[14] Third session Fifty-eighth Congress, Record, pp. 2240, 2241.
[15] Third session Fifty-eighth Congress, Record, p. 2145.

witness testified, that he would not live in Tallahassee because he had taken his residence in Pensacola. It is a fact and a circumstance connected with the act of residence.

Mr. Manager Henry W. Palmer, of Pennsylvania, said:

We object to it as irrelevant, incompetent, and tending to throw no light on the subject-matter under discussion.

The Presiding Officer [16] said:

This paper is a certified copy of the action of the board of county commissioners, held in Tallahassee, being an invitation sent to Judge Swayne to make his permanent home in Tallahassee. The Presiding Officer does not see how it is evidence in this case. If any Senator desires, he will submit the question to the Senate. [A pause.] It is not admitted.

2226. In impeachment trials the rule that the best evidence procurable should be presented has been followed.

It was decided in the Belknap trial that a witness might not be examined as to the contents of an existing letter without the letter itself being submitted.

Instance wherein the President pro tempore ruled on evidence during an impeachment trial.

On April 4, 1868,[17] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, Mr. Robert S. Chew, chief clerk of the State Department, was sworn as a witness on behalf of the House of Representatives, and examined by Mr. Manager Benjamin F. Butler as to the practice of making temporary appointments of assistant secretaries of Departments to perform the duties of their chiefs in the absence of the latter. The witness testified that the appointments in such cases were made by the President, or by his order. Mr. Butler then asked:

Did the letter of authority in most of these cases * * * proceed from the head of the Department or from the President?

Mr. William M. Evarts of counsel for the President, objected that the letter of authority showed from whom it came, and was the best evidence on that point.

In the discussion which followed, the counsel for the President intimated that they did not object if the question was intended to elicit a reply as to whose manual possession the paper came from. But if it was intended to ascertain who signed the paper, then the paper itself would be the best evidence.

Mr. Butler reduced the question to writing as follows:

Question. State whether any of the letters of authority which you have mentioned came from the Secretary of State or from what other officer?

The Chief Justice [18] thereupon made an inquiry which led to this colloquy:

The CHIEF JUSTICE. "Came from the Secretary of State." Do I understand you to mean signed by him?

Mr. Manager BUTLER. I am not anxious upon that part of it, sir. I am content with the question as it stands.

The CHIEF JUSTICE. The Chief Justice conceives that the question in the form in which it is put is not objectionable, but——

Mr. Manager BUTLER. I will put it, then, with the leave of the Chief Justice.

[16] Orville H. Platt, of Connecticut, Presiding Officer.
[17] Second session Fortieth Congress, Globe supplement, p. 118.
[18] Salmon P. Chase, of Ohio, Chief Justice.

The CHIEF JUSTICE. The Chief Justice was about to proceed to say that if it is intended to ask the question whether these documents of which a list is furnished were signed by the Secretary, then he thinks it is clearly incompetent without producing them.

Mr. Manager BUTLER. Under favor, Mr. President, I have no list of these documents; none has been furnished.

The CHIEF JUSTICE. Does not the question relate to the list which has been furnished?

Mr. Manager BUTLER. It relates to the people whose names have been put upon the list; but I have no list of the documents at all. I have only a list of the facts that such appointments were made, but I have no list of the letters, whether they came from the President or from the Secretary or from anybody else.

The CHIEF JUSTICE. In the form in which the question is put the Chief Justice thinks it is not objectionable. If any Senator desires to have the question taken by the Senate, he will put it to the Senate. [To the managers, no Senator speaking.] You can put the question in the form proposed.

Mr. Manager BUTLER (to the witness). State whether any of the letters of authority which you have mentioned came from the Secretary of State, or from what other officer.

Mr. CURTIS. I understand the witness is not to answer by whom they were sent.

Mr. Manager BUTLER. I believe I have this witness.

The CHIEF JUSTICE. The Chief Justice will instruct the witness. [To the witness.] You are not to answer at present by whom these documents were signed. You may say from whom they came.

2227. On July 10, 1876,[19] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, Gen. William B. Hazen, a witness on behalf of the United States, was cross-examined by Mr. Matt. H. Carpenter, counsel for the respondent. The witness testified that he had proposed in a letter to Mr. James A. Garfield, a Member of the House of Representatives, to give information as to post traders, and as a result had been subpoenaed before the Military Committee in 1872. He also testified as to writing letters to the Secretary of War, General Belknap. Then Mr. Carpenter asked:

Q. Do you recollect a long letter to General Belknap dated September 12, 1875?

Witness replied that he did.

Thereupon Mr. Carpenter proposed to ask:

Do you recollect using these words, or substantially these words, in that letter to General Belknap, namely: "I was summoned to Washington to give evidence upon staff organization of the French and German armies. After finishing upon these subjects I was questioned upon the subject of post traders. I at first remonstrated, on the ground that I had not reported the matter to you" (that is, the Secretary), "because I believed the Commissary Department would defeat any action in that direction?"

Mr. Manager John A. McMahon objected, saying:

You have no right to cross-examine him in regard to the contents of a letter without submitting it to him. * * * If you say it is a memorandum of a letter that was destroyed, no matter; but if you claim to have the letter you can not cross-examine him on it without putting it in his hand.

We make objection, Mr. President and Senators, to the witness being asked any question as to the contents of a letter which the counsel apparently holds in his hand. If he does not have it, the objection at any rate goes to the point that it having been addressed to the defendant, the counsel must first show it to have been destroyed.

The question being submitted, the Senate, without division, excluded the question.

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[19] First session Forty-fourth Congress, Senate Journal, p. 970; Record of trial, pp. 231–233.

Thereupon Mr. Carpenter said:

Mr. President, if the Senate will pardon me just a moment, I did not state the ground of the question, because I thought it was apparent. The witness has just sworn to a totally different state of facts; that he came here on subpœna and was examined on this matter in obedience to the subpœna. On cross-examination we got from him the fact that he wrote a letter to General Garfield from his post. Now, here is a letter, or at least I am inquiring of him now if he did not write to General Belknap, on the 12th of September, 1875, a totally different account of that transaction. * * * Senators will recollect that this witness testified here that he gave testimony before the House Military Committee, because he thought if he conferred directly with the Secretary of War he would not pay any attention to it. He then swears he did write a letter and sent it through the regular military channels, communicating everything to General Belknap that he swore to before the committee. In this letter, of which I now question him, he writes, as we claim and offer to prove by him, that he did not report the matter to the Secretary for the reason that he knew the Commissary Department would not permit it to be done.

Mr. George F. Edmunds, a Senator from Vermont, said: "The letter will show," to which Mr. Carpenter replied: "The letter I do not propose to give in evidence."

Objection being made to this debate, Mr. John H. Mitchell, a Senator from Oregon, moved to reconsider the vote whereby the evidence had been excluded.

Thereupon Mr. Montgomery Blair, of counsel for the respondent, argued:

It seems to me that the ruling of the Senate is made upon a rare misconception of the question submitted by my colleague in this case. Here is a witness upon the stand who testifies that he wrote a certain letter to the Secretary of War, semiofficial or official, he does not know which, communicating facts in relation to abuses prevailing at these trading posts in the Indian country, and that the reason why he did not go to the Secretary of War rather than go before the Military Committee to testify about these abuses was that he had written such a letter and that it had received no attention. Now, we want to ask him—and it is perfectly competent; no lawyer I think will deny the competency of it—whether he had not stated to another person on another occasion directly the contrary of that, stating the person and the time, leaving us the liberty of calling in that person, of calling for that letter, and showing that he is here stultifying himself and falsifying himself. * * * I said that I believed every lawyer in this body would recognize the principle that it was perfectly competent to ask a witness whether or not he had on a different occasion given a different account of the same subject than that he now offers. * * * I have not investigated the subject fully; but it seems to me perfectly plain that a party may be called upon to say whether he had not at a different time to a different person made a different statement; and this letter falls entirely within the common practice of showing that a witness had made on a different occasion a different statement in regard to the same subject matter.

Mr. Manager McMahon said:

I think the Senate will discover that a while ago when I interrupted the witness when the contents of a letter were stated to him, I was right in regard to the law. I read now from an elementary book, Greenleaf on Evidence:

"§ 463. A similar principle prevails in cross-examining a witness as to the contents of a letter or other paper written by him. The counsel will not be permitted to represent, in the statement of a question, the contents of a letter, and to ask the witness whether he wrote a letter to any person with such contents, or contents to the like effect, without having first shown to the witness the letter, and having asked him whether he wrote that letter, and his admitting that he wrote it. For the contents of every written paper, according to the ordinary and well-established rules of evidence, are to be proved by the paper itself, and by that alone, if it is in existence."

That is very simple; and I was right a while ago, notwithstanding the overpowering weight of the gentlemen on the other side.

The Senate, without division, disagreed to the motion to reconsider.

2228. On July 12, 1876,[20] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, Nelson H. Davis, Inspector-General of the Army, was examined as a witness on behalf of the respondent, and was asked this question by Mr. Matt. H. Carpenter, of counsel for the respondent:

Q. Were you instructed by General Belknap as Secretary of War at any time to investigate into the standing and character of Durfee & Peck?

Durfee had been partner of one Evans, who was alleged to have been corruptly appointed post trader at Fort Sill by the respondent, and Mr. Carpenter explained the purpose of the question:

Mr. Durfee was Evans's partner, and Mr. Evans informed the Secretary of War of that fact. The Secretary of War had his suspicion that Durfee & Peck or Durfee himself was not the proper man to be appointed, and we propose to show that he ordered this witness to proceed there and inquire into the matter; that he did inquire into it, not at that paricular post, but as to these men, and it was in consequence of that that Mr. Evans, who, it was understood, would go into company with Durfee if he was appointed, was not at that time appointed. Afterwards he did not form that partnership, and he was appointed without objection.

Mr. Manager McMahon objected to the question, saying that it was first desirable to know whether the instructions were written or verbal.

Thereupon Mr. Carpenter waived the question, and asked of witness:

Did you investigate?

Mr. Manager McMahon objected on the ground that the matter was all of record, and hence that the record would be the best evidence.

The question being submitted to the Senate, the journal and record of trial show that the objection was overruled without division, but no record of an answer by the witness appears, and Mr. Carpenter at once proceeded to another matter, as if the question had been excluded.

2229. On July 12, 1876,[21] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, Maj. Gen. John Pope was examined as a witness on behalf of the respondent, and testified as to applications on the part of the post trader at Fort Sill for permits to sell liquor. The witness described the usual way in which such permits were forwarded to the War Department, and then Mr. Matt. H. Carpenter, of counsel for the respondent, asked:

Do you know any instance while General Belknap was Secretary of War, in which he overruled recommendations of the officers through whose hands the application had come?

Mr. Manager John A. McMahon objected, saying:

It seems to me, Mr. President, that the record ought to settle that question. Everything goes officially through the departments and the action of the Secretary of War upon it, favorable or unfavorable, ought to be proved by the record and not by the mere recollection of a witness who has had so many other transactions.

The question being submitted to the Senate, the objection was sustained without objection.

Very soon after Mr. Carpenter asked, and the witness began to answer, as follows:

[20] First session Forty-fourth Congress, Senate Journal, p. 976; Record of trial, p. 258.
[21] First session Forty-fourth Congress, Record of trial, p. 256.

Q. Do you recollect any applications in regard to licenses for selling liquor at Fort Sill while General Belknap was Secretary of War?—A. I remember an application, simply because I had occasion to look it up recently, that the officers at Fort Sill——

Mr. Manager McMahon said:

We object to this. The witness himself discloses the fact that he remembers it because he has recently seen the official documents. Now, I say that the official documents must be produced.

The President pro tempore [22] said:

The manager took exception that the record should be produced, and on the prior ruling of the Senate the Chair ruled that the objection was well taken. If the counsel prefers, the Chair will submit the question to the Senate.

No request was made that the question be submitted, and the examination proceeded: [23]

Q. (By Mr. Carpenter.) Do you know anything of the extension of the reservation about Fort Sill, and when it took place?—A. Fort Sill was a post established at the time I took command of the department. My predecessor in command, General Schofield, was written to from the War Department, I think, directing him to take some steps to have the reservation extended and properly surveyed——

Mr. Manager McMahon objected, saying:

I am obliged again to say that all these are matters of record. The gentleman has a client who understands all about getting copies of them, who is thoroughly informed, and we must certainly object to having oral testimony as to what is matter of record.

The Senate, without division, sustained the objection.

In relation to these decisions, Mr. Carpenter said:

General Pope is very anxious to get away from here and get back to his post, and we are willing to accommodate in every way to reach that result; but if the managers are to pursue the present captious course of objection and require these documents to be produced, they have got to be looked up in the Department, and General Pope will have to stay and swear in view of them; and after Mr. Evans arrives we shall then want him also in regard to two or three points that we can not inquire of now. * * * What I have spoken of now are these very matters that were covered by the questions that you objected we must get the records here to show. General Pope knows just as much about the matter without looking through forty pages as he will after he does that; but still the Senate has sustained the objection; and if you insist on it General Pope must remain. That is all.

Mr. Manager McMahon said:

We certainly must try the case according to the rules of evidence. We want to see the records themselves.

2230. In the Swayne trial hearsay testimony introduced to show inconvenience to litigants from respondent's conduct was ruled out.

Instance during the Swayne trial, wherein the Presiding Officer, contrary to his usual habit, submitted a question of evidence to the Senate at once.

On February 13, 1905,[24] in the Senate sitting for the trial of Judge Charles Swayne, John S. Beard was sworn and examined.

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[22] T. W. Ferry, of Michigan, President pro tempore.
[23] Senate Journal, pp. 975, 976.
[24] Third session Fifty-eighth Congress, Record, p. 2467.

Mr. Manager James B. Perkins, of New York, asked:

Have you ever heard complaints made by counsel of inconvenience in their practice by reason of the absence of Judge Swayne from Florida?

Mr. John M. Thurston, of counsel for respondent, objected, saying:

We object to asking for hearsay testimony. If there are any such cases, the attorneys themselves are within call, and the honorable manager is asking this witness to state nothing more than what some other attorney may have said.

Mr. Manager Perkins said:

Well, Mr. President, how else can the matter of common reputation be proven? The answer of Judge Swayne it seems to us is immaterial. The law requires that he shall live in the district, and if he was not a resident it was a high misdemeanor. But in his answer it is alleged by way of palliation that he does not think inconvenience resulted to the bar. That we can only meet by evidence of this character.

The Presiding Officer [25] said:

The Presiding Officer will submit this question to the Senate. The manager asks the witness, having first inquired who were the lawyers who did most of the business before the district court, if this witness had heard them complain of inconvenience growing out of the absence of Judge Swayne. Objection is made. The Presiding Officer will submit that question to the Senate. Senators who think the question is a proper one will say "aye" [putting the question]; contrary, "no." In the opinion of the Chair the "noes" have it. The objection is sustained.

2231. Testimony as to what was said by the agent or coconspirator of respondent in regard to carrying out respondent's order, the said order being a ground of the impeachment, was admitted. Instance wherein the Chief Justice ruled on the admissibility of evidence during the Johnson trial.

On March 31, 1868,[26] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, Mr. Walter A. Burleigh, Delegate in Congress from Dakota Territory, was sworn, and the examination was begun by Mr. Manager Benjamin F. Butler. Mr. Burleigh testified that he had known Lorenzo Thomas, Adjutant-General of the Army, for several years, and that he had called on General Thomas at his house on the evening of February 21 last, and had a conversation with him.

Thereupon Mr. Manager Butler asked a question which, on the succeeding day, was reduced to writing as follows:

You said yesterday, in answer to my question, that you had a conversation with Gen. Lorenzo Thomas on the evening of the 21st of February last. State if he said anything as to the means by which he intended to obtain, or was directed by the President to obtain, possession of the War Department? If so, state all he said as nearly as you can.

Mr. Henry Stanbery, of counsel for the President, objected to the question. In making his objection, Mr. Stanbery first reviewed the orders issued by the President to Mr. Secretary Stanton and to General Thomas, and continues:

Now, what proof has yet been made under the first eight articles? The proof is simply, so far as this question is concerned, the production in evidence of the orders themselves. There they are to speak for themselves. As yet we have not

[25] Orville H. Platt, of Connecticut, Presiding Officer.
[26] Second session Fortieth Congress, Senate Journal, pp. 867, 872–878; Globe supplement, pp. 59, 63–71.

had one particle of proof of what was said by the President, either before or after he gave those orders or at the time that he gave those orders—not one word. The only foundation now laid for the introduction of this testimony is the production of the orders themselves. The attempt made here is, by the declarations of General Thomas, to show with what intent the President issued those orders; not by producing him here to testify what the President told him, but without having him, sworn at all, to bind the President by his declarations not made under oath; made without the possibility of cross-examination or contradiction by the President himself; made as though they are made by the authority of the President.

Now, Senators, what foundation is laid to show such authority, given by the President to General Thomas, to speak for him as to his intent, or even as to General Thomas's intent, which is quite another question. You must find the foundation in the orders themselves, for as yet you have no other place to look for it. Now, what are these orders? That issued to General Thomas is the most material one; but, that I may take the whole, I will read also that issued and directed to Mr. Stanton himself. He says to Mr. Stanton, by his order of February 21, 1868:

"SIR: By virtue of the power and authority vested in me as President by the Constitution and laws of the United States you are hereby removed from office as Secretary for the Department of War, and your functions as such will terminate upon receipt of this communication.

"You will transfer to Brevet Maj. Gen. Lorenzo Thomas, Adjutant-General of the Army, who has this day been authorized and empowered to act as Secretary of War ad interim, all records, books, papers, and other public property now in your custody and charge."

So much for that. Then the order to General Thomas of the same day is:

"SIR: Hon. Edwin M. Stanton having been this day removed from office as Secretary for the Department of War, you are hereby authorized and empowered to act as Secretary of War ad interim, and will immediately enter upon the discharge of the duties pertaining to that office.

"Mr. Stanton has been instructed to transfer to you all the records, books, papers, and other public property now in his custody and charge.

"Respectfully, yours,

ANDREW JOHNSON.

"To Brevet Maj. Gen. LORENZO THOMAS,
"Adjutant-General U.S. Army, Washington, D.C."

There they are; they speak for themselves; orders made by the President to two of his subordinates; an order directing one of them to vacate his office and to transfer the books and public property in his possession to another party, and the order to that other party to take possession of the office, receive a transfer of the books, and act as Secretary of War ad interim. Gentlemen, does that make them conspirators? Is that proof of a conspiracy or tending to have a conspiracy? Does that make General Thomas an agent of the President in such a sense as that the President is to be bound by everything he says and everything he does even within the scope of his agency?

Mr. Stanbery argued at length to show that General Thomas was an officer of the Government performing his duty under order of a superior officer, and in no sense an agent. Furthermore, he argued that no foundation had been laid for the introduction of such testimony.

Mr. Manager Benjamin F. Butler, replying, gave a brief résumé of the actions of the President in relation to Secretary of War Stanton:

He had come to the conclusion to violate the law and take possession of the War Office; he had come to the conclusion to do that against the law and in violation of the law; he had sent for Thomas, and Thomas had agreed with him to do that by some means if the President would give him the order, and thus we have the agreement between two minds to do an unlawful act; and that, I believe, is the definition of a conspiracy all over the world.

Let me restate this. You have the determination on the part of the President to do what had been declared to be, and is, an unlawful act; you have Thomas consenting; and you have therefore an agreement of two minds to do an unlawful act; and that makes a conspiracy, so far as I understand the law of conspiracy. So that upon that conspiracy we should rest this evidence under article seven, which alleges that—

"Andrew Johnson * * * did unlawfully conspire with one Lorenzo Thomas, with intent unlawfully to seize, take, and possess the property of the United States in the Department of War in the custody and charge of Edwin M. Stanton."

And also under article five, which alleges a like unlawful conspiracy not alleging that intent.

Then there is another ground upon which this evidence is admissible, and that is upon the ground of principal and agent. Let us, if you please, examine that ground for a few moments. The President claims by his answer here that every Secretary, every Attorney-General, every executive officer of this Government exists by his will, upon his breath only; that they are all his servants only, and are responsible to him alone, not to the Senate or Congress or either branch of Congress; and he may remove them for such cause as he chooses; he appoints them for such cause as he chooses; and he claims this right to be illimitable and uncontrollable, and he says in his message to you of December 12, 1867, that if any one of his Secretaries had said to him that he would not agree with him upon the unconstitutionality of the act of March 2, 1867, he would have turned him out at once.

Mr. Butler cited as authorities Roscoe's Criminal Evidence (2 Carrington and Payne, p. 232), United States *v.* Goding (12 Wheaton, pp. 469, 470), and Greenleaf on Evidence.

These arguments as outlined were further amplified by Mr. Benjamin R. Curtis, of counsel for the President, and by Mr. Manager John A. Bingham.

And the question being put to the Senate, it was decided, yeas 39, nays 11, that the question proposed by Mr. Manager Butler should be put to the witness.

2232. On March 31, 1868,[27] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, Hon. Walter A. Burleigh, Delegate from Dakota Territory, was sworn and examined as to a certain visit which he made to the house of Gen. Lorenzo Thomas, of the Army.

The witness having testified that he saw General Thomas at the time of that visit, Mr. Manager Benjamin F. Butler asked:

Had you a conversation with him?

Mr. Henry Stanbery, of counsel for the President, asked the object of the question, to which Mr. Butler replied:

The object is to show the intent and purpose with which General Thomas went to the War Department on the morning of the 22d of February; that he went with the intent and purpose of taking possession by force; that he alleged that intent and purpose; that in consequence of that allegation Mr. Burleigh invited General Moorhead and went up to the War Office. The conversation which I expect to prove is this: After the President of the United States had appointed General Thomas and given him directions to take the War Office, and after he had made a quiet visit there on the 21st, on the evening of the 21st he told Mr. Burleigh that the next day he was going to take possession by force.

Mr. Stanbery [28] thereupon entered an objection.

The Chief Justice [29] said:

The Chief Justice thinks the testimony is competent.

2233. On April 1, 1868,[30] in the Senate during the impeachment trial of Andrew Johnson, President of the United States, Hon. Walter A. Burleigh, Delegate from Dakota Territory, a witness called by the managers, testified to conversation which he had had with Gen.

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[27] Second sesion Fortieth Congress, Senate Jonrnal, p. 867; Globe supplement, p. 59.
[28] The Senate Journal has Mr. William M. Evarts as entering the objection.
[29] Salmon P. Chase, of Ohio, Chief Justice.
[30] Second session Fortieth Congress, Senate Journal, pp. 872, 873; Globe supplement, pp. 71–72.

Lorenzo Thomas, Adjutant-General of the Army, after the said Thomas had been ordered by President Johnson to supersede Secretary of War Stanton and take possession of the office.

Then Mr. Manager Benjamin F. Butler offered this question:

Question. Shortly before this conversation about which you have testified, and after the President restored Major-General Thomas to the office of Adjutant-General, if you know the fact that he was so restored, were you present in the War Department, and did you hear Thomas make any statements to the officers and clerks, or either of them, belonging to the War Office, as to the rules and orders of Mr. Stanton or of the office which he, Thomas, would revoke, relax, or rescind in favor of such officers and employees when he had control of the affairs therein? If so, state as near as you can when it was such conversation occurred, and state all he said as nearly as you can.

Mr. William M. Evarts, of counsel for the President, objected to the question as irrelevant and immaterial to any issue in the cause, and as not to be brought in evidence against the President by any support given by the testimony already in.

Mr. Manager Butler argued that the question was justified, because General Thomas was a coconspirator with the President:

You will observe the question carries with it this state of facts: Thomas had been removed from the office of Adjutant-General, for many years under President Lincoln, under the administration of Mr. Stanton, of the War Office. That is a fact known to all men who know the history of the war. Just before he made him Secretary of War ad interim the President restored Thomas to the War Office as the Adjutant-General of the Army. That was the first step to get him in condition to make a Secretary of War of him. That was the first performance of the President, the first act in the drama. He had to take a disgraced officer, and take away his disgrace, and put him into the Adjutant-General's office, from which he had been by the action of President Lincoln and Mr. Stanton suspended for years, in order to get a fit instrument on which to operate; get him in condition. That was part of the training for the next stage. Having got him in that condition, he being sufficiently virulent toward Mr. Stanton for having suspended him from the office of Adjutant-General, the President then is ready to appoint him Secretary ad interim, which he does within two or three days thereafter.

We charge that the whole procedure shows the conspiracy.

To this Mr. Evarts replied:

The question which led to the introduction of this witness's statements of General Thomas's statements to him, of his intentions, and of the President's instructions to him, General Thomas, was based upon the claim that the order of the President of the 21st of February, upon Mr. Stanton for removal, and upon General Thomas to take possession of the office, created and proved a conspiracy: and that thereafter, upon that proof, declarations and intentions were to be given in evidence. That step has been gained, and, in the judgment of this honorable court, in conformity with the rules of law and of evidence. That being gained, it is similarly argued that if, on a conspiracy proved, you can introduce declarations made thereafter, by the same rule you can introduce declarations made theretofore; and that is the only argument which is presented to the court for the admission of this evidence.

So far as the statements of the learned manager relate to the office, the position, the character, and the conduct of General Thomas, it is sufficient for me to say that not one particle of evidence has been given in this cause bearing upon any one of these topics. If General Thomas has been a disgraced officer; if these aspersions, these revilings are just, they are not justified by any evidence before this court. And if, as a matter of fact, applicable to the situation upon which this proof is sought to be introduced, the former employments of General Thomas and the recent restoration of him to the active duties of Adjutant-General are pertinent, let them be proved; and then we shall have at least the basis of fact of General Thomas's previous relations to the War Department, to Mr. Stanton, and to the office of Adjutant-General.

And, now, having pointed out to this honorable court that the declarations sought to be given in evidence of General Thomas to affect the President with

his intentions are confessedly of a period antecedent to the date to which any evidence whatever before this court brings the President and General Thomas in connection, I might leave it safely there. But what is there in the nature of the general proof sought to be introduced that should affect the President of the United States with any responsibility for these general and vague statements of an officer of what he might or could or would do, if thereafter he should come into the possession of power over the Department?

At the end of the debate the Chief Justice [31] said:

The Chief Justice is of opinion that no sufficient foundation has been laid for the introduction of this testimony. He will submit the question to the Senate with great pleasure, if any Senator desires it. The question is ruled to be inadmissible.

Mr. Jacob M. Howard, of Michigan, a Senator, asked that the question be taken by the Senate; and being put, Shall the question proposed by Mr. Manager Butler be put to the witness? the yeas were 28 and the nays 22.

So the question was put.

2234. An alleged coconspirator was permitted to testify as to declarations of the respondent at a time after the act, the testimony being responsive to similar evidence on the other side.—On April 10, 1868,[32] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, Lorenzo Thomas, Adjutant-General of the Army, was called as a witness on behalf of the President, and related the circumstances which occurred on February 21, 1868, when, in obedience to the direction of the President, he attempted to supersede Mr. Stanton as Secretary of War.

General Thomas having described his interview with Secretary Stanton, Mr. Henry Stanbery, of counsel for the President, proceeded with the examination:

Q. Did you see the President after that interview?—A. I did.
Q. What took place?

At this point Mr. Manager Benjamin F. Butler interposed an objection, as follows:

I object now, Mr. President and Senators, to the conversation between the President and General Thomas. Up to this time I did not object, as you observe, upon reflection, to any orders or directions which the President gave, or any conversation had between the President and General Thomas at the time of issuing the commission. But now the commission has been issued; the demand has been made; it has been refused; and a peremptory order given to General Thomas to mind his own business and keep out of the War Office has been put in evidence. Now, I suppose that the President, by talking with General Thomas, or General Thomas, by talking with the President, can not put in his own declarations for the purpose of making evidence in favor of himself. The Senate has already ruled by solemn vote, and in consonance, I believe, with the opinion of the Presiding Officer, that there were such evidence of common intent between these two parties as to allow us to put in the acts of each to bear upon the other; but I challenge any authority that can be shown anywhere that, in trying a man for an act before any tribunal, whether a judicial court or any other body of triers, testimony can be given of what the respondent said in his own behalf, and especially to his servant, and a fortiori to his coconspirator. A conspiracy being alleged, can it be that the President of the United States can call up any officer of the Army, and, by talking to him after the act has been done, justify the act which has been done?

Replying to this objection, Mr. Stanbery said:

But, says the learned manager, the transaction ended in giving the order and receiving the order, and you are to have no testimony of what was said by the

[31] Salmon P. Chase, of Ohio, Chief Justice.
[32] Second session Fortieth Congress, Senate Journal, p. 885; Globe supplement, pp. 137–140.

President or General Thomas, except what was said just then, because that was the transaction; that was the res gestae. Does the learned gentleman forget his testimony? Does he forget how he attempted to make a case? Does he forget, not what took place in the afternoon between the President and General Thomas that we are now going into, but what took place that night? Does he forget what sort of a case he attempts to make against the President, not at the time when that order was given, nor before it was given, nor in the afternoon of the 21st, but under his conspiracy counts, the managers have undertaken to give in evidence that on the night of the 21st General Thomas declared that he was going to enter the War Office by force?

That is the matter charged as illegal; and the articles say that the conspiracy between General Thomas and the President was that the order should be executed by the exhibition of force, intimidation, and threats, and to prove that what has he got here? The declarations of General Thomas, not made under oath, as we propose to have them made, but his mere declarations, when the President was absent and could not contradict him—not, as now, under oath, and all the conversation when the President was present and could contradict or might admit. The honorable manager has gone into all that to make a case against the President of conspiracy; and not merely that, but proves the acts and declarations of General Thomas on the 22d; and not only that, but as late at the 9th of March, at the presidential level, brings a witness, with the eyes of all Delaware upon him [laughter], and proves by that witness, or thinks he has proved, that on that night General Thomas also made a declaration involving the President in this conspiracy, as a party to a conspiracy still existing to keep Mr. Stanton out of office.

Now, how are we to defend against these declarations made on the night of the 21st or the 22d, and again as late as the 9th of March? Does not the transaction run through all that time? How is the President to defend himself if he is allowed to introduce no proof of what he said to General Thomas after the date of the order? May he not call General Thomas? Is General Thomas impeached here as a coconspirator? Is his mouth shut by a prosecution? Not at all. He is free as a witness—brought here and sworn. Now, what better testimony can we have to contradict this alleged conspiracy than the testimony of one of the alleged conspirators; for if General Thomas did not conspire certainly the President did not conspire. A man can not conspire by himself.

The Chief Justice having submitted the question to the Senate, "Is the question admissible?" there appeared 42 yeas, 10 nays. So the question was admitted.

Later, in the examination of the same witness,[33] Mr. Stanbery asked this question:

Did the President at any time prior to or including the 9th of March authorize or direct you to use force, intimidation, or threats to get possession of the War Office?

Mr. Manager Butler objected to the introduction of such testimony. He said that the President had been impeached on February 22, and what directions he had given after that event were not to be a subject of testimony.

Mr. William M. Evarts, of counsel for the President, contended that, as the managers had introduced witnesses to prove what General Thomas said on March 9, it was competent to introduce evidence as to what the President had actually done.

The Senate, without division, admitted the question.

2235. In general during impeachment trials questions as to conversations with third parties, not in presence of respondent, have been excluded from evidence.—On March 8, 1803,[34] in the high court of impeachment during the trial of John Pickering, judge of the United States district court of New Hampshire, Mr. Jonathan

[33] Senate Journal, p. 886; Globe supplement, p. 141.
[34] First session Eighth Congress, Annals, pp. 358, 359.

Steele was testifying, when Mr. Joseph H. Nicholson, of Maryland, chairman of the managers for the House of Representatives, addressed the court. He said he wished in case it should be deemed proper by the court, to ask one of the witnesses whether he had conversed with the family physician of Judge Pickering, and what his opinion was as to the origination of his insanity. Mr. Nicholson observed that he had doubts of the propriety of this question, and therefore, in the first instance, stated it to the court.

The court decided the question inadmissible.

Later, on the same day, this witness, in the course of his testimony, was going on to state some conversation he had with Judge Pickering's physician at this time which he was induced to ask in consequence of solicitude to gain true information as to the reported intemperance of the Judge, when he was interrupted by the Court,[35] and informed that this species of testimony had been already decided to be inadmissible.

2236. On July 10, 1876,[36] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, Caleb P. Marsh was called as a witness for the United States. It was alleged in the articles of impeachment that Marsh, in collusion with the respondent, had effected the appointment of one Evans as post trader at Fort Sill, and that in consideration thereof Marsh had received from Evans certain sums of money which had been shared with the respondent. The witness being examined as to a contract between himself and Evans as to the payment of the above-mentioned sums of money, identified a paper presented to him as that contract. Then these questions were put and answered:

Q. Did Mr. Evans sign that paper with you?—A. He did.

Q. This agreement was reduced to writing in New York City. State whether it was agreed to before it was reduced to writing, and, if so, where. In other words, whether you came to any understanding in Washington before you went to New York City.—A. We came to an understanding as to the amount he was willing to pay, if I would allow him to hold the post and continue the business at Fort Sill.

Q. In that connection, without further questions, give us all that passed between you and Mr. Evans prior to the execution of this contract.

To the last question Mr. Matt. S. Carpenter, of counsel for the respondent, objected, saying:

The Senate, of course, will observe that this calls for a conversation between the witness and a third person, not in our presence, with no pretense that we know anything about it.

The President pro tempore said:

The question is on the admission of the interrogatory.

The question was decided in the negative.

2237. On July 11, 1876,[37] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, Caleb P. Marsh, a witness on behalf of the United States, had been examined and cross-examined, and had testified to sending to the respondent sums of money which he had received in pursuance to his contract with one

[35] Aaron Burr, of New York, Vice President, was presiding.
[36] First session Forty-fourth Congress, Senate Journal, p. 969; Record of trial, p. 225.
[37] First session Forty-fourth Congress, Senate Journal, pp. 971–973; Record of trial, pp. 238–241.

Evans, the post trader at Fort Sill. Mr. John A. Logan, a Senator from Illinois, proposed this question:

Prior to the sending of the first money, had you said anything to any person or had any person ever said anything to you on the subject of sending money to General Belknap; if so, who was it?

Mr. Matt. H. Carpenter, of counsel for the respondent, objected to the question, but the Senate without division decided that it might be asked.

The witness replied that he had had a conversation with the present Mrs. Belknap. It was before he had sent any money to respondent, but he had sent money to her.

Thereupon Mr. Logan asked:

State what the conversation was.

Mr. Manager John A. McMahon objected to the interrogatory, saying:

Even if General Belknap was present, while we might have called it as against him, he can not produce it as in his favor. It is the conversation of a third party. * * * Before the vote is taken, Senators, I desire that all shall understand the precise conversation now called for. It is a conversation between the witness and the present Mrs. Belknap, occurring on the night of the funeral of the second Mrs. Belknap, between the witness and her, not in the presence of General Belknap; a conversation between the two persons on that occasion. Clearly it seems to me the defendant is not at liberty to produce that conversation in his behalf.

The question being taken on the admissibility of the question, there appeared yeas 18, nays 23. So the objection was sustained.

Mr. Henry L. Dawes, a Senator from Massachusetts, then proposed this question:

State all the knowledge or information that General Belknap had, which it is in your power to state, as to the amount of any money sent him or the source whence it came, other than what you have already stated.

Mr. Carpenter having objected, the Senate without division admitted the question.

Mr. John A. Logan proposed this question:

Did you have any agreement with any person other than General Belknap in reference to sending the money you have testified to or any part of it? If so, with whom was such agreement and what was such agreement?

Mr. Manager McMahon objected, and Mr. Manager Elbridge G. Lapham said:

Our objection is that this calls for a conversation with a third person, and is the precise question upon which the Senate has already passed. The witness having stated expressly that he had no conversation with the defendant, the question calls for some express conversation, some expression, agreement, or understanding, and not for an implied or inferential understanding from the acts of the parties.

After argument by managers and counsel, Mr. Frederick T. Frelinghuysen, a Senator from New Jersey, said:

As I understand it, the court, exercising its privilege and against the objection of the respondent, permitted it to be proven that there was a conversation which had relation in some manner to these payments. I think it is the right of the respondent that that conversation should now be given. It was the court, not the respondent, who introduced the fact that there was such conversation that had relation to these payments. I do not think we can fairly exclude the conversation.

Mr. George F. Edmunds, a Senator from Vermont, dissented from the law of the proposition made by Mr. Frelinghuysen.

The Senate, by a vote of 25 yeas, 21 nays, admitted the question.

The witness answered:

I had a conversation with Mrs. Bower, the present Mrs. Belknap, on the night of the funeral. She asked me to go upstairs with her to look at the baby in the nursery. I said to her, as near as I can remember, "This child will have money coming to it after a while." She said, "Yes; my sister gave the child to me, and told me the money coming from you I must take and keep for it." I am not certain about the rest of the conversation. I have an indistinct impression of what was said afterwards. I said, very likely, "All right; but perhaps the father ought to be consulted," and her reply was that if I sent the money to him she would get it any way for the child, or something of that kind. That is as far as I remember it; but I had some understanding: I have sometimes thought that I said something to General Belknap that night. My entire recollection is indistinct about the matter, except her relation of her sister's dying request made an impression on me more than any other part of the conversation.

2238. In the Johnson trial declarations of respondent, made anterior to the act, and even concomitant with it, were held inadmissible as evidence.

Instance wherein a decision of the Chief Justice as to the admissibility of evidence was overruled by the Senate.

The Senate, in the Johnson trial, declined to exclude evidence as to fact on the ground that it might lead to evidence as to declaration.

Leading questions were ruled out during the Johnson trial.

Citation of English precedents as to evidence during the Johnson trial.

On April 11, 1868,[38] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, Gen. William T. Sherman was called as a witness on behalf of the President. The witness had testified that between December 4, 1867, and February 4, 1868, he had several interviews with the President relating to Mr. Stanton, Secretary of War. Thereupon Mr. Henry Stanbery, of counsel for the President, asking as to a certain specified interview, propounded this question:

In that interview, what conversation took place between the President and you in regard to the removal of Mr. Stanton?

Mr. Manager Benjamin F. Butler objected to the question.

The Chief Justice[39] said at once, before argument:

The Chief Justice thinks the question admissible within the principle of the decision made by the Senate relating to a conversation between General Thomas and the President;[40] but he will put the question to the Senate, if any Senator desires it.

The managers, having persisted in objection, an argument arose, Mr. Stanbery saying:

When a prosecution is allowed to raise the presumption of guilt from the intent of the accused by proving circumstances which raised that presumption against him, may he not rebut it by proof of other circumstances which show that he could not have had such a criminal intent? Was anything ever plainer than that?

[38] Second session Fortieth Congress, Senate Journal, p. 887; Globe supplement, pp. 150–157.

[39] Salmon P. Chase, of Ohio, Chief Justice.

[40] See section 2234 of this work.

Why, consider what a latitude one charged with crime is allowed under such circumstances. Take the case of a man charged with passing counterfeit money. You must prove his intent; you must prove his scienter; you must prove circumstances from which a presumption arises; did he know the bill was counterfeit? You may prove that he had been told so; prove that he had seen other money of the same kind, and raise the intent in that way. Even when you make such proof against him arising from presumptions, how may he rebut that presumption of intent from circumstances proved against him? In the first place, by the most general of all persumptions—proof of good character generally. That he is allowed to do to rebut a presumption—the most general of all presumptions—not that he did what was right in that transaction, not that he did certain things or made certain declarations about the same time which explained that the intent was honest, but going beyond that through the whole field of presumptions, for it is all open to him, he may rebut the presumption arising from proof of express facts by the proof of general good character, raising the presumption that he is not a man who would have such an intent. * * * Now, what evidence is a defendant entitled to whom is charged with crime where it is necessary to make out an intent against him where the intent is not positively proved by his own declarations, but where the intent to be gathered by proof of other facts, which may be guilty or indifferent, according to the intent? What proof is allowed against him to raise this presumption of intent? Proof of those facts from which the mind itself infers a guilty intention. But while the prosecution may make such a case against him by such testimony, may he not rebut the case by exactly the same sort of testimony? It is a declaration that they rely upon as made by him at one time, may he not meet it by declarations made about the same time with regard to the same transaction? Undoubtedly. They cannot be too remote, I admit that; but if they are about the time, if they are connected with the transaction, if they do not appear to have been manufactured, then the declarations of the defendants, from which the inference of innocence would be presumed, are, under reasonable limitations, just as admissible as the declarations of the defendant from which the prosecution has attempted to deduce the inference of criminal purpose.

Mr. Stanbery proceeded to cite from the State trials, p. 1065, the trial of Hardy.

Replying, Mr. Manager Butler said:

The learned gentleman from Ohio says what? He says "in a counterfeiter's case we have to prove the scienter." Yes, true; and how? By showing the passage of other counterfeit bills? Yes; but, gentleman, did you ever hear, in a case of counterfeiting, the counterfeiter prove that he did not know the bill was bad by proving that at some other time he passed a good bill? Is not that the proposition? Why try the counterfeit bill, which we have nailed to the counter, of the 21st of February; and, in order to prove that he did not issue it, he wants to show that he passed a good bill on the 14th of January. It does take a lawyer to understand that. That is the proposition.

We prove that a counterfeiter passed a bad bill—I am following the illustration of my learned opponent. Having proved that he passed a bad bill, what is the evidence he proposes? That at some other time he told somebody else, a good man, that he would not pass bad money, to give it the strongest form; and you are asked to vote it on that reason. I take the illustration. Is there any authority brought for that? No.

What is the next ground? The next is that it is in order to show Andrew Johnson's good character. If they will put that in testimony I will open the door widely. We shall have no objection whenever they offer that. I will take all that is said of him by all good and loyal men, whether for probity, patriotism, or any other matter that they choose to put in issue. But how do they propose to prove good character? By showing what he said to a gentleman. Did you ever hear of good character, lawyers of the Senate? Laymen of the Senate, did you ever a good character proved in that way? A man's character is in issue. Does he call up one of his neighbors and ask what the man told him about his character? No; the general speech of people in the community, what was publicly known and said of him, is the point, and upon that went Hardy's case.

* * * * * * *

But, then, look at the vehicle of proof. What is the vehicle of proof? They do not propose to prove it by his acts. When they are offered, I shall be willing to

let them go in. Let them offer any act of the President about that time, either prior or since, and I shall not object, although the Senate ruled out an act in Cooper's case. But how do they propose to prove it? "What conversations took place between the President and you?" I agree, gentlemen of the Senate—I repeat it even after the criticisms that have been made—that you are a law unto yourselves. You have a right to receive or reject any testimony. All the common law can do for you is, that being the accumulation of the experience of thousands of years of trial, it may afford some guide to you; but you can override it. You have no right, however, to override the principles of justice and equity, and to allow the case of the people of the United States to be prejudiced by the conversations of the criminal they present at your bar, made in his own defense before the acts done, which the people complain of. That I may, I trust, without offense say, because there is a law that must govern us at any and all times, and the single question is—I did not mean to trouble the Senate with it before, and never will again on this question of conversation—what limit is there? If this is allowable, you may put in his conversations with everybody; you may put in his conversations with newspaper reporters—and he is very free with those, if we are to believe the newspapers. If he has a right to converse with General Sherman about this case and put that in, I do not see why he has not a right to converse with Mack, and John, and Joe, and J.B., and J.B.S., and T.R.S., and X.L.W., or whoever he may talk with, and put all that in.

I take it that is no law which makes a conversation with General Sherman any more competent than a conversation with any other man.

Mr. William M. Evarts, of the President's counsel, said:

And now I should like to look first to the question of the point of time as bearing upon the admissibility of this evidence. Under the eleventh article, the speech of the 18th of August, 1866, is alleged as laying the foundation of the illegal purposes that culminated in 1868, to point the criminality, that is what made the subject of accusation in that article. Proof, then, of the speeches of 1866 is made evidence under this article eleven, that imputes not criminality in making the speech, but in the action afterwards pointed by the purpose of the speech. So, too, a telegram to Governor Parsons, in January, 1867, is supposed to be evidence as bearing upon the guilt completed in the year 1868.

So, too, the interview between Wood, the office seeker, and the President of the United States, in September, 1866, is supposed to bear in evidence upon the question of intent in the consummation of the crime alleged to have been completed in 1868. I apprehend therefore that on the question of time this interview between General Sherman and the President of the United States, in the very matter of the public transaction of the President of the United States changing the head of the War Department, which was actually completed in February, 1868, is near enough to point intent and to show honest purpose, if these transactions, thus in evidence, are near enough to bear upon the same attributed crimes.

There remains, then, only this consideration, whether it is open to the imputation that it is a mere proof of declarations of the President concerning what his motives and objects were in reference to his subsequent act in the removal of Stanton. It certainly is not limited to that force or effect. Whenever evidence of that mere character is offered that question will arise to be disposed of; but as a part of the public action and conduct of the President of the United States in reference to this very office, and his duty and purpose in dealing with it, and on the very point, too, as to whether that object was to fill it by unwarrantble characters tending to a perversion or betrayal of the public trust, we propose to show his consultations with the Lieutenant-General of the armies of the United States to induce him to take the place.

On the other question of whether his efforts are to create by violence a civil war or bloodshed, or even a breach of the peace, in the removal of the Secretary of War, we show that in this same consultation it was his desire that the Lieutenant-General should take the place in order that by that means the opportunity might be given to decide the differences between the Executive and Congress as to the constitutitonal powers of the former by the courts of law. If the conduct of the President in relation to matters that are made the subject of inculpation, and of inculpation through motives attributed through designs supposed to be proved, can not be made the subject of evidence, if his public action, if his public conduct, if the efforts and the means that he used in the selection of agents are not to be received to rebut the intentions or presumptions that are sought to be

raised against him, well, indeed, was my learned associate justified in saying that this is a vital question. Vital in the interests of justice, I mean, rather than vital to any important considerations of the cause.

Mr. Manager James F. Wilson, quoted the Hardy case, over which a dispute had arisen:

My principal purpose is to get before the minds of Senators the truth in the Hardy case as it fell from the lips of the Chief Justice, when he passed upon the question which had been propounded by Mr. Erskine and objected to by the attorney-general. The ruling is in these words:

"LORD CHIEF JUSTICE EYRE. Mr. Erskine, I do not know whether you can be content to acquiesce in the opinion that we are inclined to form upon the subject, in which we go a certain way with you. Nothing is so clear as that all declarations which apply to facts, and even apply to the particular case that is charged, though the intent should make a part of that charge, are evidence against a prisoner and are not evidence for him, because the presumption upon which declarations are evidence is, that no man would declare anything against himself unless it were true; but every man, if he was in a difficulty, or in the view to any difficulty, would make declarations for himself. Those declarations, if offered as evidence, would be offered therefore upon no ground which entitled them to credit. That is the general rule. But if the question be—as I really think it is in this case, which is my reason now for interposing—if the question be, what was the political speculative opinion which this man entertained touching a reform of Parliament, I believe we all think that opinion may very well be learned and discovered by the conversations which he has held at any time or in any place.

"Mr. ERSKINE Just so, that is my question; only that I may not get into another debate, I beg your lordship will hear me a few words.

"LORD CHIEF JUSTICE EYRE. I think I have already anticipated a misapprehension of what I am now stating, by saying that if the declaration was meant to apply to a disavowal of the particular charge made against this man that declaration could not be received; as for instance, if he had said to some friend of his: When I planned this convention, I did not mean to use this convention to destroy the king and his Government, but I did mean to get, by means of this convention, the Duke of Richmond's plan of reform, that would fall within the rule I first laid down; that would be a declaration, which being for him, he could not be admitted to make, though the law will allow a contrary declaration to have been given in evidence. Now, if you take it so, I believe there is no difficulty."

And upon that ruling the question was changed as read by my associate manager, and correctly read by him, and all that followed this ruling of the chief justice and the subsequent discussion was read by my associate manager. The lord chief justice further said:

"You may put the question exactly as you propose."

That is, after discussion had occurred subsequent to the ruling of the chief justice to which I have referred, and in which a change in the character of the original question was disclosed.

"I confess I wished by interposing to avoid all discussion, because I consider what we are doing, and whom we have at that bar, and in that box, who are suffering by every moment's unnecessary delay in such a cause as this.

"Mr. ERSKINE. I am sure the jury will excuse it; I meant to set myself right at this bar; this is a very public place."

Then follows the question—

"Mr. DANIEL STUART examined by Mr. Erskine:

"Did you before the time of this convention being held, which is imputed to Mr. Hardy, ever hear from him what his objects were, whether he has at all mixed himself in that business?

"I have very often conversed with him, as I mentioned before, about his plan of reform; he always adhered to the Duke of Richmond's plan."

* * * * * * *

And which declaration came within the exception to the rule laid down by the chief justice. The final question was then put:

"From all that you have seen of him, what is his character for sincerity and truth?

"I have every reason to believe him to be a very sincere, simple, honest man."

To which the attorney-general said:

"If this had been stated at first to the question meant to be asked, I do not see what possible objection I could have to it."

* * * * * * *

That remark applies to the last question. The remark was made after the last question was put; but, as I understand it the two questions are substantially the same and are connected, and the remark of the attorney-general applied to both, as the first was but the basis the inducement to the last.

* * * * * * *

Now, what is the question which has been propounded by the counsel on the part of the President to General Sherman? It is this:

"In that interview what conversation took place between the President and you in regard to the removal of Mr. Stanton?"

Now, I contend that that calls for just declarations on the part of the President as fall within the rule laid down by the chief justice in the Hardy case, and therefore must be excluded. If this conversation can be admitted, where are we to stop? Who may not be put upon the witness stand and asked for conversations had between him and the President, and at any time since the President entered upon the duties of the presidential office, to show the general intent and drift of his mind and conduct during the whole period of his official existence?

* * * * * * *

We certainly must insist upon the well known and long established rule of evidence being applied to this particular objection, for the purpose of ending now and forever, so far as this case is concerned, these attempts to put in evidence the declarations of the President, made, it may be, for the purpose of meeting an impeachment by such weapons of defense.

It is offered to be proved now, as the counsel inform us, that the President told General Sherman that he desired him to accept an appointment of Secretary for the Department of War to the end that Mr. Stanton might be driven to the courts of law for the purpose of testing his title to that office.

At the conclusion of the arguments the Chief Justice said:

Senators, the Chief Justice has expressed the opinion that the question now proposed is admissible within the vote of the Senate of yesterday. He will state briefly the grounds of that opinion. The question yesterday had reference to a conversation between the President and General Thomas after the note addressed to Mr. Stanton was written and delivered, and the Senate held it admissible. The question to-day has reference to a conversation relating to the same subject-matter, between the President and General Sherman, which occurred before the note of removal was written and delivered. Both questions were asked for the purpose of proving the intent of the President in the attempt to remove Mr. Stanton. The Chief Justice thinks that proof of a conversation shortly before a transaction is better evidence of the intent of an actor in it than proof of a conversation shortly after the transaction. The Secretary will call the roll.

The question being put, "Is the question admissible?" there appeared yeas 23, nays 28. So the question was ruled out.

Mr. Stanbery next asked:

General Sherman, in any of the conversations of the President while you were here, what was said about the department of the Atlantic?

Mr. Manager Butler objected that this question fell within the ruling just made.

Thereupon Mr. Stanbery proposed the question in this form:

What do you know about the creation of the department of the Atlantic?

Mr. Manager Butler said:

We have no objection to what General Sherman knows about the creation of the department of the Atlantic, provided he speaks of knowledge and not from the declarations of the President. All orders, papers, his own knowledge, if he has any, if it does not come from declarations, we do not object to.

The Chief Justice said:

The counsel for the President will be good enough to state whether in this question they include statements made by the President.

To this Mr. Stanbery replied:

Not merely that; what we expect to prove is in what manner the department of the Atlantic was created; who defined the bounds of the department of the Atlanitc; what was the purpose for which the department was arranged.

It was also developed by a question from the Chief Justice that the conversation referred to was prior to the attempted removal of Mr. Stanton.

The question being put, the Senate decided [41] without division that the question was not admissible.

Mr. Stanbery then asked this question:

Did the President make any application to you respecting the acceptance of the duties of Secretary of War ad interim.

Mr. Manager Butler said:

I am instructed, Mr. President, to object to this, because an application can not be made without being either in writing or in conversation, and then either would be the written or oral declaration of the President, and it is entirely immaterial to this issue.

Mr. William M. Evarts said:

Mr. Chief Justice and Senators, the ground, as we understand it, upon which the offer, in the form and to the extent in which our question which was overruled sought to put it, was overruled, was because it proposed to put in evidence declarations of the President as if statements of what he was to do or what he had done. We offer this present evidence as executive action of the President at the time and in the direct form of a proposed devolution of office then presently upon General Sherman.

Mr. Butler objected that under the guise of proving an act it was proposed to get in a conversation.

The question being put, the Senate decided without division that the question was admissible.[42]

The question having been put, and General Sherman having testified that the President had tendered him the office of Secretary of War ad interim on two occasions, Mr. Stanbery then asked:

At the first interview at which the tender of the duties of the Secretary of War ad interim was made to you by the President did anything further pass between you and the President in reference to the tender or your acceptance of it?

In response to a question by Mr. Manager Butler as to the scope of the question, Mr. Stanbery stated that the question was intended to draw out the declarations concomitant with the act.

Mr. Buler thereupon entered an objection to the question on the ground that it contemplated an evasion of the principles of the ruling heretofore made. He said:

My proposition is, objecting to this evidence, that the evidence is incompetent and is based upon first getting in an act which proved nothing and looked to be immaterial, so that it was quite liberal for Senators to vote it in, but that liberality is taken advantage of to endeavor to get by the ruling of the Senate and put in declarations which the Senate has ruled out.

[41] Senate Journal, p. 888; Globe Supplement, p. 157.
[42] Senate Journal, p. 888; Globe Supplement, pp. 157, 158.

Mr. Evarts argued:

The tender of the War Office by the Chief Executive of the United States to a general in the position of General Sherman is an Executive act, and as such has been admitted in evidence by this court. Like every other act thus admitted in evidence as an act, it is competent to attend it by whatever was expressed from one to the other in the course of that act to the termination of it. And on that proposition the learned manager shakes his finger of warning at the Senators of the United States against the malpractices of the counsel for the President. Now, Senators, if there be anything clear, anything plain in the law of evidence, without which truth is shut out, the form and features of the fact permitted to be proved excluded, it is this rule that the spoken act is a part of the attending qualifying trait and character of the act itself.

The question being submitted to the Senate, "Is the question admissible?" there appeared yeas 23, nays 29. So the question was ruled out.[43]

Mr. Stanbery then asked:

In either of these conversations did the President say to you that his object in appointing you was that he might thus get the question of Mr. Stanton's right to the office before the Supreme Court?

Mr. Manager Butler objected to this question as leading in form, and as inadmissible within the decisions already made.

The Senate, by a vote of yeas 7, nays 44, decided that the question was not admissible.[44]

Mr. Stanbery then asked:

Was anything said at either of those interviews by the President as to any purpose of getting the question of Mr. Stanton's right to the office before the courts?

Mr. Stanbery explained that the preceding question seemed to have been overruled because of its form, and he now changed the form as he did not want it thrown out on a technicality.

Mr. Manager Butler objected to the question on the ground that it was incompetent under the rules of evidence to offer in another form a question ruled out as leading, saying:

I had the honor to say to the Senate a little ago that all the rules of evidence are founded upon good sense, and this rule is founded on good sense. It would do no harm in the case of this witness; but the rule is founded on this proposition: that counsel shall not put a leading question to a witness, and thus instruct him what they want him to say, and then have it overruled and withdraw it, and put the same question in substance, because you could always instruct a witness in that way. Of course, that was not meant here, because I assume it would do no harm in any form, and the counsel would not do it; but I think the Senate should hold itself not to be played with in this way.

The Senate without division decided that the question should not be admitted.[45]

Thereupon Mr. John B. Henderson, of Missouri, a Senator, proposed this question in writing:

Did the President, in tendering you the appointment of Secretary of War ad interim, express the object or purpose of so doing?

Mr. Manager John A. Bingham, on behalf of the House of Representatives, objected to the question as both leading and incompetent.

[43] Senate Journal, p. 888; Globe Supplement, p. 158.
[44] Senate Journal, pp. 889; Globe Supplement, 158, 159.
[45] Senate Journal, p. 889; Globe Supplement, p. 159.

The question being submitted to the Senate, "Is the question admissible?" there appeared yeas 25, nays 27. So the question was ruled out.[46]

Mr. Stanbery then proposed this question:

At either of these interviews was anything said in reference to the use of threats, intimidation, or force to get possession of the War Office, or the contrary?

Mr. Manager Butler objected to the question, as falling within the rule already established.

The Senate, without division, sustained the objection.[47]

2239. Evidence as to statements of Judge Swayne to prove intention as to residence and made before impeachment proceedings were suggested was the subject of diverse rulings during the trial.

Instance during the Swayne trial wherein the Presiding Officer, contrary to his usual habit, submitted a question of evidence to the Senate at once.

On February 22, 1905,[48] in the Senate sitting for the impeachment trial of Judge Charles Swayne, Milton Jackson, a witness for the respondent, was examined by Mr. Anthony Higgins, of counsel for the respondent, as to a conversation which he had with Judge Swayne several years previous to the impeachment in reference to the latter's place of residence, and this question was asked:

Q. (By Mr. Higgins.) What did the Judge state at that time about the subject of his residence?

To that I object, Mr. President, The statement of Judge Swayne, which we offered to prove, were excluded, of course, for a different reason, but certainly there is no rule of law which allows the statements of the respondent to be put in evidence in his own behalf. That, of course, is fundamental. No man can prove what he has done or what he has not done by his own statements as to what he did or purposed to do. There is no more fundamental rule of evidence than the respondent's statements can not be proved in his favor. If that were so, all Judge Swayne would have to do would be to state that he resided in Florida, and that would make him a resident of Florida, or be evidence of his residence there.

Mr. Higgins replied:

I submit to the Senate that this question is eminently proper as a verbal fact, an act of the judge, ante litem motam, before this matter was mooted, years before, in the announcement to his nearest of kin as to his residence at that time. In order to make clear to the Senate the question upon which it is asked to pass, I will say that the authorities of Leon County, Fla., in which is the city of Tallahassee, gave an invitation to Judge Swayne, written and engrossed, to make his residence and home there, and that this was shown to this witness, and that the Judge gave them reasons why he could not accept that offer, because of where he had elected to live. If that is not fair testimony and within the rule, I do not know what is. It was long before this question was ever raised, not with any view of the possibility of any such proceeding as this. The statement is admissible for a double reason—that he was not going to accept that offer; that the offer was made very shortly after the act of Congress was passed, and therefore the question arose at that time; and in rejecting that invitation he did it because he had elected to reside, as the witness will state, elsewhere in his district and with reference to the requirements of that act.

Now, we have made that statement in answer as a substantive part of the defense, that he announced at that time his intention as to where he expected to live as a proper thing for him to do, and it is an act which I submit it is eminently proper for us to be able to prove.

[46] Senate Journal, p. 889; Globe Supplement, pp. 159, 160.
[47] Senate Journal, p. 890; Globe Supplement, p. 140.
[48] Third session Fifty-eighth Congress, Record, pp. 3057, 3058.

In reply Mr. Manager Perkins argued:

In other words, Mr. President, the offer of the counsel is this when we analyze it: The question being whether Judge Swayne as a matter of fact became a resident of the northern district of Florida, they can prove that by showing by another witness that Judge Swayne said he intended to become a resident. You can prove a fact. You can prove what a man did; what he was bound to do; that he became a resident. How—by showing what he did? No; but by proving that he said to some one else he intended to become a resident.

Mr. Manager Marlin E. Olmsted, of Pennsylvania, said:

I find that in the trial of Andrew Johnson, page 207 of the proceedings as reported in the Globe, it was offered for the counsel by the respondent to prove in these words:

"We offer to prove that the President then stated that he had issued an order for the removal of Mr. Stanton and the employment of Mr. Thomas to perform the duties ad interim; that thereupon Mr. Perrin said: 'Supposing Mr. Stanton should oppose the order?' The President replied: 'There is no danger of that, for General Thomas is already in the office,' etc."

Mr. Manager Butler having objected, Mr. Manager Wilson said:

Mr. President, as this objection is outside of any former ruling of the Senate and is perfectly within the rule laid down in Hardy's case—the celebrated English impeachment case—and cited this ruling from that case, which may be found in 24 State Trials, page 1096:

"Nothing is so clear as that all declarations which apply to facts, and even apply to the particular case that is charged, though the intent should make a part of that charge, are evidence against a prisoner, and are not evidence for him, because the presumption upon which declarations are evidence is that no man would declare anything against himself unless it were true; but every man, if he was in a difficulty, or in the view to any difficulty, would make declarations for himself."

The Chief Justice submitted the question to the Senate whether it should be admitted, and the vote was, yeas 9 and nays 37. So the question was rejected. There you have precedent both English and American.

The Presiding Officer [49] said:

The Presiding Officer will state the question. Counsel for the respondent offered to prove, as affecting the question of his residence, statements made by the respondent to the witness in the year 1894 or 1895 as to where it was his intention to reside. This is the question which is submitted to the Senate.

Mr. HIGGINS. I wish further to say that I intend also to put to the witness the question as to where the Judge stated at the time he did reside.

Mr. Manager OLMSTED. That would be equally objectionable.

The PRESIDING OFFICER. And, further the statements made by Judge Swayne at that time as to where his residence was. Senators in favor of the admission of such testimony will say "aye," opposed "no." [Putting the question.] In the opinion of the Presiding Officer the "ayes" have it. The "ayes" have it. The counsel will ask the question.

On February 23 [50] a witness, Charles F. Warwick, was examined by Mr. Anthony Higgins, of counsel for the respondent, who asked:

Q. Do you know Judge Charles Swayne?—A. Very well.

Q. How long have you known him?—A. Ever since I came to the bar. I think I knew him before that intimately.

Q. Intimately, you say?—A. Intimately.

Q. Do you remember the fact of the act of Congress curtailing his district?—A. I do.

Q. Will you please state whether on or about or after that time, and fix the time yourself, you had any conversation with him, and he with you, concerning where he would make his residence in Florida?

[49] Orville H. Platt, of Connecticut, Presiding Officer.
[50] Record, pp. 3145, 3146.

Mr. Manager Henry W. Palmer, of Pennsylvania, said:

We object to that testimony as being irrelevant and incompetent. The declaration of the respondent as to where he intended to reside is, in our judgment, not evidence in this case.

Mr. Porter J. McCumber, a Senator from North Dakota, said:

Mr. President, before submitting the matter to the Senate, I wish counsel would inform the Senate on what principle of law he justifies a proposition to introduce in evidence a self-serving declaration of a party defendant in a criminal proceeding.

Mr. Higgins said:

Mr. President, I had the honor to submit some remarks upon that question yesterday. We contend that such an assertion made before the present impeachment proceedings were mooted or expected, or as the maxim of the law has it ante litem motam, is itself essentially a verbal fact. Residence is made up of two elements—intention and action. Intent without action is futile to make a residence, but intention becomes a most important part of the proposition in the end as to what constitutes residence. As I have said and admitted, alone it will not make it, but it is a part of a whole in which it takes its own due proportion.

Now, if this were a self-serving assertion, made after the fact, if it came into the case in such a way it would be so clearly objectionable that it never would be presented by counsel for the respondent. But we submit it is a most important thing. When the good faith of the conduct of the respondent is in dispute, we bring here a witness of the highest character and standing to prove what at that time was the expressed intention of the respondent in respect to establishing his residence. I think therefore that, while admitting the principle upon which the distinguished Senator raises his question, we have brought this within an exception thereto. If we had expected that this question would be raised again to-day, after it had been disposed of yesterday, we would have come prepared with authorities to submit.

Mr. Manager James B. Perkins of New York, said:

Mr. President, just a word. I did not again object to-day because the Senate yesterday, I must confess somewhat to my surprise, allowed a similar question to be answered. Doubtless it was that the legal question involved was not presented by me with the clearness with which it has now been stated by the Senator from North Dakota. The gentleman on the other side misstates the question and avoids the inquiry made by the Senator. It is not can Judge Swayne's intention be proved? His intention is a question that perhaps can be proved, but Judge Swayne's intention, no more than any other thing in Judge Swayne's behalf, can be proved by Judge Swayne's own statement.

It is offered to prove here, what? Judge Swayne's intention, by the fact that Judge Swayne said it was his intention. As the Senator from North Dakota properly says, it is an endeavor to prove something in behalf of the defendant by his own statement. There is the inherent vice of the question, and I think the failure perhaps to catch that point yesterday was the reason the ruling was made by the Senate.

Mr. Higgins replied:

Only a word in reply. The learned manager who would confine the evidence of intention to acts, when from the very great case in 3 Washington Report down it is the established law as to citizenship, as to residence, as to domicile, that they are each and every one of them made up of two articles—of intent and of action—that if you can not prove anything by words you are confined merely in your evidence to acts. That is not the law, with all due respect to my learned friend.

Mr. Manager Olmsted said:

I again call the attention of the Senate to the fact that this precise question was before the Senate of the United States in the impeachment trial of Andrew Johnson, where his counsel offered to prove, for the purpose of showing the intent of the President of the United States, his statements to other parties.

There was then cited the celebrated English case of Hardy, reported in 24 State Trials, page 1096, where it was held by the House of Lords:

"Nothing is so clear as that all declarations which apply to facts, and even apply to the particular case that is charged, though the intent"—

Mark the words—

"though the intent should make a part of that charge, are evidence against a prisoner, and are not evidence for him, etc."

Upon the citation of that authority and the argument of the case the United States Senate decided, by a vote of nearly 4 to 1, that such a statement made by the respondent could not be proved by the party to whom he made it.

Mr. Higgins said:

I have not had a chance to reply to that. I agree to that law, for that was not a case of residence, nor of domicile nor of citizenship. It was a case of ordinary criminal conduct, where the intent is inferred from the act. But the difference is laid down in the law, that residence is a mixed question of law and fact; that it is made up of action plus intent, and intent plus action, and therefore it is to be differentiated entirely from Hardy's case, and goes back to another class of authorities entirely.

The Presiding Officer said:

Shall the witness be permitted to answer the question. [Putting the question.] In the opinion of the Presiding Officer the "noes" have it. The "noes" have it, and the answer is excluded.

Later, on the same day,[51] Henry G. Swayne was sworn and examined by Mr. Higgins:

Q. Do you recall the time of the passage of the act of Congress curtailing the northern district of Florida?—A. Yes, sir.

Q. July 1894. Where were your father and family residing at that time?—A. St. Augustine, Fla.

Q. You were not there last year?—A. I was there at that time; that summer.

Q. State what you know as to any facts or acts of Judge Swayne with reference to making his residence at Pensacola.—A. Immediately after the passage of the act, or within a few days thereafter, he left the home in St. Augustine and went to Pensacola, declaring that he was——

Mr. Manager Perkins having interposed, Mr. Higgins said:

I offer to prove by this witness what the judge declared at the time; and I should like to know if the manager objects.

Mr. Manager PERKINS. We object. That is easily answered.

The PRESIDING OFFICER. The Presiding Officer understands that counsel propose to prove the declaration of Judge Swayne made at the time when he left his home in St. Augustine as to where he was going to make his home. * * * The Presiding Officer thinks that may be done. If any Senator desires, he will submit the question to the Senate. * * * This is a declaration made at the time he left his home in St. Augustine as to where he intended to take up his home on leaving the St. Augustine home. * * * If any Senator desires, the Presiding Officer will submit the question to the Senate. [A pause.] The Presiding Officer thinks it part of the res gestae. The Presiding Officer understands that the witness is about to testify to a statement made by Judge Swayne at the time he was giving up his home in St. Augustine; and that the Presiding Officer thinks the witness may state.

Mr. HIGGINS. Please proceed.

A. The statement in full which was made by Judge Swayne at the time, as I recollect it, was that the bill dividing the district or redistricting the State, whichever it was, had just passed Congress and been signed by the President, and that he would be compelled to make his residence within the boundaries of his district, and that he was going to go to Pensacola; and with that declaration he left St. Augustine that summer in the month of July. I was there, having gone down after my collegiate year was over, from Philadelphia, and I, with the other members of the family——

[51] Record, p. 3153.

2240. By a majority of one the Senate, in the Johnson trial, sustained the Chief Justice's ruling that evidence as to respondent's declaration of intent, made at the time of the act, was admissible.—On April 13, 1868,[52] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, Mr. Reverdy Johnson, a Senator from Maryland, asked for the recall as a witness of Gen. William T. Sherman, and General Sherman having taken the stand, Mr. Johnson proposed in writing this question:

When the President tendered to you the office of Secretary of War ad interim on the 27th of January, 1868, and on the 31st of the same month and year, did he, at the very time of making such tender, state to you what his purpose in so doing was?

Mr. Manager John A. Bingham objected to the question as incompetent, in accordance with the rulings of the Senate heretofore made.

The question being taken without argument, "Is the question admissible?" there appeared yeas 26, nays 22. So the question was admitted.

And the witness replied, "Yes."

Thereupon Mr. Reverdy Johnson proposed this question:

If he did, state what he said his purpose was.

Mr. Manager Bingham objected to the question, since it was incompetent for the accused to make his own declarations evidence for himself.

The Chief Justice[53] said:

The Chief Justice has already said upon a former occasion that he thinks that, for the purpose of proving the intent, this question is admissible; and he thinks also, that it comes within the rule which has been adopted by the Senate as a guide for its own action. This is not an ordinary court, but it is a court composed largely of lawyers and gentlemen of great experience in the business transactions of life, and they are quite competent to determine upon the effect of any evidence which may be submitted to them; and the Chief Justice thought that the rule which the Senate adopted for itself was founded on this fact; and in accordance with that rule, by which he determined the question submitted on Saturday, he now determines this question in the same way.

Messrs. Managers Bingham and Butler asked if this was not the same question ruled on Saturday, April 11.

The Chief Justice said:

The Chief Justice does not say that. What he does say is, that it is a question of the same general import, to show the intent of the President during these transactions. The Secretary will read the question again.

* * * * * * *

Senators, you who are of opinion that the question just read, "If he did, state what he said his purpose was," is admissible, and should be put to the witness, will, as your names are called, answer yea; those of a contrary opinion, nay. The Secretary will call the roll.

And the vote being taken, there appeared yeas 26, nays 25. So the question was admitted.

2241. Declarations of the respondent made during the act were admitted to rebut evidence of other declarations, made also during the act, but on a different day.

Instance wherein, during the introduction of evidence, an objection withdrawn by a manager was renewed by a Senator.

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[52] Second session Fortieth Congress, Senate Journal, pp. 893, 894; Globe supplement, pp. 169–173.

[53] Salmon P. Chase, of Ohio, Chief Justice.

On February 15, 1805,[54] in the high court of impeachments during the trial of the case of United States *v.* Samuel Chase, one of the associate justices of the Supreme Court of the United States, William Marshall was sworn as a witness on behalf of the respondent. During the examination of this witness Mr. Robert G. Harper, counsel for the respondent, asked a question to which objection was made by Mr. Joseph H. Nicholson, of Maryland, one of the managers.

After consultation Mr. Nicholson withdrew the objection, whereupon it was renewed by a member of the court.

Thereupon Mr. Harper, in behalf of the respondent, made the following motion:

Testimony on the part of the prosecution, tending to show from the declarations of the respondent that he had a corrupt intention to pack a jury for the trial of Callender, having been given, he offers in evidence other declarations of his, made during the proceedings, but on a different day, for the purpose of rebutting the former testimony, and of showing that his intentions, in that respect, were pure and even favorable to Mr. Callender.

Thereupon the President [55] said:

This evidence is consented to by the managers. The question is, "Shall it be, on such consent, examined by the court?"

And the question was determined in the affirmative, yeas 32, nays 2.

2242. In the Johnson trial the Senate sustained the Chief Justice in admitting as showing intent, on the principle of res gestae, evidence of respondent's verbal statement of the act to his Cabinet.—On April 17, 1868,[56] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, Gideon Welles, Secretary of the Navy, was sworn and examined as a witness by counsel for the respondent, and testified that he attended a meeting of the Cabinet on the afternoon of February 21 last. At this meeting, after the departmental business had been concluded, and as they were about to separate, the President made a statement.

Objection as to testimony of what the President said being intimated by the managers for the House of Representatives, Mr. William M. Evarts, of counsel for the respondent, made this offer of proof:

We offer to prove that on this occasion the President communicated to Mr. Welles and the other members of his Cabinet, before the meeting broke up, that he had removed Mr. Stanton and appointed General Thomas Secretary of War ad interim, and that upon the inquiry by Mr. Welles whether General Thomas was in possession of the office the President replied that he was; and upon further question of Mr. Welles whether Mr. Stanton acquiesced the President replied that he did; all that he required was time to remove his papers.

Mr. Manager Benjamin F. Butler at once objected.

Mr. President and Senators, as it seems to us, this does not come within any possible proposition of law to render it admissible. It is now made certain that this act was done without any consultation of his Cabinet by the President, whether that consultation was to be held verbally, as I think is against the constitutional provision, or whether the theory is to be adopted that the President has a right to consult with his Cabinet upon questions of his conduct.

Mr. Manager Butler proceeded to discuss the constitution and functions of the President's Cabinet, holding that strictly the President might only require written opinions of the heads of Departments.

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[54] Second session Eighth Congress, Senate Impeachment Journal, p. 520; Annals, p. 251.
[55] Aaron Burr, of New York, Vice-President, and President of the Senate.
[56] Second session Fortieth Congress, Senate Journal, pp. 908, 909; Globe Supplement, pp. 222–226.

Continuing as to the competency of the evidence, Mr. Butler said:

Now, the question is, after he has done the act, after he has thought it was successful, after he thought Mr. Stanton had yielded the office, can he, by his narration of what he had done and what he intended to do, shield himself before a tribunal from the consequences of that act? It is not exactly the same question which you decided yesterday by almost unexampled unanimity in the case of Mr. Perrin and Mr. Selye, the Member of Congress, on that same day, a few minutes earlier or a few minutes later? They offered in evidence here what he told Mr. Perrin and what he told Mr. Selye; they complicated it by the fact that Mr. Selye was a Member of Congress; and the Senate decided by a vote which indicated a very great strength of opinion that that sort of narration could not be put in.

Now, is this any more than narration? It was not to take the advice of Mr. Welles as to what he should do in the future, or upon any question; it was mere information given to Mr. Welles or to the other members of the Cabinet after they had separated in their Cabinet consultation, and while they were meeting together as any other citizens might meet. It would be as if, after you adjourned here, some question should be attempted to be put in as to the action of the Senate because the Senators had not left the room. Again, I say it was simply a narration, and that narration of his intent and purposes, his thoughts, expectations, and feelings.

I do not propose to argue it further until I hear something showing why we are to distinguish this case from the case of Mr. Perrin, on which you voted yesterday. Mr. Perrin tells you that on the 22d he waited for the Cabinet meeting to break up, and as soon as it broke up he went in with Mr. Selye, and then the President undertook to tell him. You said that was no evidence. Now, when he undertook to tell Mr. Welles is that any more evidence? I can not distinguish the cases, and I desire to hear them distinguished before I attempt an answer to any such distinction.

* * * * * * *

It is said that it is an official act. I had supposed up to this moment—aye, and I suppose now—that there is no act that can be called an official act of an officer which is not an act required by some law or some duty imposed upon that officer. Am I right in my ideas of what is an official act? It is not every volunteer act by an officer that is official. Frequently such acts are officious, not official. An official act, allow me to say, is an act which the law requires, or a duty which is enjoined upon the officer by some law, or some regulation, or in some manner as a duty. Will the learned counsel tell the Senate what constitutional provision, what statute provision, what practice of the Government requires the President at any time to inform his Cabinet or any member of them whatever that he has removed one man and put in another, and that that other man is in office? If there is any such law, it has escaped my attention. I am not aware of it.

* * * * * * *

Now, then, what is offered? Stanton has been removed by the act of the President; and thereupon, without asking advice—because that is expressly waived by the learned counsel last addressing us—not as a matter of advice, the President gives information. Now, how can that information be evidence? How can he make it evidence? The information is required by no law, was given for no purpose to carry out any official duty, was the mere narration of what the President chose to narrate at that time.

Mr. Evarts, in behalf of the respondent argued:

Now, then, it stands thus: That at a Cabinet meeting held on Friday, the 21st of February, when the routine business of the different Departments was over, and when it was in order for the President to communicate to his Cabinet whatever he desired to lay before them, the President did communicate this fact of the removal of Mr. Stanton and the appointment of General Thomas ad interim, and that thereupon his Cabinet officers inquired as to the posture in which the matter stood, and as to the situation of the office and of the conduct of the retiring officer. Here we get rid of the suggestion that it is a mere communication to a casual visitor which made the staple of the argument yesterday against the introduction of the evidence as to the conversation with Mr. Perrin and Mr. Selye. We now present you the communication made by the President of the United States while this act was in the very process of execution, while it was yet, as we say in law, in fieri, being done.

It being in fieri, the President communicates the fact how this public transaction has been performed and is going on, and we are entitled to that as a part of the res gestæ in its sense of a governmental act, with all the benefit that can come from it in any future consideration you are to give to the matter as bearing upon the merits and the guilt or innocence of the President in the premises. It bears, as we say, directly upon the question whether there had been any other purpose than the placing of the office in a proper condition for the public service according to the announcement of the President as his intention when he conversed with General Sherman in the January preceding; and it negatives all idea that at the time that General Thomas to Mr. Wilkeson or to the Dakota Delegate, Mr. Burleigh, was saying or suggesting anything of force, the President was the author of, or was responsible for, his statements. The truth is, it presents the transaction as wholly and completely an orderly and peaceful movement of the President of the United States, as, in fact, it was, and no evidence has been given to the contrary, of any occurrence disturbing that peaceful order and as the situation in which its completion left the matter in the mind of the President up to that point of time.

Mr. Benjamin R. Curtis, also of counsel for the respondent, added:

We are anxious that this testimony now offered should be distinguished in the apprehension of the Senate, as it is in our own, from an offer of advice, or from the giving of advice by the Cabinet to the President. We do not place our application for the admission of this evidence upon the ground that it is an act of giving advice by his councilors to the President. We place it upon the ground that this was an official act done by the President himself when he made a communication to his councilors concerning this change which he had made in one of their number; that that was strictly and purely an official act of the President, done in a proper manner, the subject-matter of which each of those councilors was interested in in his public capacity, and which it was proper or the President to make known to them at the earliest moment when he could make such a communication.

Mr. Curtis further reviewed the constitutional history of the Cabinet to show that the practice was for the President to rely on the Cabinet, both for consultation and decision, finally saying as to his remarks in making this review:

They are pertinent to the question now under consideration, for they go to show that under the Constitution and laws of the United States as practiced on by every President, including General Washington and Mr. Adams, Cabinet ministers were assembled by them as a council for the purposes of consultation and decision, and of course, when thus assembled, a communication made to them by the President of the United States concerning an important official act which was then in fieri, in process of being executed and not yet completed is itself an official act of the President, and we submit to the Senate that we have a right to prove it in that character.

The Chief Justice [57a] said at the conclusion of the arguments:

Senators, the Chief Justice thinks that this evidence is admissible. It has, as he thinks, important relation to the res gestæ, the very transaction which forms the basis of several of the articles of impeachment, and he thinks it also entirely proper to take into consideration in forming an enlightened judgment upon the intent of the President. He will put the question to the Senate if any Senator desires it.

Mr. Aaron H. Cragin, a Senator from New Hampshire, asked that the evidence excluded in the case of Witness Perrin [57b] be read. This having been done, Mr. Jacob M. Howard, a Senator from Michigan, proposed this question:

In what way does the evidence the counsel for the accused now offer meet any of the allegations contained in the impeachment?
How does it affect the gravamen of any one of the charges?

[57a] Salmon P. Chase, of Ohio, Chief Justice.
[57b] See sec. 2244 of this work.

To this Mr. Evarts responded:

The Senators will perceive that this question anticipates a very extensive field of inquiry—first as to what the gravamen of all these articles is, and, secondly, as to what shall finally be determined to be the limits of law and fact that properly press upon the issues here; but it is enough to say, probably, as we have every desire to meet the question with all the intelligence that we can command, at the present stage of the matter, without going into these anticipations, that it bears upon the question of the intent with which this act was done, as being a qualification of the act in the President's mind at the time he announces it as complete. It bears on the conspiracy articles and it bears upon the eleventh article, even if it should be held that the earlier articles, upon the mere removal of Mr. Stanton and the appointment of General Thomas, are to cease in the point of their inquiry, intent, and all with the consummation of the acts.

The Chief Justice thereupon said:

The Chief Justice will restate to the Senate the question as it presents itself to his mind. The question yesterday had reference to the intention of the President, not in relation to the removal of Mr. Stanton, as the Chief Justice understood it, but in relation to the immediate appointment of a successor by sending in the nomination of Mr. Ewing. The question to-day relates to the intention of the President in the removal of Mr. Stanton; and it relates to a communication made to his Cabinet after the departmental business had closed, but before the Cabinet had separated. The Chief Justice is clearly of opinion that this is a part of the transaction and that it is entirely proper to take this evidence into consideration as showing the intent of the President in his acts. The Secretary will call the roll.

The question being taken, there appeared, yeas 26, nays 23. So the evidence was admitted.

2243. It was decided in the Chase trial that declarations of the respondent after the act might not be admitted to show the intent.—On February 15, 1805,[58] in the high court of impeachment, during the trial of the case of United States *v.* Samuel Chase, an associate justice of the Supreme Court of the United States, Mr. Joseph Hopkinson, counsel for the respondent, asked of Edward J. Coale, the witness under examination, the following question:

At the time Judge Chase desired you to make the copy in your hand, did he, or did he not, explain to you his reasons or motives for drawing up the paper from which this copy was made? If yes, what were they?

Mr. Joseph H. Nicholson, of Maryland, one of the managers, objected to the question.

At the suggestion of the President[59] the question was reduced to writing.

Mr. Hopkinson said he thought such questions perfectly legal when they went to show the intention of the accused. "We have heard," said he, "much of the quo animo, and it is perfectly clear that the intention constitutes the guilt of the offense."

Mr. Nicholson said:

The quo animo is to be collected from the acts of the party. The evidence of his declaration may be shown to prove the quo animo. But I do not consider it to be correct that Judge Chase shall be permitted to give in evidence declarations made at any other time than that when we have stated he made them; otherwise it will always lay in the discretion of the party accused to state declarations made at another time by him for the purpose of justifying any acts he may have committed.

[58] Second session Eighth Congress, Senate Impeachment Journal, p. 519; Annals, pp. 242–243.
[59] Aaron Burr, of New York, Vice-President and President of the Senate.

Mr. Luther Martin, counsel for the respondent, said he had ever considered the declaration of the party at the time he was charged with committing a criminal act as competent evidence to show his innocence.

Mr. Nicholson said there was no doubt of it, but that he was not charged with drawing out the paper as a criminal act. Any declaration made by Judge Chase at the time he delivered the opinion of the court may be given in evidence, but any other declarations have nothing to do with the case.

The President said:

Where was the conversation between the judge and yourself?

Mr. COALE. At the judge's lodgings.

The question was then taken—

Is it competent for the counsel for the respondent to put said question to the witness?

And it was determined in the negative, yeas 9, nays 25.

2244. In the Johnson trial the Senate ruled out evidence as to respondent's declarations of intent made after the act.

Comment of the Chief Justice on the Senate's decisions on evidence as to respondent's declarations at or near the time of the act.

On April 16, 1868,[a] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, Mr. Edwin O. Perrin was sworn and examined by counsel on behalf of the respondent. Mr. Perrin testified to an interview which he had with the President in company with Mr. Selye, a Congressman, on the evening of February 21, 1868.

Mr. William M. Evarts, of counsel for the respondent, asked:

Did you then hear from the President of the removal of Mr. Stanton?

Mr. Manager Benjamin F. Butler at once entered an objection, which caused the counsel for respondent to submit in writing the following:

We offer to prove that the President then stated that he had issued an order for the removal of Mr. Stanton and the employment of General Thomas to perform the duties ad interim; that thereupon Mr. Perrin said: "Supposing Mr. Stanton should oppose the order." The President replied: "There is no danger of that, for General Thomas is already in the office." He then added: "It is only a temporary arrangement; I shall send in to the Senate at once a good name for the office."

Mr. Manager Butler said:

I find it, Mr. President and Senators, my duty to object to this. There is no end to declarations of this sort. The admission of those to Sherman and to Thomas was advocated on the ground that the office was tendered to them and that it was a part of the res gestæ. This is mere narration, mere statement of what he had done and what he intended to do. It never was evidence and never will be evidence in any organized court, so far as any experience in court has taught me. I do not see why you limit it. If Mr. Perrin, who says he has heretofore been on the stump, can go there and ask him questions, and the answers can be received, why not anybody else? If Mr. Selye could go there, why not everybody else? Why could he not make declarations to every man, aye, and woman, too, and bring them in here, as to what he intended to do and what he had done to instruct the Senate of the United States in their duties sitting as a high court of impeachment?

[a] Second session Fortieth Congress, Senate Journal, pp. 905, 906; Globe supplement, pp. 206–208.

And Mr. Manager James F. Wilson added:

Mr. President, as this objection is outside of any former ruling of the Senate, and is perfectly within the rule laid down in Hardy's case, I wish to call the attention of the Senate to that rule again, not for the purpose of entering upon any considerable discussion, but to leave this objection under that rule to the decision of the Senate:

"Nothing is so clear as that all declarations which apply to facts, and even apply to the particular case that is charged, though the intent should make a part of that charge, are evidence against a prisoner, and are not evidence for him, because the presumption upon which declarations are evidence is that no man would declare anything against himself unless it were true; but every man, if he was in a difficulty, or in the view to any difficulty, would make declarations for himself." (24 State Trials, p. 1096.)

If this offer of proof does not come perfectly within that rule, then I never met a case within my experience that would come within its provisions. I leave this objection to the decision of the Senate upon that rule.

In behalf of the admission of the evidence Mr. Evarts said:

It will be observed that this was an interview between the President of the United States and a Member of Congress, one of "the grand inquest of the nation," holding, therefore, an official duty and having access, by reason of his official privilege, to the person of the President; that at this hour of the day the President was in the attitude of supposing, upon the report of General Thomas, that Mr. Stanton was ready to yield the office, desiring only the time necessary to accommodate his private convenience, and that he then stated to these gentlemen: "I have removed Mr. Stanton and appointed General Thomas ad interim," which was their first intelligence of the occurrence; that upon the suggestion, "Will there not be trouble or difficulty?" the President answered (showing thus the bearing on any question of threats or purpose of force as to be imputed to him from the declarations that General Thomas was making at about the same hour to Mr. Wilkeson) that there was no occasion for or "no danger of that, as General Thomas was already in." Then, as to the motive or purpose entertained by the President at the time of this act of providing anybody that should control the War Department or the military appropriations, or by combination with the Treasury Department suck the public funds, or to have, though I regret to repeat the words as used by the honorable manager, a tool or a slave to carry on the office to the detriment of the public service, we propose to show that at the very moment he asserts, "This is but a temporary arrangement; I shall at once send in a good name for the office to the Senate."

Now, you will perceive that this bears upon the President's condition of purpose in this matter, both in respect to any force as threatened or suggested by anybody else being imputable to him at this time, and upon the question of whether this appointment of General Thomas had any other purpose than what appeared upon its face, a nominal appointment, to raise the question of whether Mr. Stanton would retire or not, and determined, as it seemed to be for the moment, by the acquiescence of Mr. Stanton, was then only to be maintained until a name was sent in to the Senate, as by proof hitherto given we have shown was done on the following day before 1 o'clock.

At the conclusion of argument the Chief Justice [61] said:

Senators, the Chief Justice is unable to determine the precise extent to which the Senate regards its own decision as applicable. He has understood the decision to be that, for the purpose of showing intent, evidence may be given of conversations with the President at or near the time of the transaction. It is said that this evidence is distinguishable from that which has been already introduced. The Chief Justice is not able to distinguish it; but he will submit directly to the Senate the question whether it is admissible or not.

The question being taken on the admission of the testimony, there appeared, yeas 9, nays 37. So the evidence was excluded.

2245. In the Johnson trial the Chief Justice ruled that an official message transmitted after the act was not admissible as evidence

[61] Salmon P. Chase, of Ohio, Chief Justice.

to show intent.—On April 15, 1868,[62] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, during the presentation of evidence on behalf of the respondent, Mr. Benjamin R. Curtis, of counsel, offered a message of the President to the Senate of the United States, bearing date February 24, 1868.

Mr. Benjamin F. Butler, of the managers for the House of Representatives, objected to the admission of the message as evidence, since it was virtually a declaration of the President after he was impeached, and that could not be evidence Mr. Butler stated that the record as to the impeachment was:

> That on the 21st of February a resolution was proposed for impeachment and referred to a committee; on the 22d the committee reported, and that was debated through the 22d and into Monday, the 24th, and the actual vote was taken on Monday, the 24th.

Arguing in support of the objection, Mr. John A. Bingham, of Ohio, one of the managers, said as to the message:

> Is it any more than a volunteer declaration of the criminal, after the fact, in his own behalf? Does it alter the case in law? Does it alter the case in the reason or judgment of any man living, either within the Senate or out of the Senate, that he chose to put his declaration in his own defense in writing? The law makes no such distinctions. I undertake to assert it here, regardless of any attempt to contradict my statement, that there is no law that enables any accused criminal, after the fact, to make declarations, either orally or in writing, either by message to the Senate or a speech to a mob, to acquit himself or to affect in any manner his criminality before the tribunals of justice, or to make evidence which shall be admitted under any form of law upon his own motion to justify his own criminal conduct.
>
> I do not hesitate to say that every authority which the gentlemen can bring into court regulating the rule of evidence in procedures of this sort is directly against the proposition, and for the simple reason that it is a written declaration made by the accussed voluntarily, after the fact, in his own behalf.

Mr. William M. Evarts, of counsel for the President, argued that as the managers had been permitted to put in evidence a resolution of the Senate passed on February 21, and declaring that the President had exceeded his powers, the counsel for the respondent should be permitted to put in the message, which was an answer to that resolution. Mr. Evarts said:

> Now, if the crime [the removal of Secretary Stanton] was completed on the 21st of February, which is not only the whole basis of this argument of the learned managers, but of every other argument upon the evidence that I have had the honor of hearing from them, I should like to know what application or relevancy the resolution passed by the Senate on the 21st of February, after the act of the President had been completed, and after that act had been communicated to the Senate, has on the issue of whether that act was right or wrong? And if the fact that it is an expression of opinion relieves the testimony from the possibility of admission, what was this but an expression of the opinion of the Senate of the United States in the form of a resolution regarding a past act of the President? There could be, then, no single principle of the law of evidence upon which this fact put in proof in behalf of the managers could be admitted, except as a communication from this branch of the Government to the President of the United States of its own opinion concerning the legality of his action; and in the same line and in immediate reply the President communicates to the Senate of the United States, openly and in a proper message, his opinions concerning the legality of the act. What would be thought of the Government that, in a criminal prosecution, by way of inculpating a prisoner, should give in evidence what a magistrate or a sheriff had said to him concerning the crime imputed, and then shut the mouth of the

[62] Second session Fortieth Congress, Senate Journal, p. 898; Globe supplement, pp. 175–178.

prisoner as to what he had said then and there in reply? Why, the only possibility, the only argument for affecting the prisoner with criminality for what had been said to him, was that, unreplied to, it might be construed into admission or submission; and to say that the prisoner when told, "You stole that watch," could not give in evidence his reply, "it was my own watch, and I took it because it was mine," is precisely the same proposition that is being applied here by the learned managers to this communication back and forth between the Senate and the President.

The arguments being concluded, the Chief Justice [63] said:

There is, perhaps, Senators, no branch of the law in which it is more difficult to lay down precise rules than that which relates to evidence of the intent with which an act is done. In the present case it appears that the Senate, on the 21st of February, passed a resolution, which I will take the liberty of reading:

"Whereas the Senate have received and considered the communication of the President stating that he has removed Edwin M. Stanton, Secretary of War, and had designated the Adjutant-General of the Army to act as Secretary of War ad interim: Therefore,

"*Resolved by the Senate of the United States*, That under the Constitution and laws of the United States the President has no power to remove the Secretary of War and to designate any other officer to perform the duties of the office ad interim."

That resolution was adopted on the 21st of February, and was served, as the evidence before you shows, on the evening of the same day. The message which is now proposed to be introduced was sent to the Senate on the 24th day of February. It does not appear to the Chief Justice that the resolution of the Senate called for an answer, or that there was any call upon the President to answer from the Senate itself; and therefore he must regard the message which was sent to the Senate on the 24th of February as a vindication of the President's act addressed by him to the Senate; and it does not appear to the Chief Justice to come within any of the rules which have been applied to the introduction of evidence upon this trial. He will, however, take pleasure in submitting the question to the Senate if any Senator desires it. [After a pause.] If no Senator desires that the question be submitted to the Senate, the Chief Justice rules the evidence to be inadmissible.

2246. The Chief Justice was sustained in admitting during the Johnson trial evidence of an act after the fact as showing intent. Evidence of declarations of respondent after the fact was excluded in the Johnson trial, although related to an act admitted in proof to show intent.

On April 16, 1868,[64] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, Walter S. Cox, an attorney at law residing in the District of Columbia, was called as a witness on behalf of the respondent. The witness having stated that he was connected professionally with the case of Gen. Lorenzo Thomas, who had been arrested on a warrant based on an affidavit of Edwin M. Stanton, Secretary of War, Mr. Benjamin R. Curtis, of counsel for the respondent, asked:

When and under what circumstances did your connection with that matter begin?

To this question Mr. Manager Benjamin F. Butler objected on the ground of irrelevancy.

The Chief Justice [65] said:

The Chief Justice sees no objection to the question as an introductory question, but will submit it to the Senate if it is desired. [After a pause, to the witness.] You can answer the question.

[63] Salmon P. Chase, of Ohio, Chief Justice.
[64] Second session Fortieth Congress, Senate Journal, p. 903; Globe supplement pp. 197–200.
[65] Salmon P. Chase, of Ohio, Chief Justice.

The witness stated that he was sent for on February 22, and went to the President's House, where he saw the President about 5 p.m. Witness was about to relate what the President said, when Mr. Manager Butler interposed an objection.

This produced from the counsel for the respondent the following written offer:

We offer to prove that Mr. Cox was employed professionally by the President, in the presence of General Thomas, to take such legal proceedings in the case that had been commenced against General Thomas as would be effectual to raise judicially the question of Mr. Stanton's legal right to continue to hold the office of Secretary for the Department of War against the authority of the President, and also in reference to obtaining a writ of quo warranto for the same purpose; and we shall expect to follow up this proof by evidence of what was done by the witness in pursuance of the above employment.

Mr. Manager Butler at once objected.

In the course of the arguments Mr. Manager James F. Wilson thus stated the substance of the objection:

Now, I submit to this honorable body that no act, no declaration of the President made after the fact, can be introduced for the purpose of explaining the intent with which he acted. And upon this question of intent let me direct your minds to this consideration—the issuing of the orders referred to constitute the body of the crime with which the President stands charged. Did he purposely and willfully issue an order to remove the Secretary of War? Did he purposely and willfully issue an order appointing Lorenzo Thomas Secretary of War ad interim? If he did thus issue the orders, the law raises the presumption of guilty intent, and no act done by the President after these orders were issued can be introduced for the purpose of rebutting that intent. The orders themselves were in violation of the terms of the tenure of office act. Being in violation of that act, they constitute an offense under and by virtue its provisions, and the offense thus being established must stand upon the intent which controlled the action of the President at the time that he issued the orders. If, after this subject was introduced into the House of Representatives, the President became alarmed at the state of affairs, and concluded that it was best to attempt by some means to secure a decision of the court upon the question of the constitutionality or unconstitutionality of the tenure of office act, it can not avail him in this case. We are inquiring as to the intent which controlled and directed the action of the President at the time the act was done; and if we succeed in establishing that intent, either by proof or by presumption of law, no subsequent act can interfere with it or remove from him the responsibility which the law places upon him because of the act done.

Mr. William M. Evarts, of counsel for the respondent, argued:

Mr. Chief Justice and Senators, we have here the oft-repeated argument that the crime against the act of Congress was complete by the papers drawn and delivered by the President; that the law presumes that those papers were made with the intent that appears on their face, which, it is alleged, is a violation of that act; and as that would be enough in an indictment against the President of the United States to affect him with a punishment, in the discretion of the judge, of six cents fine, so by peremptory necessity it becomes in this court a complete and perfect crime under the Constitution, which must require his removal from office, and that anything beyond the intent that the papers should accomplish what they tend to accomplish is not the subject of inquiry here. Well, it is the subject of imputation in the articles; it is the subject of the imputation in the arguments; it is the subject, and the only subject, that gives gravity to this trial, that there was a purpose of injury to the public interest and to the public safety in this proceeding.

Now, we seek to put this prosecution in its proper place on this point, and to show that our intent was no violence, no interruption of the public service, no seizure of the military appropriations, nothing but the purpose by this movement either to procure Mr. Stanton's retirement, as was desired, or to have the necessary footing for judicial proceedings. If this evidence is excluded, then, when you come to the summing up of this cause, you must take the crime of the dimensions and of the completeness that is here avowed, and I shall be entitled before

this court and before this country to treat this accusation as if the article had read that he issued that order for Mr. Stanton's retirement, and that direction to General Thomas to take charge ad interim, with the intent and purpose of raising a case for the decision of the Supreme Court of the United States between the Constitution and the act of Congress; and if such an article had been produced by the House of Representatives and submitted to the Senate it would have been a laughingstock of the whole country.

The gentlemen shall not make their arguments and escape from them at the same breath. I offer this evidence to prove that the whole purpose and intent of the President of the United States in his action in reference to the occupancy of the office of Secretary of War had this extent and no more—to obtain a peaceable delivery of that trust from one holding it at pleasure to the Chief Executive, or, in the absence of that peaceable retirement, to have a case for the decision of the Supreme Court of the United States; and if the evidence is excluded you must treat every one of these articles as if the intent were limited to an open averment in the articles themselves that the intent of the President was such as I propose to prove it.

At the conclusion of the arguments, the Chief Justice [66] said:

Senators, the counsel for the President offer to prove that the witness, Mr. Cox, was employed professionally by the President in the presence of General Thomas to take such legal proceedings in the case that had been commenced against General Thomas as would be effectual to raise judicially the question of Mr. Stanton's legal right to continue to hold the office of Secretary for the Department of War against the authority of the President, and also in reference to obtaining a writ of quo warranto for the same purpose, and they state that they expect to follow up this proof by evidence of what was done by the witness in pursuance of the above employment. The first article of impeachment, which may, perhaps, for this purpose, be taken as a sample of the rest relating to the same subject, after charging that "Andrew Johnson, President of the United States," in violation of the Constitution and laws, issued the order which has been so frequently read for the removal of Mr. Stanton, proceeds:

"Which order was unlawfully issued with intent then and there to violate the act entitled 'An act regulating the tenure of certain civil offices,'" etc.

The article charges, first, that the act was done unlawfully, and then it charges that it was done with intent to accomplish a certain result. That intent the President denies, and it is to establish that denial by proof that the Chief Justice understands this evidence now to be offered. It is evidence of an attempt to employ counsel by the President in the presence of General Thomas. It is the evidence so far of a fact; and it may be evidence also of declarations connected with that fact. This fact and these declarations, which the Chief Justice understands to be in the nature of facts, he thinks are admissible in evidence. The Senate has already, upon a former occasion, decided by a solemn vote that evidence of the declarations by the President to General Thomas and by General Thomas to the President, after this order was sent to Mr. Stanton, were admissible in evidence. It has also admitted evidence of the same effect, on the 22d, offered by the honorable managers. It seems to me that the evidence now offered comes within the principle of those decisions; and, as the Chief Justice has already had occasion to say, he thinks that the principle of those decisions is right, and that they are decisions which are proper to be made by the Senate sitting in its high capacity as a court of impeachment, and composed, as it is, of lawyers and gentlemen thoroughly acquainted with the business transactions of life and entirely competent to judge of the weight of any evidence which may be submitted. He therefore holds the evidence to be admissible, but will submit the question to the Senate, if desired.

Mr. Charles D. Drake, of Missouri, having asked for a vote, on the question "shall the proof offered be admitted," there appeared yeas 29, nays 21. So the proof was admitted.

The witness then testified as to directions which he received from the President to institute legal proceedings to test General Thomas's right to the office of Secretary of War.

[66] Salmon P. Chase, of Ohio, Chief Justice.

Mr. Curtis, of counsel for the respondent, then asked:

What did you do toward getting out a writ of habeas corpus under the employment of the President?

Mr. Manager Butler having objected, the question was referred to the Senate and decided to be admissible; yeas 27, nays 23.[67]

The witness proceeded to describe his efforts in court, saying finally:

But the counsel who represented the Government, Messrs. Carpenter and Riddle, applied to the judge then for a postponement of the examination——

Mr. Manager Butler having questioned this statement, the Chief Justice said:[68]

It is an account of the general transaction, as the Chief Justice conceives, and comes within the rule. The witness will proceed.

The witness, having related how General Thomas was discharged from court, proceeded:

Immediately after that I went, in company with the counsel he had employed, Mr. Merrick, to the President's House, and reported our proceedings and the results to the President. He then urged us to proceed——

Here Mr. Manager Butler interposed an objection, and Mr. Manager John A. Bingham called attention to the fact that this was asking for the President's declaration on February 26, two days after his impeachment.

Mr. Evarts, of counsel for the respondent, explained:

If it is to turn on that point, which has not been discussed in immediate reference to this question, we desire to be heard. The offer which the Chief Justice and Senators will remember was read, and upon which the vote of the Senate was taken for admission, included the efforts to have a habeas corpus proceeding taken, and also the efforts to have a quo warranto. The reasons why, and the time at which, and the circumstances under which, the habeas corpus effort was made, and its termination, have been given. Thereupon the efforts were attempted at the quo warranto. It is in reference to that that the President gave these instructions. We suppose it is covered by the ruling already made.

The Chief Justice said:[69]

The Chief Justice may have misapprehended the intention of the Senate; but he understands their ruling to be in substance this: That acts in respect to the attempt and intention of the President to obtain a legal decision, commencing on the 22d of February, may be pursued to the legitimate termination of that particular transaction; and, therefore, the Senate has ruled that Mr. Cox, the witness, may go on and testify until that particular transaction came to a close. Now, the offer is to prove conversations with the President after the termination of that effort in the supreme court of the District of Columbia. The Chief Justice does not think that is within the intent of the previous ruling; but he will submit the question to the Senate, Senators, you who are of the opinion that this testimony should be received will please say "aye;" those of the contrary opinion, "no." [Putting the question.] The question is determined in the negative. The evidence is not received.

Thereupon Mr. Curtis propounded this question:

After you had reported to the President the result of your efforts to obtain a writ of habeas corpus, did you do any act in pursuance of the original instructions you had received from the President on Saturday, to test the right of Mr. Stanton to continue in the office? And if so, state what the acts were.

[67] Globe supplement, p. 201; Senate Journal, p. 904.
[68] Globe supplement, p. 202.
[69] Senate Journal, p. 904; Globe supplement, p. 202.

The Chief Justice at once intimated that under the last vote of the Senate this question was inadmissible; but Mr. John Sherman, a Senator from Ohio, asked that the fifth article of impeachment be read:

That said Andrew Johnson, President of the United States, unmindful of the high duties of his office and of his oath of office, on the 21st day of February, in the year of our Lord 1868, and on divers other days and times in said year, before the 2d day of March, in the year of our Lord 1868, at Washington, in the District of Columbia, did unlawfully conspire with one Lorenzo Thomas, and with other persons to the House of Representatives unknown, to prevent and hinder the execution of an act entitled "An act regulating the tenure of certain civil offices," passed March 2, 1867, and in pursuance of said conspiracy did unlawfully attempt to prevent Edwin M. Stanton, then and there being Secretary for the Department of War, duly appointed and commissioned under the laws of the United States from holding said office, whereby the said Andrew Johnson, President of the United States, did then and there commit and was guilty of a high misdemeanor in office.

Counsel for the respondent stated that the question had reference to this article.

The Chief Justice, having had the original offer of proof on the part of counsel for respondent read, said:

The discussion and the ruling of the Chief Justice in respect to that question was in reference to the first article of the impeachment. Nothing had been said about the fifth article in the discussion, so far as the Chief Justice recollects. The question is now asked with reference to the fifth article and the intent alleged in that article to conspire. The Chief Justice thinks it is admissible with that view under the ruling upon the first offer. He will, however, put the question to the Senate if any Senator desires it.

Mr. John Conness, a Senator from California, having asked for a vote, there appeared in favor of admitting the question 27 yeas, and against it 23 nays.[70] So the question was admitted.

2247. The Chief Justice admitted during the Johnson trial as showing intent a question as to action by the respondent, although taken after impeachment.—On April 16, 1868,[71] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, Richard T. Merrick, attorney at law, was called as a witness on behalf of the respondent. Witness testified that he had been counsel for Gen. Lorenzo Thomas when the latter was arrested on complaint of Edwin M. Stanton, Secretary of War, at the time of the President's attempt to remove Mr. Stanton and place General Thomas in the office; and that after the action of the chief justice of the supreme court of the District in discharging General Thomas, he saw the President and communicated to him what had transpired.

Then Mr. Benjamin R. Curtis, of counsel for the respondent, proposed a question which, after objection, was presented in an offer of proof:

We offer to prove that about the hour of 12 noon, on the 22d of February, upon the first communication to the President of the situation of General Thomas's case, the President or the Attorney-General in his presence gave the attorneys certain directions as to obtaining a writ of habeas corpus for the purpose of testing judicially the right of Mr. Stanton to continue to hold the office of Secretary of War against the authority of the President.

Mr. Manager Benjamin F. Butler objected that the witness had been General Thomas's counsel and had not been employed by the

[70] Senate Journal, pp. 904, 905; Globe supplement, pp. 202, 203.
[71] Second session Fortieth Congress, Senate Journal, p. 905; Globe supplement, p. 205.

President. Therefore this witness's testimony could not be considered evidence of the President's acts or declarations after impeachment.

The Chief Justice [72] said:

The Chief Justice thinks this evidence admissible within the rule already determined by the Senate. He will submit the question to the Senate if any Senator desires it. [After a pause.] The witness may answer the question.

Mr. Curtis then proposed this question:

What, if anything, did you and Mr. Cox do in reference to accomplishing the result you have spoken of?

Mr. Manager Butler having objected, the Chief Justice said:

The Chief Justice thinks it is competent, but he will put the question to the Senate if any Senator desires it. [After a pause, to the witness.] Answer the question.

2248. In impeachment trials witnesses are ordinarily required to state facts, not opinions.

In the Johnson trial a witness was not permitted, as a matter of proof of intent, to state that he had formed and communicated an opinion to respondent.

On February 11, 1805,[73] in the high court of impeachments during the trial of the case of United States *v.* Samuel Chase, and while one Henry Tilghman was under examination, Mr. John Randolph, jr., of Virginia, one of the managers on behalf of the House of Representatives, proposed this question:

You say that when the written opinion of the court was thrown on the table, it produced considerable agitation among the gentlemen of the bar. What did you conceive to be the cause of that agitation?

Mr. Philip B. Key, counsel for the respondent, objected.

The President [74] having required the question to be reduced to writing it was read by the Secretary.

Thereupon Mr. James A. Bayard, of Delaware, a Senator, moved that the Senate should withdraw. This motion was then disagreed to.

The question was then put: "Is it competent for the managers to put the said question to the witness?"

It was determined in the negative, yeas 0, nays 34.

2249. On February 12, 1805,[75] in the high court of impeachments during the trial of the case of United States *v.* Samuel Chase, one of the associate justices of the Supreme Court of the United States, a witness, George Hay, being under examination, the following occurred:

The WITNESS. Finding that the judge had made up his mind on that subject, and that the law of Virginia was not considered as obligatory, I had no idea of making any motion to the court founded on the doctrine which he had thus denounced. My opinion before, at that time, and at the present time, the opinion which I expressed officially on a late occasion, is, that where the laws of the United States do not otherwise require or provide——

Mr. Luther Martin, counsel for the respondent, said that he apprehended this testimony was of no kind of consequence.

The WITNESS. I was only about to state the reasons why nothing more was said on that subject, on a motion founded on it.

The PRESIDENT.[76] The Senate object to that sort of testimony. You will please to confine yourself as much as possible to facts.

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[72] Salmon P. Chase, of Ohio, Chief Justice.
[73] Second session Eighth Congress, Senate Impeachment Journal, p. 518, Annals, p. 180.
[74] Aaron Burr, of New York, President of the Senate and Vice-President of the United States.
[75] Second session Eighth Congress, Annals, p. 204.
[76] Aaron Burr, of New York, Vice-President and President of the Senate.

2250. On April 13, 1868,[77] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, Gen. William T. Sherman was called as a witness on behalf of the President, and Mr. Henry Stanbery, of counsel for the President, asked this question:

After the restoration of Mr. Stanton to office, did you form an opinion whether the good of the service required a Secretary of War other than Mr. Stanton; and if so, did you communicate that opinion to the President?

Mr. Manager John A. Bingham at once objected to the question:

Mr. President and Senators, we desire to state very briefly to the Senate the ground upon which we object to this question. It is that matters of opinion are never admissible in judicial proceedings, but in certain exceptional cases, cases involving professional skill, etc.; it is not necessary that I should enumerate them. It is not to be supposed for a moment that there is a Member of the Senate who can entertain the opinion that a question of the kind now presented is competent under any possible circumstances in any tribunal of justice. It must occur to Senators that the ordinary tests of truth can not be applied to it at all; and in saying that, my remark has no relation at all to the truthfulness or veracity of the witness. There is nothing upon which the Senate could pronounce any judgment whatever. Are they to decide a question upon the opinions of forty or forty thousand men what might be for the good of the service? The question involved here is a violation of the laws of the land. It is a question of fact that is to be dealt with by witnesses; and it is a question of law and fact that is to be dealt with by the Senate.

Now, this matter of opinion may just as well be extended one step further, if it is to be allowed at all. After giving his opinion of what might be requisite to the public service, the next thing in order would be the witness's opinion as to the obligations of the law, the restrictions of the law, the prohibitions of the law. We can not suppose that the Senate will entertain such a question for a moment. It must occur to the Senate that by adopting such a rule as this it is impossible to see the limit of the inquiry or the end of the investigation. If it be competent for the witness to deliver this opinion, it is equally competent for forty thousand other men in this country to deliver their opinions to the Senate; and then, when is the inquiry to end? We object to it as utterly incompetent.

Mr. Stanbery explained the object of the question:

Mr. Chief Justice and Senators, if ever there was a case involving a question of intention, a question of conduct, a question as to acts which might be criminal or might be indifferent according to the intent of the party who committed them, this is one of that class. It is upon that question of intent (which the gentlemen know is vital to their case, which they know as well as we know they must make out by some proof or other) that a great deal of their testimony has been offered, whether successfully or not I leave the Senate to determine; but with that view much of their testimony has been offered and has been insisted upon. That is, it has been to show with what intent did the President remove Mr. Stanton. They say the intent was against the public good, in the way of usurpation, to get possession of that War Office and drive out a meritorious officer, and put a tool, or as they say in one of their statements a slave, in his place.

Upon that question of conduct, Senators, what now do we propose to offer to you? That the second officer of the Army—and we do not propose to stop with him—that this high officer of the Army, seeing the complication and difficulty in which that office was, by the restoration of Mr. Stanton to it, formed the opinion himself that for the good of the service, Mr. Stanton ought to go out and some one else take the place. Who could be a better judge of the good of the service than the distinguished officer who is now about to speak?

But the gentlemen say what are his opinions more than another man's opinions, if they are merely given as abstract opinions? We do not intend to use them as abstract opinions. The gentlemen did not read the whole question. It is not merely what opinion had you, General Sherman; but having formed that opinion, did you communicate it to the President, that the good of the service required Mr. Stanton to leave that Department; and that in your judgment, acting for the good of the service, some other man ought to be there.

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[77] Second session Fortieth Congress, Senate Journal, p. 892; Globe supplement, pp. 163–166.

This is no declaration of the President we are upon now. This is a communication made to him to regulate his conduct, to justify him, indeed to call upon him to look to the good of the service, and to be rid, if possible, in some way of that unpleasant complication. Anyone can see there was a complication there that must in some way or other be got rid of; for look at what the managers have put in evidence!

During the arguments Mr. Roscoe Conkling, a Senator from New York, submitted in writing this question:

Question. Do the counsel for the respondent offer at this point to show by the witness that he advised the President to remove Mr. Stanton in the manner adopted by the President, or merely that he advised the President to nominate for the action of the Senate some person other than Mr. Stanton?

Mr. Stanbery replied that counsel for the President did not propose either, but proposed to show that General Sherman gave his opinion for the good of the service, and for that good thought that somebody else ought to be in the office.

The question being submitted to the Senate, "Is the question admissible?" there appeared yeas 15, nays 35. So the question was excluded.

2251. On July 10, 1876,[78] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, Gen. William B. Hazen, a witness on behalf of the United States, testified that he had communicated to the Military Affairs Committee of the House of Representatives certain facts in regard to the post tradership at Fort Sill. Thereupon Mr. Manager John A. McMahon asked:

There has been a criticism made upon your communicating this matter to the Military Committee instead of communicating it through the regular channels to the Secretary of War. State your views of that question.

Mr. Matt. H. Carpenter, of counsel for the respondent, objected, on the ground that it might swear away an argument of the defense; but when the managers stated that a similar question had been put to another witness by Mr. Carpenter and admitted by the court the objection was withdrawn.

Thereupon Mr. George F. Edmunds, a Senator from Vermont, said:

I object to that question myself, if counsel do not. I do not think the time of the court ought to be wasted with that sort of evidence.

Thereupon Mr. Manager McMahon withdrew the question.

2252. It was decided in the Belknap trial that a question to a witness might not be so framed that the answer might imply an opinion.

Instance wherein a President pro tempore ruled on evidence during an impeachment trial.

On July 11, 1876,[79] in the Senate for the impeachment trial of William W. Belknap, late Secretary of War, Caleb P. Marsh, a witness on behalf of the United States, was examined by Mr. Matt. H. Carpenter, of counsel for the respondent, who asked this question:

Was there any corrupt agreement or any agreement between you and Mr. Belknap in regard to being appointed post trader at Fort Sill?

Mr. Manager John A. McMahon said:

We object to the word "corrupt." Say "any agreement." I think by using the word "corrupt" you are asking an opinion of the witness. The objection we make

[78] First session Forty-fourth Congress, Record of trial, pp. 229, 230.
[79] First session Forty-fourth Congress, Record of trial, p. 236.

Is that the question calls for an opinion as to the character of the agreement instead of calling for the agreement itself.

The President pro tempore [80] said:

The Chair sustains the objection.

2253. In the Swayne trial the opinions of witnesses, including answers to questions of mixed law and facts, were excluded.—On February 11, 1905, in [81] the Senate sitting for the impeachment trial of Judge Charles Swayne, a witness, A. H. D'Alemberte, was under examination, when Mr. Manager James B. Perkins, of New York, asked this question:

I ask the witness if Judge Swayne, to his knowledge, was in 1900 a resident of the county of which he was collector and in which Pensacola is situated?

Mr. Anthony Higgins, of counsel for respondent, objected, saying:

It is a question of law. We have no objection to the witness stating, but desire to have him state, every fact he knows about the movement or the residence of Judge Swayne, or where he actually or bodily was, but to ask a more conclusion of law is, we think, improper.

The Presiding Officer [82] said:

The question is, Was the respondent, to the witness's knowledge, a resident of Pensacola? The witness may answer the question.

The WITNESS. To my knowledge, he was not.

Q. (By Mr. Manager PERKINS). Was Judge Swayne a resident of Pensacola during that time?

Mr. John M. Thurston, of counsel for the respondent, objected, saying:

Mr. President, we are not objecting to their asking this witness whether or not in any particular year, month, week, or day Judge Swayne was in Pensacola. That would be a proper question. It would ask for a fact. But they are asking for a conclusion which can only result from the consideration of many facts related to the law.

The Presiding Officer said:

The witness is asked really for his opinion whether Judge Swayne was a resident at a certain place. If this witness can be so asked, any number of witnesses can be asked the question, and the decision of it would then depend upon the opinion of witnesses.

The question of residence is one of mixed law and fact, and must be determined, as the Presiding Officer thinks, by the Senate upon the proved circumstances and facts of the case and not upon the opinion of witnesses resident in that part of the country. So the question is excluded.

2254. On February 21, 1905,[83] in the Senate sitting for the impeachment trial of Judge Charles Swayne, a witness, William A. Blount, was under examination by Mr. John M. Thurston, of counsel for the respondent, when this question was propounded by Mr. Charles A. Culberson, a Senator from Texas:

Q. What was the manner of Judge Swayne as to anger or resentment in imposing sentence in the contempt proceedings?—A. That depends entirely upon the viewpoint of the man who was listening to him. I believed that he was right. It seemed to me——

Mr. Manager David A. De Armond, of Missouri, said:

Mr. President, I object to that. It is not an answer to the question. The witness is giving an opinion.

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[80] T. W. Ferry, of Michigan, President pro tempore.
[81] Third session Fifty-eighth Congress, Record, p. 2394.
[82] Orville H. Platt, of Connecticut, Presiding Officer.
[83] Third session Fifty-eighth Congress, Record, p. 2985.

The Presiding Officer [83a] said:

The witness may state how he regarded the appearance of the judge in imposing this sentence. * * *

The Presiding Officer was about to say that he did not think the witness should make any comment in answering any question as to whether he thought the judge was right or not.

2255. On February 22, 1905,[84] in the Senate sitting for the impeachment trial of Judge Charles Swayne, a witness for the respondent, Thomas F. McGowin, was examined by Mr. John M. Thurston, of counsel for the respondent:

Q. You heard all that was said?—A. I did; all that the judge said.

Q. Yes; all that the judge said. What was the general appearance of Judge Swayne in the delivery of these remarks?—A. As I recall it, I thought the judge spoke with a little more than ordinary deliberation and calmness and firmness, and the impression that was created on my mind was that——

Mr. Manager Henry W. Palmer, of Pennsylvania, said:

Mr. President, I object to the impression created on the witness's mind. What he is entitled to testify to are facts that occurred there at that time.

The Presiding Officer [85] said:

Let the last phrase be stricken out. The witness can not testify in the impression made on his mind.

2256. In the Belknap trial objection was successfully made to an opinion of a subordinate officer as to evidence of the character of respondent's administration.—On July 12, 1876, in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, Nelson H. Davis, Inspector-General of the Army, was examined as a witness on behalf of the respondent, and Mr. Matt. H. Carpenter, of counsel for the respondent, having ascertained that witness had been in the Army during respondent's entire administration and had been holding constant official relations with him, asked:

From all you know of the subject, and from all you know of General Belknap, I ask you what has been the general character of his administration of the War Department?

Mr. Manager George A. Jenks at once objected:

The objection I make to that is that a witness must testify to character instead of to the specific acts of this man, or general acts. He must know what has been said by those who are familiar with his administration in that office, instead of how has he done the business.

Mr. Manager George F. Hoar said:

We understand also that it should be the opposite of the particular offense charged. If a man is charged with adultery, his reputation for chastity; if he is charged with perjury, his reputation for veracity. We suppose the question should be, "What is the reputation of the Secretary for official integrity?" * * * We do not understand that it is competent to prove by a subordinate officer in the Army, as an expert, the general character of the administration of a great officer of state. There is no such thing as an expert in such an administration. We object to the question unless it is limited to the reputation of the Secretary for official integrity.

Mr. Carpenter said:

We shall claim when we come to sum up this case that the general management of the War Department by General Belknap is a proper subject of con-

[83a] Orville H. Platt, of Connecticut, Presiding Officer.
[84] Third session Fifty-eighth Congress, Record, p. 3049.
[85] First session Forty-fourth Congress, Senate Journal, p. 977; Record of trial, p. 261.

sideration; that if they could establish this particular charge we could still prove the general management and official conduct of the Department, and then appeal to the Senate upon the whole record of the administration of that office whether this man shall be driven out into a little corner of his life or whether his whole conduct in the office is to be considered.

The Senate, without division, decided that the question should be admitted.

2257. A witness was permitted in the Belknap trial to give in answer a conclusion derived from a series of facts.—On July 10, 1876,[86] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, Caleb P. Marsh, a witness on behalf of the United States, was examined by the managers and testified as to payments of money to the respondent from remittances received from one Evans, who had been appointed post trader at Fort Sill through witness's efforts in collusion with respondent. The witness had testified to sending remittances to respondent by express, when Mr. Manager John A. McMahon aked:

Did General Belknap know where these moneys came from that you were sending to him?

Mr. Matt. H. Carpenter, of counsel for the respondent, objected, saying:

I object to that question. That calls for a conclusion, not for a fact. * * * A conclusion may be drawn from a correspondence running through years, and a dozen conversations; but it is a conclusion always. If you ask him what he told General Belknap, or what Belknap ever said to him, that calls for a fact; but to ask him whether he must have known such a thing calls for conclusion.

The question being submitted to the Senate, it was held, without division, to be admissible.

2258. In the Johnson trial the Senate sustained the Chief Justice in admitting as evidence of a general practice tabular statements of documents relating to particular instances.—On April 15, 1868,[87] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, Mr. Benjamin R. Curtis, of counsel for the respondent, offered in evidence certain certified documents from the Navy Department, being in the nature of tabular statements of the results shown by the records as to appointments and removals of officers. Mr. Curtis described what was offered as follows:

The documents I offer are not full copies of any record. They are, therefore, not strictly and technically legal evidence for any purpose. They are extracts of facts from those records. Allow me, by way of illustration, to read one, so that the Senate may see the nature of the document:

"NAVY AGENCY AT NEW YORK.

"1864, June 20. Isaac Henderson was, by direction of the President, removed from the office of navy agent at New York, and instructed to transfer to Paymaster John D. Gibson, of United States Navy, all the public funds and other property in his charge."

We do not offer that as technically legal evidence of the fact that is there stated; but having in view simply to prove, not the case of Mr. Henderson, with its merits and the causes of his removal, etc., all of which would appear on the records, but the practice of the Government under the laws of the United States; instead of taking from the records the entire documents necessary to exhibit his

[86] First session Forty-fourth Congress, p. 969; Record of trial, p. 226.
[87] Second session Fortieth Congress, Senate Journal, pp. 899, 900; Globe supplement, pp. 183–186.

whole case, we have taken the only fact which is of any importance in reference to this inquiry. If the Senate consider that they must apply the technical rule of evidence, we must get the records and have the records copied, and of course, for the same reason, readmitted.

There was objection on the part of the managers, but after argument the Chief Justice [88] said:

The counsel for the President propose to offer in evidence two documents from the Navy Department, exhibiting the practice which has existed in that Department in respect to removals from office. To the introduction of this evidence the honorable managers object. The Chief Justice thinks that the evidence is competent in substance, but that the question of form is entirely subject to the discretion of the Senate and of the Senate alone. The whole question, therefore, is submitted to the Senate. Senators, you who are of opinion that this evidence should be received will, as your names are called, answer "yea;" those of the contrary opinion, "nay."

And there appeared yeas 36, nays 15. So the document was admitted.

2259. A summary by counsel of the contents of documents was held to be in the nature of argument and not admissible as evidence.—On February 23, 1905,[89] in the Senate sitting for the impeachment trial of Judge Charles Swayne, Mr. John M. Thurston, of counsel for the respondent, in the course of the presentation of evidence, offered certificates from certain clerks of United States circuit courts, showing the dates at which the respondent had held court.

Then Mr. Thurston said:

For the convenience of the court and notification to the managers as to what we claim these certificates show, I will ask to have printed in the Record a list compiled by us from the certificates showing the various dates in a brief and concise form in the nature of a calendar, and also showing our computations of the number of days covered by them.

Mr. Manager Henry W. Palmer, of Pennsylvania, objected, saying:

Mr. President I submit that the certificates when printed will show what they contain, and their computation is what we object to.

The Presiding Officer [90] said:

That is a part of the argument, and the Presiding Officer thinks should be withheld until the argument is commenced.

2260. In impeachment trials public documents are admitted in evidence for what they may be worth.

Ruling by the Vice-President as to evidence in an impeachment trial.

On February 15, 1805 [91] in the high court of impeachments during the trial of the case of United States *v.* Samuel Chase, one of the associate justices of the Supreme Court of the United States, Mr. Joseph Hopkinson, counsel for the respondent, offered in evidence a certificate of the clerk of the circuit court of Pennsylvania, to show that at the trial of Fries, in 1799, there were eighty-six civil suits depending.

Also a copy of the indictment on the first trial of Fries.

Also a part of a charge delivered by Judge Iredell at the term when Fries was tried, taken from Carpenter's report of that trial, page 14.

Mr. George W. Campbell, of Tennessee, one of the managers, intimating some objection to receiving this paper in evidence.

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[88] Salmon P. Chase, Chief Justice.
[89] Third session Fifty-eighth Congress, Record, p. 3163.
[90] Orville H. Platt, of Connecticut, Presiding Officer.
[91] Second session Eighth Congress, Annals, p. 243.

The President [92] said it might be read as a report of the case; but what credit it would deserve it would be for the court to determine.

2261. On January 11, 1831,[93] in the high court of impeachments during the trial of the cause of The United States *v.* James H. Peck, the counsel for the respondent introduced as a witness Samuel D. King, a clerk in the General Land Office, to prove certain official records of that office relating to land grants in the Province of Louisiana.

The respondent was on trial for unlawfully oppressing Luke E. Lawless, whom he had imprisoned for contempt in criticising in the public prints the action of respondent as judge in a case relating to a land grant.

Mr. James Buchanan, of Pennsylvania, chairman of the managers for the House of Representatives, objected to the introduction of the documents, alleging that they referred to land grants in a portion of the territory different from that in which the case in question had arisen, and that they did not show the practice in upper Louisiana, which was the region to which the pending trial related.

Mr. Jonathan Meredith, counsel for the respondent, said:

We produce it as a public document from the proper repository. It purports to be a genuine document, and it shows, as we shall contend, that the same regulations applied to the whole province.

On the question, "Shall these documents be given in evidence?" there appeared yeas 40, nays 0.

2262. In the Johnson trial a message of President Buchanan, published as a Senate document, was admitted in evidence.—On April 15, 1868,[94] in the Senate sitting for the impeachment trial of Andrew Johnson, President of United States, Mr. Benjamin R. Curtis, of counsel for the respondent, offered, with a view of showing the practice of the Government with reference to appointments to and removals from office, a message of President Buchanan, from the published Executive documents of the Senate.

Mr. Manager Benjamin F. Butler objected:

The difficulty that I find with this message, Senators, is, that it is the message of Mr. Buchanan and can not be put in evidence any more than the declaration of anybody else. We should like to have Mr. Buchanan brought here under oath, and to cross-examine him as to this.

The question being taken, the Senate decided, without division, that the evidence should be admitted.

2263. In the Johnson trial the managers were not required, in submitting a letter of respondent, to also submit accompanying but not necessarily pertinent documents.—On April 2, 1868,[95] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, Mr. Manager James F. Wilson, of Iowa, offered in evidence a certain letter of President Johnson to Gen. U.S. Grant, wherein were two portions referring to accompanying documents:

GENERAL: The extraordinary character of your letter of the 3d instant would seem to preclude any reply on my part; but the manner in which publicity has

[92] Aaron Burr, of New York, Vice-President and President of the Senate.
[93] Second session Twenty-first Congress, Senate Impeachment Journal, p. 334; Report of trial of James H. Peck, pp. 274, 275.
[94] Second session Fortieth Congress, Senate Journal, p. 900; Globe supplement, p. 191.
[95] Second session Fortieth Congress, Senate Journal, pp. 874, 875; Globe supplement, pp. 80–83.

been given to the correspondence of which that letter forms a part and the grave questions which are involved induce me to take this mode of giving, as a proper sequel to the communications which have passed between us, the statements of the five members of the Cabinet who were present on the occasion of our conversation on the 14th ultimo. Copies of the letters which they have addressed to me upon the subject are accordingly herewith inclosed.

* * * * * * *

There were five Cabinet officers present at the conversation, the detail of which, in my letter of the 28th ultimo, you allow yourself to say, contains "many and gross misrepresentations." These gentlemen heard that conversation and have read my statement. They speak for themselves, and I leave the proof without a word of comment.

Mr. Wilson stated in introducing the letter that the special object of the managers in introducing it was to show the President's own declaration of an intent to prevent the Secretary of War, Mr. Stanton, from resuming the duties of the office, notwithstanding the action of the Senate and the requirements of the tenure of office bill.

Mr. Henry Stanbery, of counsel for the President, entered an objection which was, by direction of the Chief Justice, reduced to writing, as follows:

The counsel for the President object that the letter is not in evidence in the case unless the honorable managers shall also read the inclosures therein referred to and by the letter made part of the same.

In support of the objection, Mr. Stanbery argued:

The managers read a letter from the President to use against him certain statements that are made in it, and perhaps the whole; we do not know the object. They say the object is to prove a certain intent with regard to the exclusion of Mr. Stanton from office. In the letter the President refers to certain documents which are inclosed in it as throwing light upon the question and explaining his own views. Now, I put it to honorable Senators: Suppose he had copied these letters in the body of his letter, and had said just as he says here, "I refer you to these; these are part of my communication," could any one doubt that these copies, although they come from other persons, would be admissible? He makes them his own. He chooses to use them as explanatory of his letter. He is not willing to let that letter go alone; he sends along with it certain explanatory matter. Now, you must admit, if he had taken the trouble to copy them himself in the body of his letter, they must be read. Suppose he attaches them, makes them a part, calls them "exhibits," affixes them, attaches them to the letter itself by tape or seal or otherwise, must they not be read as part of the communication, as the very matter which he has introduced as explanatory, without which he is not willing to send that letter? Undoubtedly. Does the form of the thing alter it? Is he not careful to send the documents not in a separate package, not in another communications, but inclosed in the letter itself, so that when the letter is read the documents must be read? It seems to me there can not be a question but that they must read the whole and not merely the letter; for it was the whole that the President sent to be read to give his views, and not merely the letter unconnected with these documents.

Mr. Manager John A. Bingham argued against the objection:

We claim that we are under no obligation by any rule of evidence whatever, in introducing a written statement of the accused, to give in evidence the statements of third persons referred to generally by him in that written statement. In the first place, their statements, we say, would not be evidence against the President at all. They would be hearsay. They would not be the best evidence of what the parties affirmed. The matter contain in the letter of the President shows that the papers, without producing them here, have relation to a question of fact between himself and General Grant, which question of fact, so far as the President is concerned, is affirmed in this letter by himself and for himself, and concludes him; and we insist that if forty members of his Cabinet were to write otherwise if could not affect this question. It concludes him; it is his own declaration; and the matter of dispute between himself and General Grant, although it is referred to in this

letter, is no part of the matter upon which we rely in this accusation against the President.

Mr. Bingham admitted that if the letters referred to contained a statement relating to the matter with which they charged the President, and if the letter now sought to be introduced showed a statement from them adopted by the President himself in regard to the matter, the objection of respondent's counsel would be well taken.

The question was taken, "Shall the objection of the counsel by the President to the evidence proposed to be offered be sustained?" and there appeared yeas 20, nays 29.

So the objection was overruled and the letter was admitted as presented.

2264. Instance in the Swayne case wherein a witness was permitted to testify as to the nature of a document which was on record in the trial.

Instance during the Swayne trial wherein the Presiding Officer, contrary to his usual habit, submitted a question of evidence to the Senate at once.

On February 23, 1905,[96] in the Senate sitting for the impeachment trial of Judge Charles Swayne, Mr. Charles A. Culberson, a Senator from Texas, submitted a series of questions to a witness for the respondent, W. A. Blount:

Q. Were you counsel for O'Neal in the contempt proceedings against him before Judge Swayne?—A. I was.

Q. Did you raise a question of jurisdiction of the court in those proceedings? If so, please state such question fully and how it was raised.—A. I raised the question by a demurrer.

Mr. John M. Thurston, of counsel for the respondent, said:

Mr. President, while ordinarily we would have no objection to the answer which we anticipate, yet the O'Neal case is all here of record, and objection was made yesterday to our asking the witness Greenhut as to the injury he received and which was exhibited in court at the time of that trial. The objection was based upon the fact that the complete record being here we could not go outside of it. Therefore in return I make the same objection that the record of the O'Neal case shows every proceeding that was had therein, including any objection that may have been taken to the jurisdiction.

Mr. Manager Marlin E. Olmsted, of Pennsylvania, said:

Before that is done, may I make a suggestion? This is a very different matter from the testimony which was sought to be brought out by Greenhut. There the attempt was to prove by him the extent of his injuries in a street combat, with no evidence that the facts as to which he was to testify had been before the court. Our objection was not because of the fact that it was in the record, but that it was proposed to prove something as an excuse for the judge which had not been before him at the trial of the case, while here this witness is asked to testify to what occurred at the trial of the contempt case.

The Presiding Officer[97] said:

Shall the witness answer the question? [Putting the question.] In the opinion of the Presiding Officer the ayes have it. [A pause.] The ayes have it, and the witness will answer.

2265. Instance in the Swayne trial wherein, with the concurrence of counsel, the managers introduced without oral testimony a certified copy of a court record.

[96] Third session Fifty-eighth Congress, Record, p. 3147.
[97] Orville H. Platt, of Connecticut, Presiding Officer.

In the Swayne trial, evidently by written stipulation between managers and counsel, certified copies of records were used in the same way as the original might have been used.

On February 14, 1905,[98] in the Senate sitting for the impeachment trial of Judge Charles Swayne, Mr. Manager Samuel L. Powers, of Massachusetts, said:

I offer in evidence, Mr. President, a certified copy of the court record in what is known as the "O'Neal case." This record is made up of what is known as the complaint upon which the order of attachment in this contempt case was issued, and also a demurrer to the original complaint, which appears to have been disposed of, and also the affidavit of the respondent, which is an answer to the complaint, together with other documents, showing the disposition of that case.

It has been agreed between counsel for the respondent and the managers that this record may go into evidence without being read before the court. It is very long and would occupy possibly an entire session if it were read. But I assume, Mr. President, in order to have it go into evidence without being read, it is necessary that we should have the permission of the court to do so. So I tender this record with the request that it become a part of the evidence in this case and be printed as such without first being read to the court.

After the presentation of the affidavits, Mr. Augustus O. Bacon, a Senator from Georgia, said:

Mr. President, before the manager proceeds, as he says he will call only one witness, I desire to know whether the affidavits and such other matters as were included in these answers are offered and accepted as evidence without testimony being given from the stand? I simply wish the information.

Mr. Anthony Higgins, of counsel for the respondent, said:

Mr. President, there is no objection on the part of the respondent.

I will state, Mr. President, in respect to that matter, that this is the first trial in this court that I am aware of where a stenographic record of what occurred in another court has been presented here.

In the Peck case, seventy-five years ago, the testimony of what occurred in Judge Peck's court was entirely dependent upon the oral testimony of the witnesses who were present at that trial. It has seemed to counsel for the respondent that they were fortunate in the O'Neal case that a stenographic record had been made and preserved, and that it could be presented here, so that this court would know precisely what had occurred there.

I think therefore it is better that it should go in in that form, even though without the sanction of an oath in this tribunal.

2266. On February 21, 1905,[99] in the Senate sitting for the impeachment trial of Judge Charles Swayne, William A. Blount, a witness on behalf of the respondent, was under examination by Mr. John M. Thurston, of counsel for the respondent, when these questions were asked:

Q. Of the original contempt charge. I ask you now directly as to the other defendant in it, Mr. Paquet.—A. Judge Paquet first appear in answer to the citation with counsel, and objected to the proceeding upon the ground that Judge Swayne did not have jurisdiction, as the transaction in which counsel were engaged was not an official transaction of an officer of the court Judge Swayne overruled that contention, and Judge Paquet asked for time in which to make an answer. Thereupon he sued out a writ of prohibition from the circuit court of appeals, which was heard before that court and denied, and then he appeared in the circuit court before Judge Swayne and filed a paper, which was an apology and a purging of the contempt, as I understood, though the paper speaks for itself.

Q. (By Mr. Thurston.) What followed that?—A. Thereupon he was discharged without punishment.

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[98] Third session Fifty-eighth Congress, Record, pp. 2540, 2551.
[99] Third session Fifty-eighth Congress, Record, pp. 2983, 2984.

Mr. Thurston then said:

We offer in evidence a certified transcript of that portion of the record in the case, merely asking to have read the paper in which Judge Paquet confessed and purged himself of contempt.

This certified transcript was as follows:

UNITED STATES CIRCUIT COURT, NORTHERN DISTRICT OF FLORIDA, AT PENSACOLA—IN THE MATTER OF CONTEMPT PROCEEDINGS AGAINST LOUIS P. PAQUET

Now comes Louis P. Paquet, respondent in the above-entitled matter, and says:

That upon full and mature consideration of his actions and conduct in the matter referred to in the motion, made as the basis of the above-entitled proceedings, through excessive zeal in behalf of his clients, he did so act that this honorable court was justified in believing that the said actions were committed in contempt thereof and as showing disrespect therefor. That respondent regrets exceedingly the course taken by him in this matter, and now appears in court and requests that he be permitted to apologize for his behavior and file with the records in the above-entitled cause this paper.

LOUIS P. PAQUET, *Respondent.*

Filed March 31, 1902.

F. W. MARSH, *Clerk.*

IN THE UNITED STATES CIRCUIT COURT, NORTHERN DISTRICT OF FLORIDA—THE UNITED STATES V. LOUIS P. PAQUET

This cause coming on to be heard, on the application of Louis P. Paquet to withdraw his answer in the above-entitled cause, and the submission of his explanation and apology by the said defendant—

It is now ordered that the said defendant do have leave to withdraw his answer heretofore filed and to subtract the same from the files of this court, and that this court do accept the said apology and statement filed on March 31, 1902, and the said defendant is hereby discharged from the rule to show cause, heretofore granted against him.

Done this April 1, A.D. 1902.

CHAS. SWAYNE, *Judge.*

(Indorsement: United States v. Louis P. Paquet. Order. Filed April 2, 1902. F. W. Marsh, clerk.)

UNITED STATES OF AMERICA, *Northern District of Florida*:

I, F. W. Marsh, clerk of the district court of the United States for the northern district of Florida, hereby certify that the foregoing is a true and correct copy of an original paper or document filed in the cause therein specified in said court on the day therein set forth, as the same remains of record and on file in said court.

Witness my hand and the seal of said court at the city of Pensacola, in said district, this 3rd day of Febuary, A.D. 1905.

[SEAL.] F. W. MARSH, *Clerk.*

Mr. Manager Henry W. Palmer, of Pennsylvania, said:

We object to that paper. It has never appeared in evidence in this case. The original has never been seen, and whether any such paper exists we do not know. We object to this extract from the minority report, because it was never in the case. * * * The first place where that paper ever appeared is in the minority report. It has never been seen by anybody except perhaps the people who made the minority report. I say it was never offered in evidence in any place. I should like to see the origianl, if you have it.

Mr. Thurston replied:

This is certified to by the clerk of the court as being a part of the record, and I think, if you will permit me, I have in my pocket the stipulation with the managers that certified copies of records may be produced and used in evidence in the same manner that the original documents could be.

The Presiding Officer [100] said:

[100] Orville H. Platt, of Connecticut, Presiding Officer.

The Presiding Officer thinks an official copy of the proceedings in court is proper evidence; and as to the other question, whether this is evidence or not, three parties were proceeded against for contempt. It was one proceeding. The action of the court with regard to two of them has been introduced in evidence, and the Presiding Officer thinks that the action of the court in regard to the third of the persons complained of for contempt can properly be admitted.

2267. By a close vote, after elaborate argument, the record of Congressional debates was admitted during the Swayne trial as having a bearing on the construction of a law.

Instance during the Swayne trial wherein the Presiding Officer, contrary to his usual habit, submitted a question of evidence to the Senate at once.

On February 23, 1905,[101] in the Senate sitting for the impeachment of Judge Charles Swayne, Mr. John M. Thurston, of counsel for the respondent, in the course of the introduction of evidence, presented and asked to have incorporated in the Record certain extracts from the official debates of Congress. He explained:

These are the debates on three separate occasions when the provisions of law relating to the payment of expenses for travel and attendance of judges holding court outside of their districts were under consideration. We offer it as a part of the parliamentary history of the enactment of these laws and as having some bearing upon their construction.

Mr. Manager Martin E. Olmsted, of Pennsylvania, objected, saying:

Mr. President, the honorable counsel for the respondent offers certain extracts from the Congressional Record purporting to contain some portions of the debates at various times upon provisions of pending bills, which subsequently became statutes, relating to the payment of expenses of district judges for the purpose as he states, of construing those acts of Congress. To that we object, first, that it is not competent nor proper in the construction of a statute to consider the debates in Congress, and, second, that if admitted, it would require us in rebuttal to produce all the other portions of the debates, and then to call all those Members of Congress who are not present to ascertain their views upon the construction of the statute for which they then voted. Upon that I will take a very few minutes to refer the Presiding Officer and the Senate to what seems to me to be an entirely conclusive authority upon the subject.

It was decided in The United States *v.* Freight Association (166 U.S., p. 260) as stated in the syllabus:

"Debates in Congress are not appropriate sources of information from which to discover the meaning of the language of a statute passed by that body."

Mr. Justice Peckham delivered the opinion of the court. On page 318 he said:

"Looking simply at the history of the bill from the time it was introduced in the Senate until it was finally passed, it would be impossible to say what were the views of a majority of the Members of each House in relation to the meaning of the act. It can not be said that a majority of both Houses did not agree with Senator Hoar in his views as to the construction to be given to the act as it passed the Senate. All that can be determined from the debates and reports is that various Members had various views, and we are left to determine the meaning of this act, as we determine the meaning or other acts, from the language used therein.

"There is, too, a general acquiescence in the doctrine that debates in Congress are not appropriate sources of information from which to discover the meaning of the language of a statute passed by that body. (United States *v.* Union Pacific R. R. Co., 91 U.S. 72; Aldridge *v.* Williams, 3 How., 9, Taney, Chief Justice; Mitchell *v.* Great Works Milling and Manufacturing Co., 2 Story, 648; Queen *v.* Hertford College, 3 Q. B. D., 693.)

"The reason is that it is impossible to determine with certainty what construction was put upon an act by the members of a legislative body that passed it by resorting to the speeches of individual members thereof. Those who did not speak may not have agreed with those who did, and those who spoke might

[101] Third session Fifty-eighth Congress, Record, pp. 3164–3167.

differ from each other, the result being that the only proper way to construe a legislative act is from the language used in the act, and, upon occasion, by a resort to the history of the times when it passed."

Now, Mr. President, you will readily see from the few disjointed remarks in the body at the other end of the building, the bill coming before it for the first time, one Member taking an offhand view of a paragraph and saying so and so, and another saying something else, and the great body who vote for it saying nothing, it is improper—and the Supreme Court has so held, and so have the courts of England—that it is absolutely improper to look into the debates for the purpose of construing an act of assembly. You will see at once that in order to do full justice to the subject it would be necessary to call all those Members who did not vote and ascertain their views; which would amount to taking a new vote in the House of Representatives to determine upon the construction of an act of assembly, the construction of which is proper matter for the courts, and in this instance for the Senate sitting as a court.

Mr. Thurston argued:

We offer to prove that on April 24, 1896, when this provision was before the Senate of the United States, the meaning of the clause was discussed on the floor of the Senate, and growing out of that discussion, and for the avowed purpose of making its meaning explicit, an amendment was attached to the clause in the Senate declaring, in substance, that nothing but actual expenses or moneys actually expended should be allowed the judges. That amendment was put on in the Senate. It went to conference and was rejected by the conference report, thereby, as we claim, determining that it was not the sense of the Congress of the United States that this allowance should be of moneys actually expended by the judges.

We further claim that in the proceedings of the House of Representatives, while a similar provision was under consideration on January 27, 1903, an amendment was offered, the purport of which was to prohibit the allowance to these judges of any traveling expenses where they had not actually made the expenditure of money; in other words, to prohibit them from certifying under the law to their traveling expenses when they had been riding free; and that amendment, made for that specific purpose, was rejected by the House, thereby showing, as we contend, the clear intention of Congress to allow the judges to certify and receive necessary or reasonable traveling expenses whether they paid the money out or not.

We further propose to show that in the House of Representatives on January 27, 1903, while a similar provision was under consideration * * * that the House of Representatives on the date I have last named, in further consideration of this appropriation, took proceedings whereby an amendment was offered to prevent the judges of the courts of the United States from receiving free railroad transportation, which amendment by the House of Representatives was rejected, thereby attesting, as we believe, the opinion or construction of the House of Representatives that the provision of the law permitted judges to receive from the Treasury of the United States reasonable traveling expenses whether they paid their fare or rode free.

Mr. Anthony Higgins, also of counsel for respondent, argued:

Mr. President, in the first place, there are two classes of legislative proceedings incorporated in this offer, as I understand. The one referred to by my colleague in the beginning of his remarks on this offer is where we offered to show the parliamentary history of the clause in the act of June 11, 1896, which is an offer to show an amendment proposed by a Senator, and the adoption thereof in the Senate, and afterwards a conference report, in which the amendment adopted by the Senate was stricken out and a substitute for the same enacted; and in that shape the act of 1896 became a law.

Now, quite apart from the question of the admissibility of debates as to the construction of a statute is the principle that applies on this offer, for I find it laid down by the Supreme Court in the case of The United States *v.* Johnson (124 U.S., 237–253), which supports this proposition:

"In like manner cogent and persuasive is the construction placed by either or both of the two Houses of Congress by legislation and in debate upon the statute."

The syllabus of that case is as follows:

"The joint resolution of Congress of March 31, 1868 (5 Stat., 251) affords evidence that the practice of the Secretary of the Treasury prior to that date

not to cover into the Treasury the sums received from the sale of captured and abandoned property, but to retain them in the hands of the Treasurer in order to pay them out from time to time on the order of the Secretary, was known to Congress and was acquiesced in by it, as to what had been previously done; and all this brings the practice within the well-settled rule that the contemporaneous construction of a statute by those charged with its execution, especially when it has long prevailed, is entitled to great weight, and should not be disregarded or overturned except for cogent reasons, and unless it be clear that such construction is erroneous."

In other words, Mr. President, those legislative proceedings will make plain that the construction by a Senator upon the act of Congress under which district and circuit judges are paid when absent from their homes in the one case or their districts in the other holding court—that the construction which the learned managers place upon that act was the one which was sought by a Senator in that debate to place upon that statute in express words, and the Senate passed the amendment, and the conference committee struck it out. The Senate amendment, which was virtually a proviso that no expenses should be certified other than those that were actually incurred, was stricken out, and in place of it the last section of the act 1891, creating the circuit court of appeals, was substituted for it, which said that when these sums were paid to the judge by the marshal they should be allowed to the marshal in his accounts. That clearly comes within the case of The United States *v.* Johnson and of the acquiescence by Congress. It is a much stronger case; it is more than an acquiescence by Congress in the construction, for it is by legislation making the statute in terms to be what excludes the construction that was sought to be put on it by a specific amendment to that effect.

That is a different thing from the mere opinions that are expressed by Members of either House of Congress at the time when a bill is in consideration before it; it is a part of the legislative history of the act, the amendment adopted by the Senate and its being stricken out in conference, and another feature added to the law in substitution for it being a part of our offer in what we seek to prove.

Now, Mr. President, I submit to the Senate that the principle which has been adduced in the case of The United States *v.* Freight Association (166 U.S.) is not applicable to the case that is now before the Senate. It is not simply and merely a question as to what is the construction that would be put upon the act in question by a court; it is not a question as to the construction that will be put upon it by any member of this tribunal. The question, we respectfully submit, is whether or no this statute admits of a doubtful construction and is open to more than one opinion. If a statute is ambiguous, if it has been loosely drawn, if it is not clearly and without any uncertainty of one construction, and therefore not open to construction, then we have authority as old as Judge Story, and coming from authority as high as his, that in a case involving the accounts of an officer under such a statute any doubts are to be resolved in favor of the officer; and by a line of authority in the Supreme Court of the United States, followed frequently and numerously in the circuit courts and in the Supreme Court of the United States, we have a long line of authority that where a statute is in the least degree open to construction, and in many cases, Mr. President, where is has not been open to construction a long-continued construction of it by the executive officers of the Government has been held to be cogent, to be persuasive, to be decisive.

I had not expected to go into the presentation of that line of authority on this particular question—the question as to whether or no you would admit debates in Congress. Those debates, Mr. President, under the principle which I have now ventured to enunciate—and I do not suppose it will be disputed—go to the point that if the Congress itself in the debates placed a different construction upon this act from what the learned managers place upon it, there could be no crime in this respondent in placing a like construction upon it; that what here was said, and in another body in debate, as to what was the understanding of Congress as to the meaning of this act when Congress was in the process of enacting it, and again and again in repeated years on appropriation bills in identical terms this same statute has been brought up again and again in debate, that what was said there and then by Members of Congress as to the received construction of this act, totally different from that of the honorable managers, goes to show that this could not have been a statute that was not open to a difference of construction and opinion.

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Mr. Manager Olmsted replied:

The long line of authorities which the counsel has cited seems to resolve itself down to the case of Johnson * * * in which the recitals in a joint resolution were accepted as evidence, in accordance with the well-known principle of law that the recital in the preamble of a public act of Parliament of a fact is evidence to prove the existence of the fact, not the debates in the House or in the Senate when the joint resolution was passed, but the joint resolution itself. That is the English and American doctrine.

I will simply add one more authority and rest. In the case of The United States against The Union Pacific Railroad (91 U.S., 72), Mr. Justice Davis, delivering the opinion of the court, said, on page 79:

"In construing an act of Congress we are not at liberty to recur to the views of individual Members in debate nor to consider the motives which influenced them to vote for or against its passage. The act itself speaks the will of Congress, and this is to be ascertained from the language used."

The Presiding Officer said:

The Presiding Officer will submit this question to the Senate: Counsel for the respondent propose to offer certain extracts from the Congressional Record, including debates in the House and Senate, votes in the House and Senate, for the purpose, as stated, of showing the history of the enactment by which the United States judges holding court out of their districts are entitled to expenses and as throwing light upon the true construction of the act. [Putting the question.] In the opinion of the Presiding Officer the noes have it.

Mr. John C. Spooner, a Senator from Wisconsin, demanded the yeas and nays, and the same being taken, there appeared, yeas 34, nays 33. So the evidence was admitted.

2268. The Senate declined to admit in the Belknap trial testimony taken before a House committee and published as a public document.

Instance wherein a Senator objected to evidence which was not objected to by managers or counsel.

On July 1, 1876,[102] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, H. T. Crosby was sworn and examined by the managers and was asked if he had any recollection that General Hazen had testified before the Military Affairs Committee of the House of Representatives in regard to the post tradership at Fort Sill. The witness responded in the affirmative. Then Mr. Manager John A. McMahon asked:

Did General Belknap, to your knowledge, know that the testimony had been given by General Hazen before the Military Committee in regard to Fort Sill?

To this witness replied that he thought General Belknap (the respondent) did know, but this was only an impression which rested on no facts that he could recall.

Mr. Manager McMahon then said:

We propose to show, and we now offer to test the question, the testimony of General Hazen before the Military Committee of the House on the 22d day of March, 1872, and we propose to supplement that with the orders issued from the War Department on the 25th day of March, 1872, which was a very good order but did not quite reach the Fort Sill case. We offer it now, and desire that the testimony of General Hazen, as published in an official document, shall be read:

Mr. Matt. H. Carpenter, of counsel for the respondent, did not object, but said:

It is testimony taken not only not in this Chamber, but taken in pais. * * * The point I want to suggest to the consideration of the manager only is this, that

[102] First session Forty-fourth Congress, Senate Journal, p. 961; Record of trial, pp. 186–189.

I never heard one man tried on testimony given in some other tribunal. Without proof that the witness was dead or could not be called, and that the party was present and cross-examined him, it can not be done in a civil case. I suggest to the managers that it would be remarkable if you could read a deposition taken somewhere else.

After discussion, Mr. John Sherman, a Senator from Ohio, said:

I should like to ask the witness a question through the Chair. Did General Belknap read or hear the testimony of General Hazen?

The witness said:

I do not know, sir.

Mr. Sherman also asked:

I will ask whether that testimony of General Hazen was published in the public journals and brought to the knowledge of General Belknap.

The witness replied:

I do not know.

Mr. Sherman objected to the introduction of the testimony at this stage of the proceedings.

Later, during the examination of Gen. Irvin McDowell by Mr. Manager McMahon, the following occurred:

Q. In the conversation between you and General Belknap, besides referring to this article in the New York Tribune, did you refer to the fact that General Hazen had testified before the Military Committee?—A. I think that I mentioned the fact that I learned from General Garfield that General Hazen had done so. I think General Belknap told me that General Hazen had done so and had said substantially the same thing. I think General Belknap was indignant at General Hazen having done so instead of having come to him. I think he thought he owed it to him to have made this statement to him personally instead of going elsewhere.

The managers then offered as evidence this order:

[Circular.]

WAR DEPARTMENT,
Washington City, March 25, 1872.

I. The council of administration at a post where there is a post trader will from time to time examine the post trader's goods and invoices or bills of sale; and will, subject to the approval of the post commander, establish the rates and prices (which should be fair and reasonable) at which the goods shall be sold. A copy of the list thus established will be kept posted in the trader's store. Should the post trader feel himself aggrieved by the action of the council of administration, he may appeal therefrom through the post commander to the War Department.

II. In determining the rate of profit to be allowed, the council will consider not only the prime cost, freight, and other charges, but also the fact that while the trader pays no tax or contribution of any kind to the post fund for his exclusive privileges, he has no lien on the soldiers' pay, and is without the security in this respect once enjoyed by the sutlers of the Army.

III. Post traders will actually carry on the business themselves and will habitually reside at the station to which they are appointed. They will not farm out, sublet, transfer, or sell or assign the business to others.

IV. In case there shall be at this time any post trader who is a nonresident of the post to which he has been appointed, he will be allowed ninety days from the receipt hereof at his station to comply with this circular or vacate his appointment.

V. Post commanders are hereby directed to report to the War Department any failure on the part of traders to fulfill the requirements of this circular.

VI. The provisions of the circular from the Adjutant-General's Office of June 7, 1871, will continue in force except as herein modified.

By order of the Secretary of War.

E. D. TOWNSEND.

Then Mr. Manager McMahon said:

Now, if the Senate please, we propose to offer the testimony of General Hazen, as taken before the committee, for this reason and this purpose: We find from two different sources that General Belknap is advised of the fact and becomes indignant with the knowledge that General Hazen has testified to the existence of certain abuses at Fort Sill which lay directly within his province to correct.

Mr. Matt H. Carpenter, while not objecting formally, said:

You do not prove by anybody that General Belknap ever read that testimony to know what it was. The indignation arose from the fact that he had been talking before a committee when he ought to have gone through directer channels, through the Army.

Mr. Sherman having persisted in his objection, the question was submitted to the Senate.

Mr. Roscoe Conkling, a Senator from New York, asked:

Is that the testimony upon which the Senate is asked to vote that the respondent here was charged with a knowledge of this testimony so as to admit it as a declaration made to him?

Mr. Manager George F. Hoar replied:

I understand that General McDowell's testimony is that General Belknap said to him that General Hazen had testified in substance to the same matters which were contained in the New York Tribune article. * * * Therefore stating to him a knowledge of the substance of General Hazen's testimony. Now, if he had that knowledge of the substance of General Hazen's testimony, it tends to show that he knew that these periodical payments of money which came to him from Marsh were payments of money that had come to Marsh from the post trader. If I am in error as to the extent to which General McDowell's statement went, I can be corrected by referring to it. In other words, if General Belknap was receiving once every three months a sum of money from Marsh in New York, it is important for the Senate to know whether Belknap was informed that those moneys were moneys which were being improperly paid in consequence of this bargain of the post trader at Fort Sill to Marsh; in other words, that he knew where the money he was receiving came from. The article in the New York Tribune contains a distinct assertion of those payments by Evans to Marsh, and, as I understand it, the testimony of General Hazen contains in substance the same thing. It is therefore important not as proving the truth of anything that General Hazen said, but as proving that the Secretary of War was notified that such thing was said at that time.

The question being taken, the Senate declined to admit the testimony, yeas 20, nays 31.

2269. Testimony taken before a House committee and seen by respondent was admitted in the Belknap trial, not as evidence of the fact but as a partial foundation for an inference.—On July 11, 1876,[103] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, Hon. Hiester Clymer, chairman of the Committee of the House of Representatives which had reported the evidence against the respondent, was examined as a witness on behalf of the United States. The witness was shown the manuscript copy of the testimony given by one Caleb P. Marsh before his committee, and, after he had identified it, was asked by Mr. Manager John A. McMahon:

After the testimony of Mr. Marsh was taken, state what action your committee took in regard to it so far as the Secretary of War was concerned.

To this question Mr. Matt. H. Carpenter, of counsel for the respondent, objected.

[103] First session Forty-fourth Congress, Senate Journal, p. 974; Record of trial, pp. 245–249.

Mr. McMahon explained the objects of the introduction of the testimony:

We propose to put in evidence the fact that the witness Marsh was examined; that his testimony was reduced to writing; that the Secretary of War was officially notified of the fact; that he appeared; that the testimony was read over to him; that he took time to consult; that he finally came in and presented his resignation to the committee, from which we shall draw our inferences as far as the situation permits. That is all. * * *

Mr. George G. Wright, a Senator from Iowa, asked of the manager:

Do I understand that the managers propose to introduce this testimony and follow it by the single proposition that thereupon the Secretary of War resigned, and thereby ask the Senate to draw a conclusion, or that there was anything said by him or done by him other than the mere resignation?

To this Mr. McMahon replied:

I have already stated that we expect to show that the investigation was continued from one hour in the day until another and then continued until the next day, and that while they were waiting for the matter the resignation was brought in and handed to the committee; and I accept the statement of the distinguished counsel, if he desires it in, for the express purpose of preventing his being impeached. If he desires to prove that fact, I have not any objection certainly.

Mr. Roscoe Conkling, a Senator from New York, asked of the manager:

Shall I understand the managers to propose either to read at large the testimony of Marsh or to have that testimony received here and go upon the record, all for the purpose of proving that after it was delivered the respondent resigned his office? Is that the scope of this proposal, or is it intended to put into the case what Marsh testified in another form on another occasion, that that testimony may speak in this trial?

Mr. Manager McMahon replied:

Mr. President, I will answer the honorable Senator. It is offered in part only for the purpose which the honorable Senator from New York has eliminated from my remarks. The entire purpose is to show that substantially the same testimony as has been given here, not a different statement, but substantially the same statement as has been made here, was read over to the Secretary of War as a charge by one of the coordinate branches of the Government, to which he made no statement under oath or otherwise, and that the substantial facts therein stated having been brought to his knowledge and read without dispute, we are entitled to draw two inferences, the one from his resignation and the other from his failure to deny the facts therein stated, whatever they may have been.

Thereupon Mr. Jeremiah S. Black, of counsel for the respondent, said:

That is, you want to use it as a confession.

To this Mr. McMahon replied:

If you put it in that severe light, probably yes.

Mr. Montgomery Blair, of counsel for the respondent, said:

I ask the attention of the Senate to the scope of the question which is now to be acted upon, and I put it to this body to say whether any legitimate conclusion such as the counsel for the Government seeks to draw from the conduct which he seeks to prove here would be authorized by the proof. The whole object of the gentleman is to show that in consequence of similar proof being offered before the Committee on War Expenditures and being made known to the defendant in this case he thereupon resigned his commission as Secretary of War, and he admits that at the time this resignation was put in it was done in consequence of an understanding which then was had that thereby impeachment or an action of this kind which is now here pending would be avoided.

Mr. Manager McMahon here interposed:

You misunderstand me. I say if you can prove that, I have no objection.

Mr. Blair continued:

Well, I understand that that is the proof which is to be offered, and is the nature of the case to which the managers now invite this court. Now, I ask the court to consider the state of proof to which the managers invite your attention, and to say whether or not any such conclusion as they seek to have you draw from it could be legitimately drawn. They ask you to draw a conclusion from the fact that the Secretary of War on seeing the proof resigned his office. I ask this court if that is a confession of guilt, or whether anybody in his senses could draw such a conclusion from it, even if it were not accompanied with the facts which we intend to prove if the matter is gone into. We intend to show that the reason of the resignation was that we wanted to avoid this trial, and had reason to believe that the committee before whom this testimony was taken concurred with us in the belief that that would be an avoidance of this trial. Now, take the whole scope of the case, because here is voluminous testimony to be offered and to be considered, and I ask the Senate to consider now before we go into it whether or not any such conclusion as the managers seek to draw from that can be legitimately drawn.

The question being taken, the Senate without division decided to admit the question.

The witness then answered the question, stating that the respondent was shown the testimony of Marsh, that he did not reply to it, and that he sent to the committee information of his resignation as Secretary of War.

Then Mr. Manager McMahon said:

Now we offer in evidence the testimony, the original paper, that was taken before the committee. * * * I offer it in evidence because, of course, it is impossible for this court to know to what extent the defendant was implicated by this testimony unless we know just exactly what the testimony was; and the strength of the inference, or its weakness, must of course be determined by the strength or weakness of the charges and the directness of the testimony.

Mr. Carpenter, of counsel for the respondent, having intimated but not formally made an objection, Mr. Roscoe Conkling, a Senator from New York, said:

Shall I understand that it is now proposed to offer here for any purpose the testimony delivered by Marsh before the committee of the House? If it is, if nobody else does, I raise an objection to that, on the ground that it is incompetent; and I ask for the yeas and nays upon it.

Mr. Francis Kernan, a Senator from New York, asked:

Is the object to have it read as evidence in this case, or read as a communication made to Mr. Belknap?

Mr. Manager McMahon replied:

To have it read precisely upon the principle that the article in the New York Times of February 15, 1872, was read, as a charge of certain matters therein stated, but not as evidence of the truth of anything therein stated. Every lawyer, I think, can see the difference.

Mr. Thomas F. Bayard, a Senator from Delaware, asked:

What is the object and intent of the offer?

Mr. Manager McMahon replied:

I think the honorable Senator from Delaware will remember that in my answer to the remark of the Senator from New York who sits farthest from me [Mr. Kernan] I stated distinctly the object and purpose of this offer not

as evidence to this court of the truth of any fact therein stated, but simply for the purpose of showing that at a particular time certain charges from an authorized source were made against the defendant, which were read to him for the purpose of ascertaining what action he took after this was communicated to him.

Mr. Bayard asked further:

Is it the object of the present inquiry to corroborate or discredit the testimony of Marsh, the witness, or to establish any fact therein referred to, or solely to prove what was the action or conduct of Mr. Belknap when the fact that such charges had been made against him was so made known to him?

Mr. Manager McMahon replied:

Mr. President, the question put to the managers is as follows: "'Is it the object of the present inquiry to corroborate or discredit the testimony of Marsh?" In the first place, I will answer in detail that it is to corroborate Mr. Marsh in just this far, not as evidence of any facts stated therein, but when the charge was made by Marsh the Secretary of War by his conduct admitted the truthfulness of it.

Secondly, "Or to establish any fact therein referred to." Not as evidence of any fact therein referred to except in this way, when the fact is charged against the defendant, to draw a conclusion as to its truthfulness or untruthfulness by the action of the Secretary of War in regard to it.

"Or solely to prove what was the action or conduct of Mr. Belknap when the fact that such charges had been made against him was so made known to him." It is solely for that purpose; but from that we draw our conclusion as to the truthfulness or untruthfulness of the charge there stated, but do not seek to establish any minor details on that point.

Mr. Carpenter, arguing against the admission of the evidence, said:

If it is competent to introduce this testimony given by Marsh before the House committee simply because Belknap did not say anything in reply to it, is it not competent to introduce here every newspaper article that has charged him, from Maine to California, with being guilty of this offense, and with being a thief and all that sort of thing, to which he has, under direction of counsel, never opened his mouth, to which he has never written a reply, of which he has never taken the slightest notice? Upon what principle could you introduce the deposition of this witness simply because it was read to the defendant and he said nothing, and exclude a newspaper article which you could show he had seen and to which he had said nothing? We did not care when the article from the New York Tribune was offered to object for certain reasons. It was very doubtful in our mind whether that was legal testimony; but we did not care to object to it. But here is an offer made now the result of which, if sustained, is that if they can show that a newspaper has published an article charging him with being a thief in this particular, calling him all the hard names they can think of in consequence of these charges made here, and that he read it and threw it down, making no remark, that would be as competent as this testimony. It must be borne in mind that that committee had no jurisdiction over Mr. Belknap. Mr. Belknap could have no trial before that committee. A few things may be mentioned in a political trial that would not be proper in a court of law. It was well known that that committee was of an opposite political faith, and it was not expected that much justice would be done to Mr. Belknap or any other Republican; and any lawyer, I think, who had been consulted by Mr. Belknap would have given him the advice which he did receive, and that was to let the committee alone till they got through, and then see what their charges amounted to. But if the managers can introduce this evidence upon the ground that it was read to him and he said nothing, I submit that every newspaper article which can be shown to have been seen by him is evidence if they can also show that he read it and made no reply.

The question on the admission of the testimony being taken, the Senate decided, yeas 24, nays 14, that it should be admitted.

On July 19 [104] John S. Evans, post trader at Fort Sill, was examined as a witness, and was asked this question by Mr. Carpenter, of counsel for the respondent:

Mr. Evans, after you went back to Fort Sill with your appointment would you have reduced your prices but for the contract made with Marsh?

Mr. Manager McMahon objected, and the Senate, without division, excluded the question.

Mr. Carpenter then said:

Now, Mr. President, following the example of the managers, I offer here in partial corroboration of this witness his examination before the committee of the House, in which he swore distinctly that he would not have made the change of a shilling and that he never would have put prices down until he was compelled by the commission of officers that had jurisdiction.

Mr. Manager McMahon said:

This matter is considered to be ruled out under the decision already made, I take it. If the Senate will not let him swear to it here in open court, they certainly will not allow you to corroborate him in that way.

After argument, during which Mr. Carpenter quoted the words of Mr. Manager McMahon as to the Marsh testimony, wherein he stated that the object was to corroborate Marsh's oral testimony to a qualified extent, the question was taken, and the Senate, without division, excluded the testimony.

2270. Although Judge Swayne had been a voluntary witness before the House investigating committee, the Senate decided that the record of his testimony was prohibited by statute from use in the trial.

Discussion as to the status of the Senate as a court during an impeachment trial.

An argument that an impeachment trial is not a criminal proceeding.

As to whether or not there is a distinction between a misdemeanor and a high misdemeanor.

Instance of an appeal from the decision of the Presiding Officer on a question of evidence during the Swayne trial.

On February 14, 1905,[105] in the Senate sitting for the impeachment trial of Judge Charles Swayne, Mr. Manager Henry W. Palmer, of Pennsylvania, made the following offer of testimony in support of the articles relating to respondent's alleged improper use of a railway car:

The managers offered to prove that the respondent on the 28th day of November, 1904, at the city of Washington, D.C., voluntarily appeared before a subcommittee of the House Judiciary Committee, not having been summoned as a witness or otherwise, and voluntarily made the following statement.

Mr. John M. Thurston, of Nebraska, objected to the introduction of this evidence, claiming that it was prohibited by section 859 of the Revised Statutes:

No testimony given by a witness before either House, or before any committee of either House of Congress, shall be used as evidence in any criminal proceeding against him in any court, except in a prosecution for perjury committed in giving such testimony.

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[104] Senate Journal, p. 982; Record of trial, p. 281.
[105] Third session Fifty-eighth Congress, Record, pp. 2536–2540.

Mr. Thurston said:

Judge Swayne did appear; he was examined and cross-examined, and, speaking a little outside of the record, I know that these questions the managers propose to ask him relate mostly, if not wholly, to his answers made on his cross-examination. But, Mr. President, the law of Congress does not distinguish between a man who comes before Congress or a committee of his own volition and a man who is haled there by process. The prohibition of the statute is as broad as human language can make it. It was designed for a wise and beneficient purpose, and no thought, in our judgment, ought to be had here by the managers in this case against our objection of attempting to override that statute of the Congress of the United States. * * * Mr. President, just a word or two in reference to this last suggestion, which is one which I had not expected to hear—that this trial is not a criminal proceeding. What is it, Mr. President? It has been held through all the history of impeachment trials to be in accordance with trials of persons charged with crimes. The verdict to be rendered in the case is one of "Guilty" or "Not guilty"—a verdict which is only appropriate in a criminal proceeding. Punishment is not of life, or limb, or liberty, but, sir, it is a far graver one, in my judgment, than any of those would be. It is a punishment of so grave a character that it can only be inflicted, under the Constitution of the United States, on being found guilty of high crimes or misdemeanors, and yet the gentleman says, with apparent sincerity, that this is not a criminal proceeding. You are trying this man here on a charge that he is guilty of a high crime or a high misdemeanor, and yet you say it is not a criminal proceeding.

Now, Mr. President, Charles Swayne, as the record shows, appeared before the House subcommittee and was sworn as a witness, and testified there. Afterwards, at another session of the committee, he again appeared, and was again examined and cross-examined before the same tribunal on another day. Did you ever hear in any court of justice the theory, when a man has been sworn as a witness on one day, that you needed to swear him again on the next day in the same case?

Mr. Manager Palmer said:

The offer is to prove that Judge Swayne voluntarily appeared before a subcommittee of the House Judiciary Committee and made a voluntary statement in his own defense. He was not a witness; he was not summoned; and his statement was entirely voluntary. * * * On this occasion he read a typewritten statement, which occupies thirteen pages of the record. After his statement was read certain questions were asked him based on allegations that were made in his statement; and the questions that were asked him, that we now offer to prove, were based on suggestions made in his statement. The questions were asked by members of the committee to clear up some things that Judge Swayne had stated in his written statement. Now, we offer this testimony in entire good faith. * * * I say we offer this testimony in entire good faith. We are not pettifogging; we are not endeavoring to get before the Senate testimony which is not testimony; but we offer it because we believe it is testimony, because it is competent testimony, and because it is the admission of the respondent here, a judge of a Federal court, who, in his own defense, made a voluntary statement, and he ought not to be objecting to it now here, as we believe. * * * No, sir; it was not under oath. To state the fact exactly as it is, Judge Swayne appeared before the committee, and this conversation occurred. On a previous occasion this testimony was given, or at least this statement was made on the last hearing that was had. On a previous hearing, several months before, Judge Swayne appeared and raised some question about some testimony that was given as to his residence. It was said to him by a member of the committee, "There is one man in the United States who knows all about this subject," and Judge Swayne said: "Do you mean me?" The committeeman said: "Yes; I mean you." Judge Swayne said: "Do you wish to have me sworn?" It was said to him: "That is entirely voluntarily with you; you can be sworn if you desire to be sworn." Then he held up his hand, and was sworn. That was at the hearing some months before. At the last hearing he appeared and read this typewritten statement, which, I say, occupies thirteen pages of the record, and that statement led to the inquiry made by a committeeman, which elicited the information which we now ask to give

here. He was not sworn at that time. He had been sworn some months before on a different proposition at his own request or on his own volition.

Now, the reason for this statute is plain. It protects a witness who is compelled to testify to matters which might criminate him. In this case the offer is to show that Judge Swayne appeared voluntarily before the committee—and that is admitted—that he was not a witness summoned to appear, but that he appeared voluntarily, and made a statement and argument in his own defense. Something he said in that argument attracted the attention of a member of the committee who interrogated him and elicited the matter contained in the offer.

The statement is evidence here, first, because this is not a criminal proceeding against the respondent. If he has committed any crime, he can be punished for it in another proceeding. This is a proceeding in which, if Judge Swayne were convicted, he would not be punished as for a crime, but the extent of the punishment would be removal from office. It is a proceeding calculated to keep the judiciary unsullied and pure. It is the only method by which a judge who violates the tenure on which his office is held can be removed. His commission runs that he is to hold this office "during good behavior;" and the only tribunal on earth in which that question can be settled is this august tribunal.

We are here to ascertain whether Judge Swayne has behaved himself well, and whether he is fit to hold this office. This is not a criminal trial; it is not a criminal prosecution; it is not followed by a sentence of any court. All that you can do under the Constitution is to deprive him of his office. If he has committed any offense the Constitution provides that he can be tried for that in another proceeding, and punished if he is found guilty.

The second reason why this is evidence is because he was not summoned to testify before the House committee, but appeared voluntarily to make a statement in his own defense. * * * Mr. President, I wish to call attention to the section of the Constitution of the United States under which this proceeding is had. I said that this was not a criminal prosecution. Did anybody ever hear that a man could be twice tried and convicted for the same offense? If the first trial is a criminal prosecution, then, of course, he could not be tried and convicted again. The provision of the Constitution is this:

"Judgment in cases of impeachment shall not extend further than to removal from office and disqualification to hold and enjoy any office of honor, trust, or profit under the United States: but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment, and punishment, according to law."

Now, I say that is an amazing proposition that this judge who appeared and made a voluntary statement in his own defense should be objecting here now on the ground that it might incriminate him.

The Presiding Officer [106] ruled:

The general proposition that the admissions of a defendant may be proved does not seem to the Presiding Officer to apply to this case. The statute is that—

"No testimony given by a witness before either House, or before any committee of either House of Congress, shall be used as evidence in any criminal proceeding against him in any court, except in a prosecution for perjury committed in giving such testimony."

Now, without deciding technically whether this is testimony which was given by a witness before a committee, or whether it is proposed to use it in a criminal proceeding, or in a court, the Presiding Officer thinks that the intention of the statute is such as to make this evidence inadmissible.

Mr. Joseph W. Bailey, a Senator from Texas, asked that the question be submitted to the Senate.

Mr. Bailey said:

If the court please, section 103 of the Revised Statutes provides that—

"No witness is privileged to refuse to testify to any fact, or to produce any paper, respecting which he shall be examined by either House of Congress, or by any committee of either House, upon the ground that his testimony to such fact or his production of such paper may tend to disgrace him or otherwise render him infamous." (See sec. 859.)

[106] Orville H. Platt, of Connecticut, Presiding Officer.

Plainly the purpose of that statute was to enable the committees of either House, or either House itself, to compel the attendance and the testimony of any witness, and it provides, contrary to the rule of law not obtaining in the courts, that the witness shall not be permitted to decline to testify upon the ground that it might disgrace him or tend to render infamous. Having deprived him of the privilege which he would enjoy before the courts of this country, and having compelled him to testify before its committees, even to his own infamy or disgrace, Congress very wisely then provided that such testimony should not be adduced against him in any criminal proceeding in any court.

But, Mr. President, this is not a criminal proceeding within that statute, and this, in my opinion, is not a court within the meaning of that statute. The Constitution may seem to contemplate that we shall sit as a court when we try the President, because it provides that the Chief Justice of the United States shall preside at such a trial. Whether that was intended, as has been suggested by some, to protect the President against the ruling of the Vice-President, who might succeed to the Presidency in the event of the President's conviction and removal, or whether it was intended, as has been suggested by others, to secure a more certain and a more correct interpretation of the law, I do not undertake at this time to decide.

My own opinion is that the reason which prevailed upon the framers of the Constitution to provide that the Chief Justice shall preside over the Senate when it tries the President on impeachment charges was that the Vice-President might be suspected of having a deep and peculiar personal interest in the result of such a trial. But whether one or the other was the reason, it can not be successfully contended that this is a court within the meaning of section 859, or if it shall be held that this is a court, then it can not be contended that this is a criminal proceeding within that section.

The very provision of the Constitution under which we are proceeding negatives the idea that this is a criminal action, because it expressly provides that no matter what our judgment may be, it only excludes the incumbent against whom it may be pronounced from the honorable office which he holds and it leaves to the ordinary administration of the criminal jurisprudence of the country the punishment for his criminal acts. * * * Mr. President, a judge, in my opinion, may be impeached without being guilty of a crime. He holds his office by a different tenure from that under which other civil officers of the Government enjoy. He holds his office during good behavior, and more than one of the charges in this very case are not a crime. No penalty is denounced against the violation of that provision of the statute which provides that a judge shall reside in the district for which he is appointed, and that his failure to do so shall be a high misdemeanor.

That term is new in legal vernacular. I know of no law books which furnish a distinction between a misdemeanor and a high misdemeanor. Certainly the Constitution does not. Congress has not seen fit to affix a penalty of any criminal nature to this very provision itself, and obviously the whole purpose that Congress had in mind when it declared that a failure to reside in the district for which the judge had been appointed was a high misdemeanor, was that his failure to do so should be an impeachable offense.

I put this case to the court and all the honorable members of it. Suppose there should be nothing before this body but the naked question, Does the honorable judge reside in his district? The law says that if he does not, he is guilty of a high misdemeanor. Does any member of the court doubt that if counsel for the respondent or the respondent himself were to rise in this court and say, "I do not reside in my district," there would be the slightest hesitancy in finding him guilty on that charge? Yet, sir, that charge is not a crime, and no Senator will contend that he could be prosecuted in the courts and punished for his failure to reside in his district. It is declared by law, it is true, to be a high misdemeanor, but it is not a crime, because there is no penalty attached to it by the law. Again, sir, suppose a judge should arbitrarily and maliciously disbar an attorney, does any Senator doubt that he could be, and ought to be impeached? And yet, sir, there is no criminl statute in that behalf provided.

The respondent was not a witness, within the statute, when examined before the committee of the House. As has well been suggested by my learned brother near me, whenever a party to a proceeding voluntarily takes the stand, he must be presumed to know the nature of it, and when he volunteers his testimony everything he says can be used. There are States under whose system of criminal jurisprudence the defendant himself may testify. He can not be called by the State; he can not be compelled to take the witness stand in his own behalf, and

if he fails or refuses to do so it is error, and reversible error, for the prosecuting attorney to refer to that fact. But when the accused does take the witness stand in his own behalf, then he is not simply permitted to tesify to what he thinks may be to his own benefit. He can be cross-examined, and all he says must be received and considered by the jury as testimony in the case.

When the respondent in this case voluntarily appeared before a committee of the House, with a full knowledge of the nature of its inquiry, and proceeded to take any of the facts, it was within the power and duty of that committee to interrogate him as to all the facts, and when he had made his statement there it does not lie with him to claim immunity under this statute.

I believe that the protection afforded by section 859 was made necessary and proper by section 103.

Having deprived the witness of a privilege as ancient almost as courts of justice, it was just and proper that he should not be exposed to prosecution and conviction upon his own testimony, which he had been compelled to give.

I do believe, further, that this is a court within the meaning of that statute. I am sure that this is not a criminal proceeding within the meaning of the statute, because the respondent might be found guilty of a charge that would terminate his office, although he were guilty of no crime.

I am further sure that the respondent in delivering his testimony before the committee of the House was not a witness within the reason or the protection of the statute, and I am still more certain that if he shall be deemed a witness he must be treated as a witness who came voluntarily to testify and whose testimony may be used against him.

Further discussion having been prevented by reference to the rules, the Presiding Officer put the question: "Is the evidence admissible?" and there appeared yeas 28, nays 45. So the evidence was not admitted.

On February 16, 1905,[107] as the managers were about to conclude the presentation of testimony, Mr. Manager David A. De Armond, of Missouri, referred again to the subject of the respondent's statements before the House committee, and suggested a reconsideration of the former decision of the Senate:

Mr. President, if it can be shown, and it appears of record, so that the showing is not difficult if it exists, that Judge Swayne made any statement before the House committee before the oath was administered to him by that committee as a witness, we shall interpose no objection to such statement. But we do object to any statement that he made before that committee after he was sworn as a witness. * * * I do not desire to add anything to the argument I made the other day on this same question, except to call the attention of the Senate to one provision of the Constitution of the United States. It was urged here the other day that this is not a criminal proceeding, and that Judge Swayne is not charged with or being tried for a crime. I wish simply to call attention to a section of the Constitution, it being the last portion of section 2 of Article III. I read:

"The trial of all crimes, except in cases of impeachment, shall be by jury."

On motion of Mr. Joseph W. Bailey, a Senator from Texas, and by a vote of yeas 53, nays 18, the doors were closed for consideration of the admissibility of the evidence heretofore ruled out.

On February 20[108] the Presiding Officer announced in the Senate sitting for the trial:

Before the reading of the Journal the Presiding Officer will announce that at the last session of the Senate in the trial of the impeachment the question of evidence was decided, namely, the proposal of the managers to introduce statements by Judge Swayne made before the committee of the House of Representatives, and it was decided that such statements were inadmissible. The vote by which it was decided will appear upon the reading of the Journal.

The Journal being read, it appeared that on the question—

Are the statements made by Judge Swayne before the committee of the House of Representatives admissible as evidence?

it was determined in the negative—yeas 29, nays 47.

[107] Record, pp. 2720, 2721.
[108] Record, p. 2899.

2271. In proving the contents of lost letters the Senate, in the Belknap trial, permitted the witness to be interrogated generally as to the import of a series of letters.

Instance of a ruling by the President pro tempore on a question of evidence during an impeachment trial.

On July 10, 1876,[109] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, Caleb P. Marsh was called as a witness for the United States, and was questioned as to sums of money which he had sent to the respondent, and as to letters that had passed between them. He testified that he had destroyed all letters and telegrams, although he had received such from the respondent, directing how the money should be forwarded. After this testimony Mr. Manager John A. McMahon said to the counsel for the respondent:

Gentlemen, we have served a notice upon you to produce the letters which have passed between these parties, and, of course, we are ready now to receive them, or to offer evidence of their contents.

The notice was read as follows:

All letters, telegrams, and communications from said Caleb P. Marsh to you in regard to the appointment of post trader at Fort Sill or elsewhere.

All letters from said Marsh to you concerning the management, conduct, or removal of the post trader at Fort Sill.

All letters or telegrams from said Marsh to you in any way connected with the forwarding to you of money, certificates of deposits, drafts, etc.

All letter from said Marsh to you informing you of the state of accounts between him and yourself, particularly the letter informing him of a change in the amount of the annual payment to be made to you by him some time in the spring of 1872.

The time covered by this notice is from June 1, 1870, to March 2, 1876. The dates more particularly referred to are those specified in the seventeenth specification set forth in the fourth article of the impeachment articles filed against you.

Mr. Matt. H. Carpenter, of counsel for the respondent, said:

This notice, as far as it calls for letters touching the management of affairs at Fort Sill, calls for what were official letters, and may be found at the War Department. We have no other letters called for by the notice.

Thereupon Mr. Manager McMahon proceeded to ask questions to elicit proof as to the contents of the letters from witness to respondent, finally asking:

Now, give us the contents, as near as you can remember, or the substance, of one of these letters, without the date?

To this Mr. Carpenter objected, saying:

The rule is perfectly well settled that if an instrument is called for and not produced they may prove the contents of it. There is no doubt about that; but to ask the witness what was the general substance of letters without regard to date is not proving any instrument whatever. I deny that you can take a witness up here and pull a drag-net over the correspondence of business men for years and ask "what was the general purport of your correspondence?" That will not do. That is too indefinite. They will have to introduce the particular letter, and if they do not have it they must account for its loss, either by them or by us, and they may then prove the contents of that particular paper; but having shown that a particular paper is lost they can not ask the witness upon the general tenor of all these letters without regard to their date. When the question was put distinctly to this witness as to what were the contents of the

[109] First session Forty-fourth Congress, Senate Journal, p. 968; Record of trial, pp. 220–222.

letter which accompanied the first remittance, he said he did not remember. Now, if there is any other particular letter which they can locate in the mind of the witness and prove by him its contents, that of course is not objected to; but the question, "what is the general substance of letters," without regard to their dates, is not proving a particular paper; it is proving at large what was the substance of a general correspondence. That can not be done. You must prove it by introducing every letter by itself. If you have not got the letter, then you must account for its loss and prove its contents, not by proving what was the general tenor of 40 papers. It is for the court to say what the general tenor of them is, after they know each letter, and we are to have the substance of each letter as near as the witness can give it.

Mr. Manager McMahon's argument was:

What we desire to prove is this: We may call his attention to the particular date, but we go further and ask, Was there a general form in which you sent them, or was there any particular letter of which you may remember the substance? The idea is that we have got to go through these 14 different occasions when money was sent, and if he does not remember the contents of a particular letter, therefore, it is not competent to testify to the contents of all of them as to his best impression! I understand that the rules of evidence are based upon a knowledge of human nature, upon a knowledge of the infirmities of human nature, and that a witness who has transacted business of this kind, when the documents are in the possession of the defendant, when he undertakes to state here the substance of their contents, is entitled to state it without saying that it was the contents of the letter of the 1st of November or the 6th of October or the 9th of October, 1874. I think I have said all upon this question that the occasion demands.

The President pro tempore having submitted the question to the Senate, it was decided without division that the interrogatory should be admitted.

The witness having, in response to the question, stated the general tenor of one of these letters, this question was asked:

Q. (By Mr. Manager McMahon.) After you had dispatched a letter like that, what letter would you get in return? Give us the contents of one of his letters that you can remember.

Mr. Carpenter said:

I want formally to make the same objection. I suppose, of course, it will be overruled, but I want to make the same point here as upon the former question.

The President pro tempore [110] said:

The Chair will take it as the sense of the Senate that the objection is overruled.

The question having been answered, another question was asked:

Q. (By Mr. Manager McMahon.) State whether, after shipping the money to him by express, you informed him of that fact; and if so, how.

Mr. Carpenter having objected, the President pro tempore submitted the question to the Senate.

Mr. Simon Cameron, a Senator from Pennsylvania, demanded the yeas and nays, which were refused.

Thereupon, without division, the Senate decided the evidence admissible.

Witness having stated that he sent the express receipt by mail when he sent the remittance, Mr. Manager McMahon asked:

State whether you received any reply; and if so, in what shape.

Mr. Carpenter, having ascertained that the question did not relate to a specific transaction, objected.

[110] T. W. Ferry, of Michigan, President pro tempore.

The Senate admitted the question.

Later Mr. Manager McMahon asked:

When you inclosed one of these certificates of deposit to him, state what was the substance of the letter which you did send to him accompanying the certificate.

Mr. Carpenter having objected unless a particular certificate was specified, the President pro tempore said:

The Chair overrules the objection. The witness will answer the question.

Soon after Mr. Manager McMahon asked:[111]

When you delivered the money to him [the respondent] you stated that you at first delivered him $1,500 quarterly, and after the lapse of one and a half or two years $1,500 semiannually. State now whether you failed to deliver to him exactly at the time the amount that you were to deliver to him; and if so, why.

Mr. Carpenter said:

I want to object to that question, Mr. President. It is as disagreeable to me to seem to be captious about objections as it is disagreeable to the Senate to have me captious, but the insidious manner in which the facts of this case are sought to be kept out of view, while some deductions and conclusions are forced in as their substitute, is, although very ingenious and very artful and very gradual, yet perfectly apparent. We ought to have the questions so put to the witness that he will understand and that we shall understand precisely what transaction is being referred to. Now, you call his attention to no particular transaction at all; you do not name a place and do not fix a date; you do not determine any particular transaction; and yet you are trying in that way to float him over all of them, when in the only instance in which you put the question direct you did not get what you wanted to get, and I suppose that is the reason why the manager is now seeking to generalize. But it is an improper way, as I believe, to lead this witness. The manager knows perfectly well how to put the proper questions in a direct examination, not fix him between this boulder and that rock, and lead him from step to step and over gulch and gulf, as he is doing by this method of examination. This is too big a thing to be played on a small mere game. Let us have it out: let us have the facts. This is too big a court to be trifled with by that method of examination. Here is a man put on the stand to swear to we all know what. Why do not they let him swear to it? Why do not they put him right straight forward and let us have these facts in their natural order, and not dragged out one after the other in this indirect and, as I think, improper way?

Mr. Manager McMahon said:

Mr. President, it is a matter of great deprivation to the House of Representatives, no doubt, that the able gentleman (and I say it in all seriousness and earnestness) does not sit here to conduct the case of the Government for it, but that is one of those accidents which we can not prevent, for the simple reason that he fails to be a Member of the House. The House has selected us to try this case, and while we concede to the gentleman (and we concede it honestly, not in any other except the fairest meaning) great ability in his profession and a full understanding of all the points of law and a full knowledge of all the details of practice and a full aptitude in all the details of nisi prius trials, yet we most respectfully submit to the Senate that we, however humble, appear here trying this case on our side, and if the gentleman will but possess his soul in patience for a little while the time will come when he can double this witness up all over four or five times with his unusual skill, and he can bring out all this truth that we are now so insidiously suppressing. He then make it appear that his client is innocent, and that all this that we are introducing as testimony has nothing whatever to do with this case. A little patience now, a little of that which we have exercised, and the time will come when all these material facts in this case, all this hidden truth, can be brought out in the full sunlight that we have had in the last three or four days. Now,

[111] Senate Journal, p. 969; Record of trial, pp. 223, 224.

we propose, and we must be allowed that privilege, to put the questions to the witness. I never knew that right interfered with before.

The Senate, without division, decided that the question should be put to the witness.

2272. In the Johnson trial the Chief Justice was sustained in admitting as evidence the warrant and papers in a legal proceeding to which respondent was related, but not a party directly.—On April 13, 1868,[112] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, Mr. R. J. Meigs, clerk of the supreme court of the District of Columbia, was called on behalf of the respondent and testified that on February 22 he affixed the seal of the court to a warrant for the arrest of Lorenzo Thomas. The said Thomas was Adjutant-General of the Army and had been arrested on complaint of Edwin M. Stanton, Secretary of War, who made affidavit that Thomas had been appointed by respondent to take illegal possession of the office of Secretary of War.

The testimony as to the issuance of the warrant having been read, Mr. Henry Stanbery, of counsel for the President, proposed to introduce as evidence the warrant and affidavit on which the warrant was issued.

To this Mr. Manager Benjamin F. Butler objected.

I have the honor to object, Mr. President, to the warrant and affidavit of Mr. Stanton being received as evidence in this cause. I do not think Mr. Stanton can make testimony against the President by any affidavit that he can put in, or for him by any proceedings between him and Lorenzo Thomas. I do not think the warrant is relevant to this case in any form. The fact that Thomas was arrested has gone in, and that is all. To put in the affidavit upon which he was arrested certainly is putting in res inter alios. It is not a proceeding between Thomas and the President; but this is between Thomas and Stanton, and in no view is it either pertinent or relevant to this case or competent in any form, so far as I am instructed.

Mr. William M. Evarts, of counsel for the President, said:

Mr. Chief Justice and Senators, the arrest of General Thomas was brought into testimony by the managers and they argued, I believe in their opening, before they had proved it, that that was what prevented General Thomas using force to take possession of the War Office. We now propose to show what that arrest was in form and substance by the authentic documents of it, which are the warrant and the affidavit on which it was based. The affidavit, of course, does not prove the facts stated in it; but the proof of the affidavit shows the fact upon which, as a judicial foundation, the warrant proceeded. We then propose to follow the opening thus laid of this proceeding, by showing how it took place and how efforts were made on behalf of General Thomas by habeas corpus to raise the question for the determination of the Supreme Court of the United States in regard to this act.

* * * * * * *

It has already been put in proof by General Thomas that before he went to the court upon this arrest he saw the President and told him of his arrest, and the President immediately replied "that is as it should be;" or "that is as we wish it to be, the question in court." Now, I propose to show that this is the question that was in the courts, to wit, the question of the criminality of a person accused and his civil-tenure bill. And I then propose to sustain the answer of the President, and also the sincerity and substance of this his statement already in evidence, by showing that this proceeding, having been commenced as it was by Mr. Stanton against General Thomas, was immediately taken hold of as the speediest and most rapid mode, through a habeas corpus, in which the President

[112] Second session Fortieth Congress, Senate Journal, p. 893; Globe supplement, pp. 166–168.

or the Attorney-General, or General Thomas acting in that behalf, would be the actor, in order to bring at once before this court, the supreme court of the District, the question of the validity of his arrest and confinement under an act claimed to be unconstitutional, with an immediate opportunity of appeal to the Supreme Court of the United States then in session, from which at once there could have been obtained a determination of the point.

At the conclusion of the argument the Chief Justice [113] said:

The Chief Justice thinks the affidavit upon which the arrest was made is competent testimony, as it relates to a transaction upon which Mr. Thomas has already been examined, and as it may be material to show the purpose of the President to resort to a court of law. He will be happy to put the question to the Senate if any Member desires it. [No Senator being heard to speak.] Read the affidavit.

But before the reading began, Mr. John Conness, a Senator from California, demanded that the question be put to the Senate. This being done, there appeared, yeas 34, nays 17. So the reading of the warrant and affidavit in evidence was permitted.

2273. On April 13, 1868,[114] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, R. J. Meigs, clerk of the supreme court of the District of Columbia, had testified as to the issuance of the warrant for the arrest of Lorenzo Thomas on the affidavit of Edwin M. Stanton, and the warrant and affidavit had been admitted as evidence.

Then Mr. Henry Stanbery, of counsel for the President, asked:

Have you got the docket entries as to the disposition of the case of The United States *v.* Lorenzo Thomas, and if so will you produce and read them?

Mr. Manager Benjamin F. Butler objected to the evidence as incompetent.

The Chief Justice [115] said:

The Chief Justice thinks that this is a part of the same transaction, and is competent evidence; but he will put the question to the Senate if any Senator desires it. [After a pause.] The witness will answer the question.

2274. Instance in the Belknap trial wherein a document not pertinent on its face was admitted to prove the negative of a pertinent proposition.—On July 8, 1876, in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, Mr. John A. McMahon, of the managers on the part of the House of Representatives, proposed the introduction as evidence of this letter, as bearing on the charge that the respondent had a corrupt arrangement with Marsh and Evans, who were interested in the past tradership at Fort Sill:

General Orders, No. 89.] WAR DEPARTMENT, ADJUTANT-GENERAL'S OFFICE,
"Washington, October 12, 1872.

The opinion of the Acting Attorney-General upon the following questions is published for the information and guidance of all concerned:

"DEPARTMENT OF JUSTICE,
"Washington, October 3, 1872.

"SIR: I have duly considered the questions which you ask the Attorney-General in your letter of the 11th instant, and which are as follows:

"Where persons such as post traders, contractors, and others have been allowed by proper authority to erect buildings to facilitate their business upon a

[113] Salmon P. Chase, of Ohio, Chief Justice.
[114] Second session Fortieth Congress, Senate Journal, p. 895; Globe supplement, pp. 173, 174.
[115] First session Forty-fourth Congress, Record of trial, p. 208.

military reserve, with no restriction as to the term during which they shall be allowed to remain—

"1. Are such buildings, after the removal of the trader, contractor, or other person from the reserve, still his personal estate, and as such has he the right to dispose of them by rent, lease, or sale to other persons?

"2. Does not such property become part of the realty after the appointment of a trader is revoked or a contractor has fulfilled his contract, or any event happens which dissolves their business connection with the reserve?

"By the order of the Secretary of War of June 17, 1871 (a copy of which you inclose to me), it is provided that 'post traders appointed under the authority given by the act of July 15, 1870, will be furnished with a letter of appointment from the Secretary of War, indicating the post to which they are appointed.'

"They will be permitted to erect buildings for the purpose of carrying on their business upon such part of the military reservation or post to which they may be assigned as the commanding officer may direct, such buildings to be within convenient reach of the garrison.

"They will be allowed the exclusive privilege of trade upon the military reserve to which they are appointed, and no other person will be allowed to trade, peddle, or sell goods, by sample or otherwise, within the limits of the reserve.

"They are under military protection and control as camp followers.

"Buildings erected by post traders on a military reserve, in conformity to this order, are erected for the mutual benefit of the Government and the trader, and are not to be regarded as buildings would be erected by trespassers, or even by tenants under leases, in which no provision is made therefor; but they are erected under a license from the Government and for the mutual benefit of both parties. Under these circumstances I am of opinion that by the proper construction of the license these buildings were not intended to become a part of the realty after their erection; but were to continue the property of the traders, and, lest therefore when a trader is removed from his post, I have no doubt that he has a right to remove the building from the place where it was erected; and that when removed he can dispose of the materials as his own property. But it is very clear that the license to erect such buildings is a purely personal one, and is granted for one purpose only. Therefore, under such licenses, the person so erecting the building would have no right to rent or lease the same or even to sell it to another post trader without permission of the military authorities, but his rights are confined solely to that of removing the building from the reserve. Undoubtedly the property in such a building might, with the approval of the commanding officer, be transferred to another post trader, and such permission would have the same force as a license to a new post trader to erect such a building at that spot.

"I return you the papers inclosed.

"I have the honor to be, sir, your very obedient servant,

"CLEMENT HUGH HILL,
"*Acting Attorney-General.*

"Hon WILLIAM W. BELKNAP,
"*Secretary of War.*"

Mr. Matt. H. Carpenter, of counsel for the respondent, objected to the letter as without relevancy and having no possible bearing on the case.

Mr. Manager McMahon said:

We have asked the Adjutant-General for a copy of every order that has been issued since the Grierson complaint in regard to post traders for the purpose of proving a negative, but a very important negative in this case, and that is for the purpose of proving that every order that the Secretary of War issued, by a coincidence of good luck, failed to hit the case of Marsh and Evans.

The President pro tempore having submitted the question to the Senate, the evidence was admitted without division.

2275. In the Belknap trial testimony cumulative as to the fact but not as to the intent of respondent was admitted.—On July 8, 1876,[116] in the Senate sitting for the impeachment trial of William W.

[116] First session Forty-fourth Congress, Senate Journal, p. 965, Record of trial, pp. 204–206.

Belknap, late Secretary of War, Mr. Manager John A. McMahon proposed the introduction as evidence of certain letters wherein a complaint had been made through the Solicitor of the Treasury that Evans, the post trader at Fort Sill, was clandestinely selling spirituous liquors, and the following letters in reply thereto:

WAR DEPARTMENT,
Washington City, November 2, 1871.

SIR: I have the honor to reply to your letter of the 28th ultimo on the subject of the illegal introduction of spirituous liquors, etc., into the Indian country by Evans & Co., and other parties, that previous to the 28th ultimo, on which date Evans, post trader at Fort Sill, was authorized to take to that post monthly ten gallons of brandy and ten gallons of whisky for the use of the officers there, no permit had been given him or the other parties referred to to introduce any liquors into that country.

Very respectfully, etc.,

W. W. B.,
Secretary of War.

The SOLICITOR OF THE TREASURY DEPARTMENT.

WAR DEPARTMENT, *November 8, 1871.*

SIR: In further response to your letter of the 28th ultimo on the subject of the alleged illegal introduction of liquors, etc., into the Indian country by certain persons, among others Evans & Co., of Fort Sill, I have the honor to inform you that Mr. John S. Evans, post trader at Fort Sill, through his friends, denies having taken liquor into the Indian country without authority. Mr. Evans was appointed to the post tradership on October 10, 1870, and holds it in his own name and not in that of Evans & Co., and no complaint has ever been made against him by the military authorities at Fort Sill, he having been regarded a good and law-abiding business man.

I therefore request that no proceedings be commenced against him without a thorough investigation of the charges that he has been engaged in such practices shows they were well founded.

Very respectfully, etc.,

W. W. BELKNAP,
Secretary of War.

To the SOLICITOR OF THE TREASURY.

The respondent was charged in the articles of impeachment with having appointed Evans corruptly and with sharing in connection with one Marsh in a tribute paid by Evans in consideration of the appointment.

Mr. Matt. H. Carpenter, of counsel for the respondent, said:

I object to all that proof. It does not go, so far as I can ascertain, to sustain any charge made in these articles at all, nor is it evidence of anything necessary for them to prove so far as I can see. They certainly do not state any reason why this should be received. One of the managers says he wants to prove by it that Evans was there acting as post trader and that Belknap knew it. As they have shown the fact that Belknap appointed him, it is pretty good evidence that he knew that Evans was appointed. There is no question made here that Belknap did not know that he was the post trader there; not the slightest. * * * You have proved by the only testimony which can prove it—to wit, the record of his appointment—that he was appointed. After you have proved the record of a judgment in a court of record, you cannot call witnesses to prove that the judgment was rendered, because that is cumulative. You have introduced conclusive evidence, and I have said to you that we do not deny it; we make no point upon it. Of course the Secretary knew that Evans was post trader.

Mr. Manager McMahon said:

The letters which we now offer by way of introduction to subsequent letters are letters which make certain specific charges against the post trader, John S. Evans. The theory of this prosecution is, and up to this point tolerably well sustained, that John S. Evans was appointed through the influence of Caleb P. Marsh and in pursuance of a corrupt bargain between them, the profits of which

were equally divided between Marsh and the Secretary of War; that the Secretary of War did actually and personally receive his share of the fruits of this arrangement no man who has any regard for testimony can doubt. The great question for this tribunal is whether he received it knowingly, under such circumstances that any officer of honesty and integrity ought to have known where this money was coming from.

The particular point, therefore, to be investigated is the conduct of the Secretary of War. Whenever this particular post trader is affected, from whom he is receiving his gains, the particular point is to discover how the Secretary of War acts. What he may say is very direct and positive testimony, but it is not any more direct and positive than what he may do. * * * We have introduced conclusive evidence that John S. Evans was, in fact, the post trader, but whether the Secretary of War had forgotten the fact in the multitude of his different appointments is another important fact in this case which we propose to show had not occurred; that he had not forgotten that John S. Evans was the post trader, but, on the contrary, that he was receiving testimony as to John S. Evan's good character, supporting and sustaining John S. Evans all along.

The President pro tempore submitted the question to the Senate, who decided without division that the evidence should be admitted.

2276. The Senate in the Belknap trial declined to admit evidence of a fact occurring after respondent had ceased to hold the civil office.

Instance of a ruling by the President pro tempore on a question of evidence in an impeachment trial.

On July 8, 1876,[117] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, E. D. Townshend, a witness on behalf of the United States, was cross-examined by Mr. Matt. H. Carpenter, of counsel for the respondent, when the latter proposed to offer in evidence a certain circular general order, issued March 7, 1876, from the War Department, and sent to every post in the United States directing the officers to examine whether the post traders were satisfactory; and, if not, to state that fact or to have them removed; and that in pursuance of the order, at Fort Sill on the 11th of April, 1876, there was a meeting of the officers and every one of them recommended the reappointment of Mr. Evans.

Mr. Manager William P. Lynde said:

We object to the introduction of that circular in evidence. It bears date, I think, 7th of March, after the resignation of Mr. Belknap, and has nothing whatever to do with the case now before the court so far as we can see. * * * It seems that this investigation was not had until Mr. Belknap had sent in his resignation and vacated the office of Secretary of War. He had made the appointment previously, it is true, on the recommendation of the officers at Fort Sill, when he was Secretary of War; but he refused to make it until Mr. Marsh threw in his interest and influence with the Secretary of War, who had informed Mr. Evans that he had already promised this appointment to Mr. Marsh. That the officers at Fort Sill found no fault with Mr. Evans and excused him of the high charges which he made for the goods which he sold to the officers and soldiers on the ground that he was paying $12,000 a year bonus we are informed by the letters of the commanding officers at the post and by the other evidence we have introduced in the trial. Therefore that these same officers should, subsequent to the resignation of the Secretary of War, when this matter was under investigation and when Mr. Evans was no longer called upon to pay this bonus of $12,000, have sufficient confidence in his integrity to recommend his continuance in that position, makes nothing in favor of the accused in this case. We therefore claim that it has no pertinency to the issue before the Senate, and ask that it may be excluded.

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[117] First session Forty-fourth Congress, Senate Journal, p. 965; Record of trial, pp. 208–211.

Mr. Montgomery Blair, of counsel for the respondent, said:

Mr. President and Senators, the court will observe that there are two theories here; one by the prosecution and one by the defense, and they recur at every stage of this case. Yesterday we had this battle with the managers, they assuming that we knew of these arrangements, of the existence of this contract, and were receiving knowingly this money. Of course they think that theory is true, and of course they think there is no other theory in the case. But there is another which we mean to make good to this court, and it is that we knew nothing of the consideration whatever; that this appointment was made in perfect good faith; that so far as we knew the law was being executed, and when failure of its execution was called to our attention we got the advice of our officers, those who were most familiar with this case, and got their remedies and applied them. They would think the argument to be on their side that we ought to have immediately removed this man, broken up his establishment, and turned him out, as the President did when the fact was finally brought to his attention and it was published that this contract existed. Let the Senate assume, as we infer they will assume, that the Secretary of War knew nothing of this transaction between these other parties; and that this man executed his duties faithfully. That he did execute them faithfully and that he was a good officer, we think is proved by the unanimous recommendation of the officers and soldiers at this post. We want now to show to the court that this officer, notwithstanding all the charges which were made, was recognized as a good and proper officer, and did his duty so satisfactorily that every officer at the post recommended his reappointment. We think this competent proof. We think this proper to go before the Senate as a circumstance to weigh in their judgment upon this case.

The President pro tempore having submitted the question, "Shall the circular be admitted?" the question was determined in the negative without division.

Thereupon Mr. Carpenter offered the recommendation made by the council of administration, which convened at Fort Sill on March 7, 1876.

Mr. Manager John A. McMahon objected.

The President pro tempore [118] said: [119]

On the same principle decided by the Senate, the Chair sustains the objection, the paper being subsequent to the resignation of the Secretary of War. * * * The Chair * * * decided it on the principle that it was subsequent to the date of resignation, and on that the Chair ruled. The Chair will, however, submit the question to the Senate, if desired, Shall this paper be admitted?

The question was determined in the negative without division.

2277. Judge Swayne being charged with submitting false certificates of expenses, evidence tending to show that other judges had submitted similar certificates was excluded.

Letters from other judges stating their construction of the law as to expenses were not admitted in behalf of Judge Swayne, charged with submitting false certificates.

A statement signed by the Secretary of the Treasury, but not under seal, summarizing the contents of official documents, was objected to as evidence in the Swayne trial.

Objection that new matter in respondent's answer, not responsive to any charge in the articles, should not lay a foundation for the introduction of evidence.

On February 23, 1905,[120] in the Senate sitting for the impeachment trial of Judge Charles Swayne, Mr. John M. Thurston, of counsel for the respondent, in the course of the introduction of testimony, made the following offer:

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[118] T. W. Ferry, of Michigan, President pro tempore.
[119] Record of trial, p. 211.
[120] Third session Fifty-eighth Congress, pp. 3169–3174, 3176.

I now offer in evidence certified statements from the Treasury of the United States showing in detail the number of days in each year from April 1, 1895, down to March 31, 1903, during which the several circuit and district judges of the United States were attending court away from home or out of their districts, and showing the amount of expenses for travel and attendance to which each and all of them certified and received.

I make this offer as tending to show from an analysis of the certificates and accounts the contemporaneous judgment which has been placed upon the statute in question by the action of many of the judges of the courts of the United States, and also by the administrative officers of the Treasury Department.

Mr. Manager Marlin E. Olmsted, of Pennsylvania, objected, saying:

I desire that it be noted on the record that what this paper purports to be, as stated in the caption, is this:

"Statement showing amounts paid to United States circuit judges as expenses claimed while attending circuit courts of appeals away from their residences, and amounts paid to United States district judges as expenses claimed while holding court out of their own said courts, being in the first circuit."

And then there is one for each of the other eight circuits. * * * To that I offer the objection, which I will ask the Secretary to read:

The Secretary read as follows:

First, It is not responsive to any allegation contained in any of the articles of impeachment.

Second. If the subject-matter of the offer in any way relates to averments contained in the answers of respondent to the first, second, and third articles of impeachment, nevertheless, the said averments are not responsive to any charge contained in the articles of impeachment and present no issue for determination in this cause.

Third. The offer of respondent is only to show that the judges named did receive for their expenses an amount equal to $10 a day in the aggregate, but does not include an offer to prove that they did not actually expend as much as, or more than, the amount charged by the honorable judges to the Government as their said expenses of travel and attendance in holding court, and the evidence is therefore immaterial and irrelevant.

Fourth. That it is not averred in the answer nor offered to prove that the respondent, either at the time of or prior to the alleged false certification of his expenses in 1897, had consulted or conferred with or taken the opinion or had knowledge of the action of any of the judges referred to in the offer.

Fifth. It is not competent for respondent, in his own defense, to prove the usage or practices of other judges in other courts, particularly as it is not offered to show that he had knowledge thereof.

Sixth. If respondent has been guilty, as charged, of falsely certifying his expenses and collecting upon his own certificate an excessive amount from the Government, it is no justification for him to show that he subsequently ascertained that others had been guilty of the same offense.

Seventh. The certificates offered from the Treasury Department are not under its seal as required by the statute to make them admissible in evidence.

Eighth. The statements offered are not copies of any official papers or records remaining in the Treasury Department, but consist of some figures and data purported to have been made up after the consideration of such papers and records. They do not purport to show the amounts of expenses certified by the judges named therein, nor whether they were more or less than $10 a day. They show merely the amounts alleged to have been paid in each instance, without stating whether the said amount was more or less than the amount certified by the judge to have been expended. They do not include the certificate of the judge nor the account of the marshal who paid him. They are partial and incomplete, and not authorized by any statute to be used as evidence.

Ninth. The offer contains an unwarranted insinuation that other judges have collected from the Government for expenses sums greater than they actually expended, but without showing or offering to show what amounts they actually did expend, or certified as having been expended, and if received, will necessitate the calling of all of the said judges, as a matter of justice to them and to all the people of the United States, for the purpose of rebutting the said insinuation contained in the offer.

Mr. Manager Olmsted then said:

Mr. President, if I may be permitted to speak upon this point, there is nothing in any article of impeachment making any reference whatever to any Federal judge save only this respondent, who is himself charged in the first article with having in 1897 falsely certified to the amount of his expenses and received the money upon his said certificate. In his answer, after admitting that he did make that certificate, but denying in rather a vague way its falsity, he says, on page 27 of this record—it is the last paragraph on the page—

"respondent says that he is fortified and confirmed in his honest belief that the construction so placed by him, etc., was and is right * * * by the fact that he is informed"—

Now, in 1905, nine years after he made that certificate, he is informed—

"and verily believes, and as the records of the Treasury Department will show, that many of the circuit judges of the United States and district judges did the same thing."

That, I submit, Mr. President, is new matter, not responsive to anything in the charge and having no proper place in the respondent's answer, and evidence under it is inadmissible upon the ruling of the Presiding Officer and of the Senate made upon the 14th instant upon our offer to prove the inconvenience to suitors and counsel of the absence of the respondent from his district. It was ruled inadmissible. That evidence was responsive to new matter inserted in the answer of the respondent, but the answer itself in that particular was not responsive to any averment in the articles of impeachment.

I want, just at this point, Mr. President, to state that the honorable counsel for the respondent took us to task for making a written offer embracing an admission made by the respondent, to which they objected. He took us to task in terms of great indignation for trying to get before the Senate matter in an improper way. I call your attention to these three exhibits attached to their answer, and ask what words of condemnation are strong enough to apply to the introduction in that matter of what is intended to be evidence in advance of the hearing of the case for the purpose of influencing the court in its decision? Upon the ruling I have already cited, and upon every authority, this evidence would have to be rejected for that reason.

But next, Mr. President, the offer is only to show that the judges named in those papers did, in certain instances, receive for their expenses as much, or a sum equal to $10 for each day if divided by the number of days. But it is not offered to show—the statement offered does not even refer to the subject, and respondent makes no offer to show—that those judges, nor any of them, did not actually expend that sum, and this is, I say, a cowardly insinuation against honorable judges—the dragging of their names in the mire without any attempt to prove that they have been guilty of any offense whatever.

Of course, Mr. President, if a judge is holding court in New Orleans, where, as I know from very recent experience, people may reasonably expend a good deal more than $10, or in New York, or in Chicago, or in San Francisco, and if his expenses amounted to $12.50 to $15 a day, he could get not to exceed $10; and so, of course, this statement would show that what he got amounted to $10. That is the maximum fixed by the law, but it is not the slightest evidence that he did not expend the money. They do not offer to introduce the certificates showing what his actual expenses were. So I say, that, lacking that essential element, it is not evidence at all in this case.

It is not pretended that this respondent at the time of making his certificate in 1897 knew the opinion of or consulted any other judge in the United States.

In regard to the fifth objection, Mr. President, it is not competent for the respondent in his own defense to prove the usage or practice of other courts or other counties. I propose to submit a very high authority. In the celebrated trial of Prescott in Massachusetts, made notable by the eminent array of counsel and managers involved, Judge Prescott, the probate judge, entitled upon one side of the court to take fees, was charged with taking more than the law permitted him.

In one case the excess was $1.98, and in another article some $39 of excessive fees were involved. He was convicted upon both charges. He offered to prove the usage of other courts and other counties throughout the State for the purpose of showing his intent to have been an honest one and in accordance with the practice throughout the State. That offer was made by Mr. Samuel Hoar and supported by himself and Daniel Webster, but they were completely overthrown in their argument by Mr. Manager Shaw—the same Mr. Shaw who afterwards became chief justice of the supreme court of Massachusetts, and, in the opinion

of many men, secured a place in the history of the jurisprudence of this country second only to that of Chief Justice Marshall. I ask that the court will hear the offer which was made by Mr. Hoar in that case:

The Secretary read as follows:

The counsel for the respondent read the motions when put into writing, as follows, viz:

"1. And now the counsel for the respondent move that, in order to rebut the charge of willful and corrupt misconduct, they may be permitted to prove that at the time of the respondent's appointment to office there did exist, and continually since has existed, in the probate offices of the several counties in this Commonwealth a practice according to which, in cases of application for administration, certain official papers are prepared and executed and certain official acts done and performed which are not particularly enumerated in the statute called the 'fee bill,' and fees paid therefor, and to show the usual amount of such fees.

"2. And now the counsel for the respondent move that, in order to rebut the charge of willful and corrupt misconduct, they may be permitted to prove that at the time of the respondent's appointment to office there did exist, and continually since has existed, in the probate offices of the several counties of this Commonwealth a practice according to which, in cases of application for administration, certain official papers are prepared and executed and certain official acts done and performed which are not particularly enumerated in the statute of the Commonwealth, commonly called the 'fee bill.'"

Mr. President, to make this as brief as possible, that offer having been elaborately argued by those eminent gentlemen, was rejected by a vote of more than 2 to 1. Judge Prescott was convicted and removed from office upon those two articles. If this respondent has been guilty of any offense it is no excuse for him to say that somebody else did the same thing in later years, and in some other court; and in any event his offer does not include anything tending to show improper conduct by any other judge.

But again, that paper is not offered under the seal of any Department. It is not so authenticated as to be admissible in evidence. It does not purport to be a copy of any record in any Department. It is simply a lot of figures made up by somebody purporting to have been abstracted or extracted from certain documents, we know not what. It certainly does not show that any other judge ever certified to $10 of expenses when his actual expenses were less.

Now, when we offered the three certificates showing Judge Swayne's certificates and the action thereon we were required by the honorable counsel for the respondent to put in the whole record, the marshal's account, the action of the Treasury Department—every paper on file. These papers which they offer are not evidence in any proceeding on earth and would not be received in any court in Christendom.

Mr. Anthony Higgins, of counsel for the respondent, said:

Mr. President, I must confess to my surprise at the last objection raised by the learned manager. It is true, I find, that the certificate to these statements is not attested by the seal of the Treasury Department, but it is signed by the Secretary of the Treasury; and the only effect of that objection would be to require us to have the seal put to this paper between this time and the next meeting of this body. I hardly suppose that the learned managers will stand on that. An objection which merely goes to the authentication and which does not dispute its genuineness, it seems to me, is hardly worthy of either this tribunal or this grave proceeding. Nor have I supposed that either side in the prosecution of this case would undertake to put unnecessary tasks upon the other or lengthen the proceedings.

The learned manager said that the counsel for the respondent had compelled the managers to put in evidence certain certificates of the judge when they put in their Treasury statements in support of the articles against Judge Swayne—the first, second, and third. We put no compulsion upon them that I remember. They took their own course, and a very proper course. They rely upon their allegation of the untruthfulness of the certificate, and of course they put in the certificate. It would have been open to us to have loaded up this record with all of these papers from the Treasury Department and to have brought the originals here to the extreme disturbance of the public business. But, as we supposed, contributing to the need of dispatch of the Senate under its present conditions, we have got a succinct statement which gives all the material facts; for, Mr. Presi-

dent, behind the certificate here, as to every item, it is presumable, and there certainly is in the Treasury Department, certain other evidence. The course of proceeding in this case, as shown by the very certificate put in by the managers, is that at the end of a session of court held by a judge away from his home, at the circuit court of appeals, or away from his district in the district court, he presents his certificate to the marshal, stating the number of days and the amount of expenses, which he certifies to, and on that the marshal pays to him the amount and takes his receipt, which, under the form prescribed by the Department of Justice, is at the bottom of the certificate. A form of that was presented by my colleague only a few moments ago and admitted without objection.

That certificate is by the statute made the voucher upon which the marshal is reimbursed for his payment to the judge; and, as I shall call attention to, the statute requires that he shall be repaid—that he shall be allowed his account. The marshal then presents such item with the other items going to make up his account, his entire account, under the act of 1875, which we put in evidence here this afternoon, to the United States judge for that court. In the particular cases, we have an object lesson here in the certificate introduced by the managers in condemnation of Judge Swayne, that there the marshal of Texas in two instances presented that account before the local judge, Judge Bryant, who did not sit in two certain trials growing out of the failure of a bank because he was interested in the matter in some way, and Judge Swayne held two long trials, one in one year and the other in another year, and made these certificates.

Now, the marshal presented his account to Judge Bryant, and, under the statute, the United States attorney for that district was at that time required to be present and his presence to be noted upon the record. The marshal's account had to be sworn to. The judge's certificate is prescribed, and the statute prescribes that he shall approve or disapprove of that account, as shall be according to law and as may be just.

So you have now the act of the marshal in paying the judge, and the act of the local judge in approving the account in the presence of the district attorney, who is there when he approves it in order to protect the United States. All that happens in the very district where the expenditures are made and where the judge knows and the district attorney knows and the marshal knows, each of their own knowledge, as to what is the amount of expenses that would be involved in a residence there. The account then goes with the marshal's to the Department of Justice, under the terms of the act which will be printed in the Record to-morrow, and is there audited, in the first instance, by the Auditor of the Department of Justice. From there, after the lapse of sixty days, it goes to the Treasury Department and is audited by the Auditor for the State and other Departments. It is then subject to the disallowance of the Comptroller, either of his own motion or upon its being brought before him.

You have, therefore, Mr. President, in this case the act in succession of six executive officers in confirmation or disallowance of such accounts. These certificates show that there has not been a single account disallowed by all of these officers: that from the beginning to the end there has been no objection made under the terms of this statute to the construction placed upon it by Judge Swayne, namely, that the certificate under which the payments were made were those that allowed a certificate of $10 a day irrespective of the facts as to whether that amount was actually expended or not. * * * I ask the learned manager if this fraud, which is a fraud before this Senate, was not such a fraud when it was brought before Judge Bryant? If it is a fraud now, it was a fraud then; and was there anything that has been proved by these witnesses that Judge Bryant did not know of his own knowledge? Did he reside in Tyler? I do not care. If he did, he knew it because he lived there. Did he reside elsewhere? Then he had to go away from his home, though in his district, to be sure, when he held court in Tyler, and he knew what it cost him just as much as Judge Swayne knew. Did not the district attorney know it? Did not the marshal know it? And does the learned counsel pretend to say that because of the terms of this certificate, as prescribed by the acts of 1891 and 1896, if that was a crime, it was not the duty of that district attorney to present Judge Swayne to his grand jury and have him indicted: that it was not the duty of Judge Bryant to bring it to the attention of the district attorney: that it was not the duty of the marshal to protest? Is it possible that there is any fraud that can exist within the jurisdiction of the Auditor of the Department of Justice, of the Auditor of the Treasury Department, of the Comptroller of the Treasury that they can not unkennel and uncover, and that it is not their duty to do it?

No, Mr. President, it can not be held in the face of that that any such construction could be put by them upon the act of 1891 and the act of 1896 as to these fees. They did not abandon their duty; they do not stand here as convicted of any such absence or lack of it. What they did do was to say, "We are concluded by the certificate because we can not go behind it; we are concluded by the certificate because the statute intended to make it an allowance when the judge certified it, irrespective of what the actual expenses were."

The Senate will perceive, Mr. President, therefore, that the admissibility of these certificates rest upon something else than the mere act of the circuit and district judges of the United States in their several and respective actions in the amounts they certified under this statute. It brings up as a ground of admissibility of these certificates the contemporary construction placed by the executive officers upon the certificates of the judges as made from time to time. The form in which we have presented it is compendious. It is stripped of every unnecessary matter of evidence, which would merely load it up with lumber. It is brought down to the naked skeleton of facts of what is vital; but it puts before the Senate all of the evidence, coupled with the acts of Congress, that is necessary, and is in no sense unfair to the managers, because it apprises them of everything that they might desire to know.

Mr. President, I had hoped that this discussion would be left to the final argument; and for my colleague and myself we are willing that that course should be pursued now. I would stop at once any further discussion of this subject and leave it until the final argument to complete then what I have already said, so as not to take up the time of the Senate; but that offer does not seem to meet with the views of the learned managers, and I am compelled, therefore, to go into the discussion of the case—I say of the case—as made now by this objection to our certificates.

What we contend, Mr. President, is that the proper construction of these acts of Congress of 1891 and 1896 as to judges holding court away from their homes or out of their districts, is the one placed upon it by Judge Swayne; and that is they were authorized to certify their expenses at $10 a day as an allowance or compensation for such services. I shall endeavor to be very brief. The act is:

"That any justice or judge who, in pursuance of the provisions of this act, shall attend the circuit court of appeals held at any place other than where he resides"—

And, mutatis mutandis, it is the same in the case of a district judge when he holds court out of his district—

"shall, upon his written certificate, be paid by the marshal of the district in which the court shall be held his reasonable expenses for travel and attendance, not to exceed $10 per day, and such payments shall be allowed the marshal in the settlement of his accounts with the United States."

The prior state of the law was that the Judge for such service was paid his actual expenses upon vouchers filed with his accounts. This will not be disputed, I presume, and I have assumed that there is no doubt as to the state of the law.

The true construction of these statutes is that Congress intended that a judge rendering such service should be paid $10 a day as an allowance for compensation for the service. That such is the true construction of the act will appear from its provisions, as shown by its language, and from the changes wrought thereby.

What is meant by "reasonable expenses" as used in the act? It was changed, Mr. President, from "actual expenses" and, therefore, presumably on its face does not mean "actual expenses." * * * Understand, Mr. President, I am arguing that this evidence is admissible because of the contemporary construction placed upon the statute by the officers, and that the statute is one which will bear construction, that it is open to construction. If it is not open to construction, if it is so clear, as the managers contend, that there is no doubt about it, in such case as that the authorities would not apply.

I must therefore make a case where it is apparent upon the face of the statute that it is doubtful and is uncertain, and hence I am compelled to go to the task if this question is to be determined on its merits. I regret it very much.

All the expenses must not merely be reasonable. The term "expenses incurred in travel" is easily defined, but it is difficult to place limits upon the term "attendance." Certainly it can reasonably be held to include (1) many expenses which might not be included under the word "actual" as construed by the accounting officers of the Government; (2) many expenses not incurred in attendance, but caused by attendance, and (3) the expenses are "not to exceed $10 a day."

What light does this provision taken in connection with the words "for travel and attendance," throw upon the true construction of the words "reasonable expenses"? If a judge spends $13 one day and $7 another, shall he certify $20 for the two days, or only $10 for the one day and $7 for the other, and $17 in all? * * * I had very nearly completed, Mr. President, the argument I was submitting about the fact that contemporary construction applies because the statute itself is one that is loosely drawn. If the words "not to exceed $10 a day" are given a hard and fast interpretation, then it must be held to mean in the case to which I have already referred that it is not to exceed $10 for any one day, and so in this instance supposed the judge would certify $17 and loss $3. That is, if he expended $7 one day and $13 another, he could only certify to the $7 that he spent that day, and only $10 for the day he spent $13; but even the learned managers will not contend that that is the construction. Why? Because it is "for travel and attendance." Oh, they say, going about large districts, you have got to have traveling expenses, and a man will spend $20 or $30 a day sometimes in traveling and all that; but what becomes, then, of your construction that it is $10 from day to day?

But, again, Mr. President, did the word "reasonable" mean an amount not as fixed by the judge's certificate, but as determined by the personal habits of the judge, and, indeed, the state of his health, or the individual limitations of his physical needs?

But light is shed upon the meaning of the words "reasonable expenses," as used in the act, by its provisions fixing who shall determine what expenses are reasonable.

That takes me to what I have already submitted, namely, a contemporary construction, in which it is said that the amounts shall be allowed to the marshal in his accounts, and the sum on the certificate shall be paid by the marshal.

I assume, again, in answer to the suggestion of the Senator from Virginia [Mr. Daniel], that it is by no means clear. On the contrary, I think it is clearly the other way; that under this act the certificate of the judge is conclusive: that is, that it is irrebuttable and irreversible, because the statute makes it so. I submit to the Senate, as a most serious matter, that it is not irreversible where there is knowledge that a fraud has been committed: I can add nothing to what I have already said as to the case where the district attorney, the marshal, and the judge all have knowledge of it.

Mr. President, not detaining the Senate longer on that, I appeal to a case that is higher authority, I submit, than the one cited by the learned manager from an impeachment trial in Massachusetts; and that is the case of The United States v. Hill, where the doctrine of contemporary construction was applied to a statute nothing like as ambiguous and loosely drawn and uncertain as the one now under consideration here. That case was where a clerk of the district court of the United States for the district of Massachusetts had not returned in his emoluments his fees for naturalization papers.

Mr. Manager Olmsted concluded the argument—

In the first place, the act itself does not vest any power or discretion in Judge Bryant, or the marshal, or anybody else except the judge who certifies, for it provides:

"For reasonable expenses for travel and attendance of district judges directed to hold court outside of their districts, not to exceed $10 per day each, to be paid on written certificates of the judges, and such payment shall be allowed the marshal in settlement of his account with the United States."

Provided the judge certified to a sum not to exceed $10 a day, what marshal had the right to sit on the account? I would not like to be that marshal. He would have been in jail for contempt inside of thirty minutes. What judge had a right to pass upon it? What Treasury official had a right to pass upon it? No one. The judge makes a certificate as to his expenses; and if it does not exceed $10 a day it is paid without question, and must be.

Now, in this offer of evidence that is not a word about the amount expended by any other judge. It is not pretended in there that any judge did not expend every dollar for which he was reimbursed by the Government. There is not anything in there about the construction of any official. We do not know whether their expenses exceeded $10 or not. We only know they did not get more than $10 for any one day.

Now, one word more about the absence of the seal from that paper. Of course there is no seal on it, and it is not a question of waiting until to-morrow for them

to get a seal on it. There can not be a seal on it. The Department can only put the seal on certified copies of papers or documents in the Department, which that is not. The act of Congress provides:

"Copies of any books, records, papers, or documents in any of the Executive Departments authenticated under the seals of such Departments, respectively, shall be admitted in evidence equally with the originals thereof."

That is not a copy of any record or any document or any book. It is some figures taken off by somebody, and we do not know who, and it simply shows the amounts paid to the judges therein named. There is no insinuation, except by counsel, that any one of these honorable judges charged or certified to any amount in excess of his actual expenses. There is nothing upon which to base the insinuation that a judge, having expended two or three or five dollars a day, certified that the expenses were $10 and collected the money from the Government.

On the same day, at the evening session, the question of the admissibility of the evidence was put by the Presiding Officer: [121]

The Presiding Officer thinks it becomes the duty of the Presiding Officer again to submit to the Senate the question with regard to the admission of evidence offered by counsel for respondent, which was submitted when a quorum of the Senate was not present, but when a quorum of the Senators sworn in the impeachment trial was present.

Counsel for the respondent offer in evidence certain statements of the Secretary of the Treasury, not under seal, purporting to show amounts paid to United States circuit judges as expenses claimed while attending circuit courts of appeals away from their residences and amounts paid to United States district judges as expenses claimed while holding court out of their own districts or while attending circuit courts of appeals away from their residences.

The question is, Shall the statement referred to be admitted in evidence? [Putting the question.] The "noes" appear to have it. The "noes" have it, and the statement is not admissible.[122]

Mr. Thurston then said:

Mr. President, I should like to have the Reporter read my two previous offers, which I desire to remake in the same terms I did before, and let the ruling be had upon them.

The Reporter read as follows:

Mr. THURSTON. Mr. President, we offer and ask to have incorporated in the record the opinion of the three circuit judges of one circuit, construing the law under which articles 1, 2, and 3 are framed. To be perfectly fair, I will state that this is in the shape of a letter, and has been written recently. On the question of offering it, I do not care to state to whom it is addressed or what judges sign it, but I offer it as an opinion of those judges on this question. The date of it is February 6, 1905.

The PRESIDING OFFICER. The Presiding Officer will exclude that paper.

Mr. THURSTON. I ask to have my second offer read.

The Reporter read as follows:

Mr. THURSTON. We offer in addition thereto similar opinions contained in letters of about the same date, signed by fifteen members of the Federal judiciary. They are all the same.

Mr. Manager PALMER. If they are similar——

The PRESIDING OFFICER. For what purpose?

Mr. THURSTON. For the same purpose that I offered the single letter.

The PRESIDING OFFICER. For what purpose?

Mr. THURSTON. For the purpose of showing the construction placed by these judges on the statute under which articles 1, 2, and 3 are framed.

The PRESIDING OFFICER. The Presiding Officer will exclude those papers.

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[121] Orville H. Platt, of Connecticut, Presiding Officer.

[122] A short time previously the yeas and nays had been taken on this question, shewing 10 votes for admission and 34 for exclusion. This vote showed the absence of a quorum, and therefore was of no effect, except as indicating the division of opinion.

2278. The Senate in the Belknap trial admitted evidence of an act which, in substance, amounted only to a refusal of respondent to confess culpability.—On July 8, 1876,[123] in the Senate sitting for the impeachment trial of William L. Belknap, late Secretary of War, E. D. Townshend, Adjutant-General of the Army, a witness for the United States, was cross-examined by Mr. Matt H. Carpenter, of counsel for the respondent, and asked what the finding of the court-martial was in the case of Capt. George T. Robinson, of the Tenth Cavalry, and especially for a letter addressed by the said Robinson to W. W. Belknap, Secretary of War, and dated St. Louis Barracks, Mo., April 2, 1875. Mr. Carpenter explained the purpose of this evidence:

This man Robinson was, as I understand, court-martialed and sentenced by the court to be dismissed the service. He was at the St. Louis Barracks at the time; and after the finding by the court was sent on to Washington to be approved by the Secretary of War he wrote a letter to the Secretary substantially stating the allegations which are now made in these articles and by the testimony offered by the managers, and containing what we regard as a blackmailing appeal to the Secretary of War, that he must disapprove of the findings of that court or the writer would take steps to disclose what he says existed in regard to the tradership at Fort Sill. (It was for transactions in connection with this tradership that the respondent was impeached.) Thereupon General Belknap examined the papers in the case, found that the proceedings were regular, that the court was justified in its finding, and he approved the finding and cashiered the captain, and filed this of record.

Mr. Manager George F. Hoar objected to the evidence;

Mr. President, it seems to me that that act of the Secretary of War affords no evidence or presumption of his innocence. A blackmailing officer, himself convicted by court-martial, sent to the Secretary a certain threat and demanded certain action. If the Secretary of War had acceded to his demand, he would have put himself in the power of that officer forever; and the acceding to that demand or concealing the letter from the persons about him in the War Department would have been a confession of guilt. On the contrary, the exhibition of the letter and the going on with the court-martial was denial. All, therefore, that it is offered to show from the conduct of the Secretary of War is that in April, 1875, being charged with this offense, he denied it and did not confess it; in other words, he seeks to make evidence for himself by proving a denial, which is the substance of his own conduct.

The question on the admission of the paper being submitted to the Senate, they decided, yeas 21, nays 18, that it should be received. So the objection was overruled.

2279. In the Belknap trial the Senate, by a bare majority, admitted, to show intent, evidence that respondent had not inquired into newspaper charges reflecting on his subordinates.—On July 10, 1876,[124] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, Mr. Whitelaw Reid, editor of the New York Tribune, was called as a witness for the United States, and examined as to a certain article which appeared in the Tribune as to the relations of the respondent with the post tradership at Fort Sill. In the course of the examination Mr. Manager John A. McMahon asked:

You can state now whether at any time, personally or by letter, the Secretary of War addressed you any communication to find out your authority for the statements in that article.

[123] First session Forty-fourth Congress, Senate Journal, p. 966; Record of trial, pp. 212, 213.
[124] First session Forty-fourth Congress, Senate Journal, p. 967; Record of trial, pp. 218, 219.

Mr. Matt H. Carpenter, of counsel for the respondent, objected that the testimony sought was wholly immaterial and irrelevant to the case.

Mr. Manager McMahon argued:

We do not know at this stage of the objection whether the witness will say "yes" or will say "no," and therefore the argument must be directed on the hypothesis that he may answer either way, and at this stage of the inquiry, if it is admissible in case he should answer either way, it is, of course, competent, and I think it is competent no matter how it may be answered. Why? Here is an article charging the existence of a grievance at Fort Sill, the payment of a tribute by one man to another for being kept in the place. We have already called Mr. Smalley, who wrote the article, and proved by him that no inquiry was made of him as to the authorship of that article, and that there was no general conversation had in regard to it. We now propose to go to the headquarters, to the fountain, and inquire whether anything was said to the editor of the paper in regard to this matter; and for this purpose I do not care what the answer may be. If the answer is "yes," we desire the communication, whatever it may have been; if the answer is "no," our argument will be, in my judgment, equally strong, if not stronger, than it would be if we had the direct communication.

Now, I will put it on the hypothesis that the witness will answer "yes." Are we not entitled to know what the Secretary of War said when such a thing as this was published? I need not argue that question. Suppose now that he will answer "no;" are we not entitled to a knowledge of the fact as we propose to prove it here that, although these charges were publicly made in regard to the management of affairs at Fort Sill, the names having been given, the parties being specified, and one of the parties specified being, as we shall show, at that time an intimate personal friend of the Secretary of War, at no stage of the proceedings was any inquiry made by the Secretary of War from any person who would have any right to speak in regard to the source of the information of the facts stated in that communication? We draw our argument from that, and I have no objection to stating it. Our argument is this, that his conduct in that matter is the conduct of a guilty man; it is the conduct of a man who knows that the facts exist; of a man who knows all about the statements in the New York Tribune article, and he does not care to go to anybody to find out the authority.

Mr. Carpenter said:

The rule, of course, must be the same here as it would be in the trial of any criminal case in a court of law, and is this Senate to establish the rule that, as often as a newspaper contains a libel upon an individual that individual must go and shoot the editor, or must sue him for libel, or demand his authority for the article, or stand convicted of the charge? That is the question. They propose to convict this man of everything said in that article because he did not go and make a row about it, because he did not go and demand the authority upon which it was published, bring a libel suit, or shoot the editor. The man who is perfectly conscious of integrity in the matter never runs after such articles—at least there is no law that compels him to do so, and there is no law of presumption against him if he refuses to do it. I should be surprised to see any judicial court establish such a rule, and I sould be anxious and curious to see how many of the Senators now sitting in the view of the Chair would be on their way for about five hundred editors within the next twenty-four hours. If it is a good rule against the Secretary of War, it is a good rule against any public man or any private citizen, and as often as any one of you Senators see a libel upon you in regard to any subject you must "jump for" the editor or you confess your guilt.

The President pro tempore having submitted the question, "Shall the managers be permitted to propound said interrogatory to the witness?" it was decided in the negative without division.

Then this question was asked:

Q. (By Mr. Manager McMahon.) Did you receive any communication from General McDowell in regard to this article in the New York Tribune?

Mr. Carpenter objected to the question.

Mr. Manager McMahon said:

Mr. President, I simply propose to show that at the time this thing occurred a communication was addressed, and to call for that and have it handed to me. Then I propose to have General McDowell recalled and to refresh his recollection by the contents of that letter. I do not propose to offer it now. * * * Am I not entitled to prove a certain letter which I desire to use in the progress of his case, and to identify it as the letter which the witness has received from a certain person in due course of mail?

The question being submitted to the Senate, they decided without division that the interrogatory might be propounded.

Later, during the same day,[125] Gen. William B. Hazen was called as a witness on behalf of the United States, and Mr. Manager McMahon asked:

State, if you know, who furnished the information upon which the New York Tribune article was published.

This question was later modified to this form:

After the publication of this article in the New York Tribune, state whether the Secretary of War, officially or otherwise, made any inquiry to you in regard to the truth of the statements contained in that article.

Mr. Carpenter objected.

Mr. McMahon explained:

From our standpoint, assuming the testimony which we have already given to be correct, which we have a right to do, we have heretofore proven that the article in the New York Tribune was brought to the knowledge of General Belknap. We have to-day proven that General Belknap had ascertained that the authority for those charges was General Hazen, who had Fort Sill within his lines and who had troops stationed there. We have had from another source that General Belknap was exceedingly indignant * * * because General Hazen had represented it to a committee instead of to him. Now, that is the inference we want to draw from it: There is no libel in the New York Tribune article upon Secretary Belknap; on the contrary, if you will read that article you will find that it expressly excludes the Secretary from participating in this matter, and says that he knows nothing about it. It is no libel upon him in a newspaper, which is a subject upon which my friend is so sensitive, and upon which the counsel made the point, and very properly, that a man should not every time run and see the author of a newspaper article; but here are charges put in this article, coming from an officer whose name is not given, but then at the bottom of it is stated that these charges are made on the authority of a high officer under the Government in the Army. Here is the Secretary of War not charged, not implicated, no libel put upon his character, no stain upon him, but a grievance, a monstrous grievance, is called to his attention, one that demanded the immediate arm of the Government to remedy if it were true. While I submit to the decision that was made a while ago in regard to the testimony of Mr. Whitelaw Reid, and did not propose to argue it at that time, I say that it is the very highest kind of testimony upon a question like this, that when these charges are made in a public newspaper, not against this gentleman who is upon trial, but against certain other individuals, and public attention is called to them, an extract from a letter quoted with quotation marks to indicate that it is an extract from an officer at that point, and then that is fathered by a leading officer in the Army—I say we have a right to show as we propose now to show, that instead of hunting up whether these things are true or not, instead of endeavoring as an officer of the Army to correct these evils, he cloaks them, does not inquire even when he knows the

[125] Senate Journal, pp. 969, 970; Record of trial, pp. 228, 229.

officer who is the authority for this statement, or the officer commanding this particular post. He shuts his eye to the transaction and goes nowhere for information. He goes neither to Mr. Smalley, who wrote the article, nor to Mr. Reid, who published it, nor to General Hazen, who was the authority for it, and as we shall show hereafter, he neither goes to Evans nor to Caleb P. Marsh to learn anything about it.

Are there no inferences to be drawn from these facts? Is it not the best kind of testimony when we have got the peculiar case that we have here? Then what are your relations, Mr. Secretary, or what were your relations to this man? Was Mr. Marsh privately milking him and dividing with you and you knew it? The inference is almost irresistable that he was aware of all these facts. He knew that General Hazen was the man who was responsible for this statement, and yet he neither corrects the abuses nor calls upon General Hazen in any shape or form.

Mr. Carpenter argued:

The testimony has already shown that Belknap was indignant at Hazen because he had violated the regulations of the Army and had not communicated what he pretended to know as a fact through the military channels, as it was his duty to do, but poured it out into the bosom of a congressional committee. The testimony also shows that Belknap did go to work investigating this matter through the proper channels. He wrote a letter to Grierson, who was in command of the post, and to Evans, and to others there, in regard to the matter. The letter of Mr. Grierson making his report is on the 18th of February. It was received about ten days after that, and the order correcting the whole thing was made on the 25th of March.

Is it possible that Mr. Belknap is to be condemned here because he did not select that particular method of investigation which the managers wish he had selected? He went to work regularly and efficiently. He did not wish to imitate the irregular conduct of General Hazen. Because Hazen had violated his duty and the regulations of the Army, it was not necessary that Belknap should also violate his duty, nor was it necessary that he should chase the newspaper or chase any correspondent of a newspaper; but he set immediately to work investigating through the regular military channels, where officers made their reports upon their character as officers and where if they were untrue they could be court-martialed for their untruth; not anonymous correspondence in newspapers, but regular official investigation, and on the 25th of March the whole matter was cured by the order of that date.

That is the state of facts. The question put to the witness is, Did General Belknap go to you about this matter? They might as well call any other man in Washington and ask, "Did he go to you about it." Belknap was under no obligation to go to General Hazen. He went through the regular channel to the commander of the post. General Hazen was not the commander of that post, and if General Hazen had known anything of irregularities there while he was in command of the post the regulations of war made it his duty to communicate it through the military authorities, not through political and congressional channels, but to make it directly through the official military channels. Then it could be corrected according to the discipline of the Army.

The question being put, "Shall the managers be permitted to propound the said interrogatory?" there appeared ayes 19, noes 18. So the interrogatory was propounded.

2280. In the Peck trial a witness was not permitted to testify to general public opinion on a subject not closely related to respondent's act.

Instance wherein, during an impeachment trial, the respondent personally examined a witness.

On January 11, 1831,[126] in the high court of impeachment, during the trial of the cause of The United States *v.* James H. Peck, a witness, Robert Walsh, was under examination, when this question was asked by the respondent himself:

Do you or not know that at and before the time of the publication there was a general belief in the State of Missouri that many claims to lands in that State, under Spanish grants, were fraudulent?

[126] Second session Twenty-first Congress, Senate Impeachment Journal, p. 333; Report of trial of James H. Peck, pp. 269–273.

The publication referred to was an opinion by Judge Peck in a case relating to Spanish grants, the case of Soulard's heirs, published in a newspaper in St. Louis. The impeachment arose from the fact that Judge Peck had punished for contempt one Lawless, who had published a criticism of the opinion.

Mr. James Buchanan, of Pennsylvania, chairman of the managers for the House of Representatives, objected to the question. It was argued in behalf of the objection that in the trial of a district judge for the imprisonment of a citizen without law and unjustly, the high court of impeachment might not be led off to the trial of fraudulent land claims in Missouri, and to the trial of them by common rumor. There would be no end to such an inquiry.

In opposition to the objection it was argued by Mr. Jonathan Meredith, counsel for the respondent, and by the respondent himself, that they were prepared to prove fraud in particular cases, and especially fraud by Soulard. It was proper to show what facts the court had in mind when the proceedings against Lawless was had. If the judge believed that the publication by Lawless contained a misrepresentation of the opinion as to the grants, and tended to show them of a fair character, might he not have rightly considered it his duty to repress such an attempt.

Arguing for the managers Mr. Henry R. Storrs, of New York, asked if rumor was evidence in any cause. Suppose, moreover, that it could be proved that there were ten thousand fraudulent land claims in Missouri. What bearing had that on the question of the impeachment. The question was whether Mr. Lawless fairly represented the opinion delivered by the judge, or whether the judge might commit him for a contempt in publishing such an article. Admit even that the claim of Soulard was fraudulent, that claim was not in issue now and the high court was not trying its merits.

The question being put: "Shall this interrogatory be put to the witness?" there appeared yeas 14, nays 27.

2281. In the Peck trial the person alleged to have been oppressed by respondent was required to testify as to acts of his own implying malice against the respondent after the said alleged oppression.—On January 11, 1831,[127] in the high court of impeachment, during the trial of the cause of The United States *v.* James H. Peck, a witness on behalf of the managers, Luke E. Lawless, was under cross-examination by counsel for the respondent. The respondent was on trial for unlawfully oppressing Lawless by imprisoning him for contempt for criticising in the public prints a decision by respondent as judge in a case relating to a claim of Soulard's heirs.

Lawless had been imprisoned for an article signed "A Citizen" and published in a St. Louis paper in 1826. Mr. Jonathan Meredith, counsel for the respondent, now produced several newspaper articles published after the publication of 1826, and some published as late as 1830, and proposed this question:

Are you the author of all or either of the articles contained in the newspapers now handed to you relating to the respondent?

[127] Second session Twenty-first Congress, Senate Impeachment Journal, p. 334; Report of trial of James H. Peck, pp. 275–277.

Mr. James Buchanan, of Pennsylvania, chairman of the managers on behalf of the House of Representatives, objected to the question, on the ground that a witness on cross-examination might not be compelled, if the publications were reprehensible, to accuse himself. It was also urged by Mr. George McDuffie, of South Carolina, one of the managers, that the letters were wholly external to the case, for it could not be supposed that Judge Peck, in imprisoning Lawless, could have had foresight of these publications. They had nothing to do with the question as to whether or not Judge Peck was guilty of illegally imprisoning a citizen.

Mr. Meredith contended that in a case of libel or slander subsequent words or libels might be given in evidence to show quo animo the words were spoken or the libel written. He referred in support of this to Second Saunders on Pleading and Evidence, page 382.

On behalf of the managers it was urged that the authority cited might be applicable if Mr. Lawless were on trial for a libel, but could any authority be produced to prove that a witness under examination might be called on to establish his own guilt, if there be any, by his own testimony? Was not this directly in face of the constitutional provision that no person should be compelled to be a witness against himself? Should a judge be permitted to drive a man by oppression into the public newspapers for redress and then be allowed to use those very publications for the purpose of proving the existence of malice in the author previous to the date of his punishment.

Mr. Meredith said:

I am perfectly aware that we are not now trying Mr. Lawless for a libel. The argument and the authority were merely analogical—they both apply to this case. The principle is the same as in a case of libel. One of the great questions in this cause is the question of misrepresentation. After we have shown the misrepresentation it may be necessary, perhaps, to go a step further and show that it was intentional. We take that step when we show subsequent attacks upon the respondent, of which Mr. Lawless was the author. Is not this the object of such evidence in the case of a libel? and why should it not be as competent in a case of this kind, where intention is the question? It matters not at what subsequent period these publications were made. * * * They relate back to the original publication, and show the design and intention of the author. Again, does the lapse of time at all affect the second view with which this testimony is offered? Mr. Lawless is a witness in this cause. He has testified before this court, and one inquiry, and a main inquiry, is with what temper is he here as a witness? And do not these publications, if he be the author of them, go to evince that temper and feeling?

On the question, "Shall this interrogatory be put to the witness?" there appeared, yeas 28, nays 13.

2282. The witness having testified that a report of a speech was made partially by others as well as by himself, the report was not admitted in evidence.

Instance of a ruling by the Chief Justice on a question of evidence during the Johnson trial.

On April 3, 1868,[128] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, Mr. Manager Benjamin F. Butler offered in evidence a report of a speech of the President printed in a newspaper.

Mr. William M. Evarts, of counsel for the President, objected to the admission of the report as evidence on the ground that the reporter

[128] Second session Fortieth Congress, Senate Journal, p. 880; Globe supplement, pp. 106, 107.

Hudson, who had been examined, had testified that a portion of the speech had been printed from notes taken by another reporter.

After discussion the Chief Justice [129] said:

The managers offer a report made in the Leader newspaper of Cleveland as evidence in the cause. It appears from the statement of the witness Hudson that the report was not made by him wholly from his own notes, but from his own notes and the notes of another person whose notes are not produced, nor is that person himself produced for examination. Under these circumstances the Chief Justice thinks that that paper is inadmissible. Does any Senator desire a vote of the Senate on the question?

Mr. Charles D. Drake, of Missouri, having asked for a vote of the Senate, the question was taken on admitting the paper as evidence, and there appeared, yeas 35, nays 11. So the report was admitted.

2283. Judge Swayne being charged with wrongfully committing persons for contempt, testimony as to the condition of the jail was ruled out as immaterial.—On February 16, 1905,[130] in the Senate sitting for the impeachment trial of Judge Charles Swayne, Charles M. Coston, a witness on behalf of the managers, was questioned by Mr. Manager David A. De Armond, of Missouri, as to the acts of the respondent in committing certain persons for contempt, and this question was asked:

Q. Well, where were they in the county jail?—A. They were in a room next to what they call "the prisoner department of the jail." This jail is a brick building, two stories in height. There is an entrance——

Mr. John M. Thurston, of counsel for the respondent, here intervened, objecting:

Mr. President, is Judge Swayne, this respondent, to be answerable for the manner in which the imprisonment was conducted in the absence of any testimony tending to show that he gave any directions with respect to it? If not, we object to this feature of the testimony.

Mr. Manager De Armond said:

Mr. President, the object of the inquiry was to ascertain where they were confined and how they were confined—something about the jail and the accommodations, or the lack of accommodations, that they had in the jail, in a general way, and the punishment that they endured under this sentence of the court. * * * We think it is material to the issue to show what the punishment inflicted upon them was, and to leave the court, in passing upon the matter with all the testimony upon the subject before the court, to determine how far the judge knew that such accommodations or lack of accommodations would be their lot in sentencing them—whether it was a proper sentence as to the amount of punishment or whether it was excessive. We are getting at the animus of the judge. * * * I think upon the question whether the sentences were excessive or not—as to that branch of it—it would be competent for the respondent to show, if he could show, that the imprisonment was not for an unusually long time; that the punishment was not excessive, if, as a matter of fact, the persons sentenced to the jail were taken to quarters which were commodious and clean and if there were no especially contaminating influences from the low class of criminals confined in the same jail at the same time; if they were the only occupants, for instance, and were in the rooms or apartments of the sheriff or keeper of the jail, instead of being in with the common criminals—I believe that would be competent for the respondent to offer in the case. It seems to me it is competent for those prosecuting the case to show the kind of confinement, the kind of place to which he sentenced them, bearing upon the question whether he had the right to send them there at all, and whether the punishment was excessive in sending them there for that length of time. That is all I wish to say about that.

[129] Salmon P. Chase, of Ohio, Chief Justice.
[130] Third session Fifty-eighth Congress, Record, pp. 2718, 2719.

For information, I ask the President whether I am to understand the ruling to be that all questions in regard to the jail are to be excluded? I do not wish to ask questions simply for the sake of asking them, of course.

The Presiding Officer [131] said:

The Presiding Officer does not see that the question as to the character of the jail or the way in which the persons sentenced for contempt were confined there is proper. It can not be said that Judge Swayne is responsible for that without some evidence is adduced showing that the judge directed something to be done which was improper. * * * The Presiding Officer thinks that it is not material to this issue to prove the condition of the jail. It any Senator so desires, the Presiding Officer will submit the question to the Senate.

On February 20,[132] during examination of a witness, Simeon Belden, by Mr. Manager De Armond, the following occurred:

Q. What was done with you?—A. I was locked up in the jail.

Q. What part of the jail—in a cell or not?

Mr. THURSTON. Wait a moment. We interpose the same objection that we made the other day. Nothing that possibly happened in and about that jail or the manner or method of the confinement of the witness could be chargeable to Judge Swayne.

Mr. Manager DE ARMOND. Mr. President, when the matter was up before, what we were trying to show was the general condition of the jail and the general way in which the prisoners were handled or cared for there. Now, I am asking simply a narrative. There was a sentence pronounced against this gentleman and Mr. Davis, and I am asking what was done in the carrying out of that sentence. I suppose, if the sentence had not been carried out at all, it would be competent for the respondent to show it, and I think it is certainly competent for us to show whether it was carried out and how it was carried out. I do not mean in the way of going into the details or description about the jail, but what was done with these men.

The PRESIDING OFFICER. Anything more than that they were imprisoned for a certain length of time?

Mr. Manager DE ARMOND. Well, I desire to show where they were put, where they were changed to—without going into the matter of details—and how long they were kept there.

The PRESIDING OFFICER (to the witness). Answer the question.

A little later,[133] while Mr. Manager De Armond was examining a witness, Michael Murphy, the following occurred:

Q. State whether or not you were in charge of the jail when General Belden and Mr. Davis were brought there by the United States marshal or deputy marshal.—A. Yes, sir; I was in charge of the jail.

Q. Was there a commitment brought with them?—A. To the best of my knowledge; yes, sir.

Q. State what you did with them.—A. I——

Mr. THURSTON. One moment. We object to this. We did not insist very hard on our right to this objection while Mr. Belden was testifying, but it is certain that what took place in that jail, its condition, the way the prisoners slept, the way they were fed, the way they were treated, could not be used to prejudice the court against Judge Swayne unless they first laid the foundation for it by showing that he was responsible for it or directed it.

The PRESIDING OFFICER. That was the opinion of the Presiding Officer on a former day, but the questions which were asked Mr. Belden were allowed on the ground that they were a narrative of what occurred. The Presiding Officer does not think that evidence showing that the condition of the jail was an improper one is admissible unless it be shown that it was known to Judge Swayne and that that was part of his motive in committing them there.

Mr. Manager DE ARMOND. I was not going to ask the witness about the general condition of the jail. I was going to ask questions practically the same as those asked General Belden; about what was done with them.

The PRESIDING OFFICER. What is the purpose of the questions?

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[131] Orville H. Platt of Connecticut, Presiding Officer.
[132] Record, pp. 2906, 2907.
[133] Record, p. 2908.

Mr. Manager DE ARMOND. To show the punishment they endured.

The PRESIDING OFFICER. Unless there is something unusual in the character of the jail which was known to Judge Swayne, the Presiding Officer thinks the evidence is inadmissible.

2284. Decisions as to relevancy of testimony during the Peck trial.—On December 23, 1830,[134] in the high court of impeachment, during the trial of the cause of The United States *v.* James H. Peck, a witness, Luke Edward Lawless, was under cross-examination by Mr. William Wirt, counsel for the respondent. The witness, in a communication signed "A Citizen," and published in a St. Louis paper, had criticised an opinion delivered by Judge Peck in the case of Soulard's heirs. The judge was now on trial for punishing Lawless for contempt.

Mr. Wirt asked a question, reduced to writing, as follows: The witness is asked to refer to such parts of the opinion of the respondent in Soulard's case as support the first specification in the article signed "A Citizen."

Mr. James Buchanan, of Pennsylvania, of the managers on the part of the House of Representatives, objected that the question was irrelevant. The court had before them, he said, the publication of the witness, in which he had placed his assumptions in one column, and the passages in the opinion from which they were deduced in another column.

Mr. Wirt responded that the managers in opening the case had argued that there had been no misrepresentation of the opinion in the letter; and the question which he had asked was useful in determining the truth or lack of truth in the claim of the managers.

The question having been read to the court, the Vice-President put the question: "Shall this interrogatory be put to the witness?" and it was determined in the affirmative, yeas 32, nays 10.

2285. On December 22, 1830,[135] in the high court of impeachment during the trial of the cause of The United States *v.* James H. Peck, while a witness, Luke Edward Lawless, was under cross-examination, Mr. Jonathan Meredith, counsel for the respondent, put the following interrogatory:

What was your contract for professional compensation in the case of Soulard's heirs?

It was for criticism of Judge Peck's decision in the case of Soulard's heirs that the witness had been punished by Judge Peck, and it was because of this punishment that the impeachment proceedings had been instigated.

The question being objected to by the witness and also by the managers for the House of Representatives, the question was put: "Shall this interrogatory be put to the witness?" and decided in the negative, yeas 19, nays 23.

2286. On January 10, 1831,[136] in the high court of impeachment during the trial of the cause of The United States *v.* James H. Peck, a witness, Josiah Spalding, was asked the following question by Mr. Jonathan Meredith, counsel for the respondent:

What are the terms in which Mr. Lawless, according to general reputation, is in the habit of speaking of courts, both in their presence and out of court?

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[134] Second session Twenty-first Congress, Senate Journal, p. 329; Report of the Trial of James H. Peck, pp. 122–125.

[135] Senate Impeachment Journal, p. 328, second session Twenty-first Congress.

[136] Second session Twenty-first Congress, Senate Impeachment Journal, p. 332; Report of trial of James H. Peck, pp. 261–268.

Judge Peck was on trial for the punishment of Mr. Lawless for contempt of court in criticising in a newspaper an opinion by the judge.

Mr. James Buchanan, of Pennsylvania, chairman of the managers, objected to the portion of the question contained in the words "and out of court."

Mr. Meredith admitted that he should not have asked the question had he not thought he had the assent of the managers.

The court, by a vote of yeas 3, nays 39, sustained the objection.

2287. General decisions during the Johnson and Belknap trials as to relevancy of testimony.

Instances of decisions by the Chief Justice on questions of evidence during the Johnson trial.

On April 15, 1868,[137] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, Mr. Benjamin R. Curtis, of counsel for the respondent, offered in evidence a letter of McClintock Young, Acting Secretary of the Treasury, removing Richard Coe from the officer of appraiser at Philadelphia.

Mr. Manager Benjamin F. Butler objected to the proposed evidence as irrelevant. The letter, it was true, showed the direction of the President that the act be done; but if it were admitted it would be necessary to investigate whether or not the Acting Secretary or even the President might make the removal without consent of the Senate.

Mr. Curtis argued as to the act of Mr. Young:

He says that he proceeds by the order of the President, and I take it to be well settled judicially and practically that wherever the head of a Department says he acts by the order of the President he is presumed to tell the truth, and it requires no evidence to show that he acts by the order of the President. No such evidence is ever preserved, no record is ever made of the direction which the President gives to one of the heads of Departments, as I understand, to proceed in a transaction of this kind. But when a head of a Department says "by order of the President I say so and so" all courts and all bodies presume that he tells the truth.

The Chief Justice [138] ruled:

The Chief Justice thinks that this evidence is admissible. The act of a Secretary of the Treasury is the act of the President unless the contrary be shown. He will put the question to the Senate, however, if any Senator desires it. [After a pause.] The evidence is admitted.

2288. On April 20, 1868,[139] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, Mr. Manager Benjamin F. Butler, in the course of the examination of Alexander W. Randall, Postmaster-General, proposed certain questions which were objected to. As a result of this the Chief Justice said:

The honorable manager appears to the Chief Justice to be making a statement of matters which are not in proof, and of which the Senate has as yet heard nothing. He states that he intends to put them in proof. The Chief Justice therefore requires that the nature of the evidence that he proposes to put before the Senate shall be reduced to writing as has been done heretofore. He will make the ordinary offer to prove, and then the Senate will judge whether they will receive the evidence or not.

Thereupon Mr. Manager Butler submitted this offer:

[137] Second session Fortieth Congress, Senate Journal, p. 899; Global supplement, p. 183.
[138] Salmon P. Chase, of Ohio, Chief Justice.
[139] Second session Fortieth Congress, Senate Journal, p. 915; Globe supplement, pp. 240–242.

We offer to show that Foster Blodgett, the mayor of Augusta, Ga., appointed by General Pope, and a member of the constitutional convention of Georgia, being, because of his loyalty, obnoxious to some portion of the citizens lately in rebellion against the United States, by the testimony of such citizens an indictment was procured to be found against him; that said indictment being sent to the Postmaster-General, he thereupon, without authority of law, suspended said Foster Blodgett from office indefinitely, without any other complaint against him and without any hearing and did not send to the Senate the report of such suspension, the office being one within the appointment of the President by and with the advice and consent of the Senate; this to be proved in part by the answer of Blodgett to the Postmaster-General's notice of such suspension, being a portion of the papers on file in the Post-Office Department upon which the action of the Postmaster-General was taken, a portion of which have been put in evidence by the counsel of the President, and that Mr. Blodgett is shown by the evidence in the record to have always been friendly to the United States and loyal to the Government.

Mr. William M. Evarts, of counsel for the respondent, objected to this evidence as wholly irrelevant to this case. The evidence concerning Foster Blodgett was produced on the part of the managers, and on their part was confined to his oral testimony that he had received certain commissions under which he held the office of postmaster at Augusta; that he had been suspended in that office by the Executive of the United States in some form of its action, and there was a superadded negative conclusion of his that his case had not been sent to the Senate. In taking up that case the defense offered nothing but the official action of the Post-Office Department, coupled with the evidence of the head of that Department that it was his own act, without previous knowledge or subsequent direction of the President of the United States. In that official order, thus a part of the action of the Department, it appears that the ground of it was an indictment against Mr. Blodgett. A complaint was made that that indictment was not produced. The managers having procured it, having put it in evidence, they now propose to put in evidence his answer to that indictment or to the accusation made before the Postmaster-General.

After argument Mr. Manager Butler modified the question so as to stand as follows:

The defendant's counsel having produced from the files of the Post Office Department a part of the record showing the alleged cause for the suspension of Foster Blodgett as deputy postmaster at Augusta, Ga., we now propose to give in evidence the residue of said record, including the papers on file in the said case, for the purpose of showing the whole of the case as the same was presented to the Postmaster-General before and at the time of the suspension of the said Blodgett.

Mr. Evarts said:

Our objection to that offer, as we have already stated, is that it does not present correctly the relation of the papers.

The Chief Justice said:

The defendant's counsel having produced from the files of the Post Office to prove has been withdrawn. The offer which has just been read has been substituted. Senators, you who are of opinion that the evidence now proposed to be offered should be received will say aye; contrary opinion, no. [Putting the question.] The noes have it. The evidence is not received.

2289. On July 11, 1876,[140] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, Gen. William

[140] First session Forty-fourth Congress, Senate Journal, pp. 973, 974; Record of trial, p. 245.

B. Hazen, a witness on behalf of the United States, was recalled, and in the course of cross-examination, Mr. Matt. H. Carpenter, of counsel for respondent, asked:

Is it according to discipline in the Army for an officer to publish scandal of the President which he knows nothing about except from hearsay?

Mr. Manager John A. McMahon said:

I must at this point enter an objection. It seems that my friend here is pursuing the old line, having the old misapprehension that every now and then crops out in this case. The misapprehension is that he is trying General Hazen and not General Belknap.

Mr. Carpenter argued:

Mr. President, this witness has been laboring for months to get up this impeachment for his own vindication. He came back here to-day for explanation, and I am doing everything in my power to assist his purpose. I want to show what his motives have been; I want to show that they are utterly groundless; I want to show that he has violated all the proprieties and all the duties of his official station by the hand he has taken in this matter and his anxiety to fan public sentiment against General Belknap, who has never done him an injury in his lifetime, and who had shown him so many favors that General Sherman objected to his giving him another; and that is the man who repeats gossip against the President and against the then Secretary of War, and publishes it in letters over his own name.

The Senate, without division, decided the question inadmissible.

2290. On January 12, 1876,[141] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, Hon. Hiester Clymer, chairman of the committee of the House of Representatives which had taken the testimony on which the impeachment was based, was examined as a witness for the United States, and then was cross-examined by Mr. Matt. H. Carpenter, of counsel for the respondent. Mr. Carpenter asked:

How long has the committee been engaged in investigating the affairs of the War Department?

Mr. Manager John A. McMahon objected, saying:

I only want to understand how far this is to go. If any inference is to be drawn from any investigation held there that there is nothing else in this matter but what has been charged, we shall claim to put in the testimony which has been taken, which we shall certainly claim thows a good deal of light on other transactions and on this. We have carefully excluded them up to this point.

The question being put to the Senate, the interrogatory was admitted without division.

Very soon thereafter, the witness was reexamined by the managers, and Mr. Manager McMahon asked:

Had your committee taken any other testimony except Mr. Marsh's at the time that the House ordered the impeachment of Mr. Belknap and notified the Senate to that effect?

Mr. Carpenter having challenged the question, Mr. McMahon stated that it was put to rebut the presumption raised by the former question. If that was pertinent, this was.

After discussion the question was put: "Shall this interrogatory be admitted," and there appeared, ayes 11, noes 16, no quorum.

Thereupon, to save time, Mr. McMahon withdrew the question.

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[141] First session Forty-fourth Congress, Senate Journal, p. 975; Record of trial, pp. 254, 255.

2291. On July 11, 1876,[142] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, Caleb P. Marsh, a witness for the United States, was under examination, when the following questions were asked, and the following colloquy took place between Mr. Matt. H. Carpenter, of counsel for the respondent, and Messrs. Managers John A. McMahon and Elbridge G. Lapham:

Q. (By Mr. Manager McMahon). Your wife has been subpoenaed as a witness to attend this tribunal?—A. Yes, sir.

Q. I desire you to state now whether she is able to attend.

Mr. CARPENTER. What is the object of that?

Mr. Manager MCMAHON. We want to know from the witness whether she is able to attend.

Mr. CARPENTER. We object. What has that to do with this case whether she is well or sick?

Mr. Manager MCMAHON. We have a right to send for her if she is able to come. Let the objection be passed upon by the Senate.

The PRESIDENT pro tempore. The counsel object to the question propounded by the managers. Shall the question be admitted?

The question was determined in the affirmative.

Q. (By Mr. Manager McMahon.) State whether your wife is able to be present in the court to be examined as a witness.—A. She is not, she is very ill.

Q. Have you the certificate of a surgeon to that effect?—A. I have.

Q. Whose certificate is it?—A. Dr. Alfred L. Loomis.

Mr. CARPENTER. Will the managers state now what the object of that testimony is?

Mr. Manager LAPHAM. It is to inform the Senate the reason why we do not call Mr. Marsh.

Mr. CARPENTER. Is it proposed to raise any presumption against the defendant?

Mr. Manager LAPHAM. We shall argue that hereafter.

Mr. CARPENTER. We will take her testimony that was given before the committee if the managers want that, or consent to have her deposition taken. We want to completely repel the presumption that Mrs. Marsh being ill is any evidence of our guilt.

Mr. Manager MCMAHON. The managers here decline to do that. I do not agree with them in that matter. The counsel will make his application to the Senate personally.

2292. Testimony admitted in the Swayne trial as material, although objected to as not bearing directly on the issues.—On February 21, 1905,[143] in the Senate sitting for the impeachment trial of Judge Charles Swayne, William A. Blount, a witness called on behalf of the respondent, was examined by Mr. John M. Thurston, of counsel for the respondent, and was questioned as to a suit known as the Florida McGuire case, the following being one of the questions:

During the first week of the court what steps did you take, if anything, to inform yourself as to the probability of the case being tried and as to when it might be reached upon the docket?

Mr. Manager David A. De Armond, of Missouri, objected:

We think it is an immaterial matter what steps he took to ascertain when the case would be for trial and what he did about it. He is not a party to the record nor a party to the proceeding that we are trying.

Mr. Thurston said:

Mr. President, we propose to show that the defendants in that case prepared themselves for trial, got out their list of witnesses, were ready for trial when the case was reached, and that they had a right to demand from the judge that he should not grant any postponement of that trial unless upon legal cause shown.

Mr. Manager DE ARMOND. I suggest in regard to that matter that the persons upon the other side are the persons whose conduct should be inquired about.

[142] First session Forty-fourth Congress, Senate Journal, p. 978; Record of trial, p. 243.
[143] Third session Fifty-eighth Congress, Record, p. 2080.

What the defendants in that Florida McGuire case did or what they thought certainly are not matters for which the attorneys upon the other side could be held responsible. It is not inquiring anything about the attorneys of Florida McGuire—the parties who are proceeded against for contempt—but it is inquiring about what the attorneys upon the other side did, and what the attorneys upon the other side thought, and why the attorneys upon the other side did or thought certain things.

The Presiding Officer said: [144]

Does the Presiding Officer understand that that was stated in the trial of that case?

Mr. THURSTON. Yes, Mr. President. I also propose to show it for another purpose. It is part of the res getae of this proceeding that has been gone into in detail and in such a manner that we might have objected at every step, but which, in deference to the desire of this court to proceed as rapidly as possible, we did not take advantage of.

The PRESIDING OFFICER. The Presiding Officer thinks the question may be asked.

2293. On February 21, 1905,[145] in the Senate sitting for the impeachment trial of Judge Charles Swayne, William A. Blount, a witness on behalf of the respondent, was examined as to a suit known as the Florida McGuire case by Mr. John M. Thurston, of counsel for the respondent:

Q. On that trial were there any witnesses called by Florida McGuire or her counsel or examined on her side who did not live in Pensacola, either upon or in the immediate vicinity to the Rivas tract?—A. So far as I know, not. I have to answer that this way: That a good many of these witnesses are known to me only in a general way, and I know generally where they reside. I do not know them personally, but I think that they all reside within a mile of the court-house in Pensacola.

Q. How long, in your judgment, would it have taken the United States marshal to have subpoenaed them all as witnesses?—A. If they had all been at home at the time they could have been subpoenaed in an hour or a half or two hours.

Mr. THURSTON. We offer this original praecipe for witnesses in that case. It is the original document which was identified the other day, and we ask, for the purpose of making up the record, that the certified copy may go in instead.

Mr. Manager David A. Armond, of Missouri, said:

We ask what is the object of offering this paper? What is it for? What do counsel expect to prove by it?

Mr. THURSTON. The object is to disprove the testimony of Judge Belden, who was very clearly brought to state that the only reason they decided to discontinue the Florida McGuire case was that they needed forty or fifty witnesses, many of them living at a distance, and that they could not possibly secure them from the time of Saturday afternoon, when court adjourned, to Monday morning, when the case was to be called. * * * I have now shown that upon the reincarnation of the Florida McGuire case between the same parties was tried out in full in the same court, and that on that trial they only asked on behalf of Florida McGuire for twelve witnesses by subpoena, and that they all lived, and that all the witnesses they produced lived, right there. It is in line with our insistence that here was a conspiracy against the dignity and the honor of the court by its officers; and that it is a mere subterfuge in their testimony to claim that they discontinued that case because they had a multitude of witnesses who could not be obtained, when the fact was, as we propose to show and insist, that their discontinuance of that case resulted solely and alone because they were held and taken to task for their conspiracy and for their contempt.

Mr. Manager DE ARMOND. Mr. President, the statement of the witness, Belden, was that they had forty or fifty witnesses for the trial, which was expected to take place in November, and that it would be impossible to get them for Monday, with notification upon the Saturday preceding.

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[144] Orville H. Platt, of Connecticut, Presiding Officer.
[145] Third session Fifty-eighth Congress, Record, p. 2982.

This, now, is a paper which purports to be a list of some of the witnesses called for and used upon a trial which took place some time the next year in the suit brought over again—in another suit. It does not at all follow from the fact that this paper contains a list of twelve names that they did not have forty or fifty witnesses for the trial before, nor does it follow that the names of all the witnesses are contained upon the paper, or that they did not need or did not use any other witnesses upon the second trial. So it is an immaterial sort of paper, we think.

The Presiding Officer [146] said:

The Presiding Officer thinks the paper bears on the question, although it is not conclusive.

[146] Orville H. Platt, of Connecticut, Presiding Officer.

Impeachment and Trial of William Blount *

1. Preliminary examination. Section 2294.
2. Delivery of impeachment at the bar of the Senate. Sections 2295, 2296.
3. Framing of the articles. Sections 2297–2299.
4. Choice of managers. Sections 2300.
5. Presentation of articles in Senate. Sections 2301, 2302.
6. Organization of Senate for trial. Section 2303.
7. Writ of summons and return. Sections 2304–2308.
8. Answer of respondent. Sections 2309–2310.
9. Replication of House. Section 2311.
10. Arguments as to impeachable offenses. Section 2312–2315.
11. Is a Senator a civil officer. Section 2316.
12. Effect of resignation of respondent. Section 2317.
13. Senate without jurisdiction to try. Senate 2318.

2294. The impeachment of William Blount, a United States Senator, in 1797.

The proceedings of the Blount impeachment were set in motion by a confidential message from the President of the United States.

In the Blount case the House voted to impeach on the strength of the matter contained in a letter proved to be in respondent's handwriting.

In the Blount impeachment case it was ruled that evidence should be taken before the House, and not before the Committee of the Whole.

In the Blount impeachment case the House seems to have distrusted its power to authorize the Speaker to administer oaths.

The House excused one of its Members from voting on any question connected with the impeachment to the bar of the Senate.

Forms of the resolutions impeaching William Blount and directing the carrying of the mpeachment to the bar of the Senate.

The Blount impeachment was carried to the bar of the Senate by a single Member of the House.

On July 3, 1797,[1] a confidential message was received in the House from the President of the United States, who transmitted a letter purporting to have been written by William Blount, a Senator of the United States for the State of Tennessee, to one James Carey, interpreter for the United States to the Cherokee Nation of Indians, for the purpose of seducing him from his duty and trust, in furtherance of certain unlawful designs. The message and papers were referred to a committee composed of Messrs. Samuel Sitgreaves, of Pennsylvania; Abraham Baldwin, of Georgia; Samuel W. Dana, of Connecticut; John Dawson, of Virginia, and William Hindman, of Maryland.

*Hinds' Precedents, Vol. 3, p. 644 (1907).
[1] First session Fifth Congress, Journal (supplemental); p. 76, Annals, p. 439.

On July 6 [2] Mr. Sitgreaves reported from the committee the following resolution:

Resolved, That William Blount, a Senator of the United States from the State of Tennessee, be impeached of high crimes and misdemeanors.

This report was on the same day considered in a Committee of the Whole House. Mr. Sitgreaves stated that the President had been advised by the law officers of the Government that the letter was evidence of crime; that the crime was of the denomination of a misdemeanor; and that William Blount, being a Senator, was liable to impeachment. In conformity with this opinion, the letter had been transmitted to the House. There was debate as to whether or not a legislator was an officer liable to impeachment, after which Mr. Sitgreaves made a statement [3] as to the forms of procedure:

As to the form of proceeding necessary to be taken on this occasion, he would state what the opinion of the committee was as to this matter. They supposed it would be first proper for that House to determine that the gentleman in question should be impeached. This being done, that a Member of that House should go to the bar of the Senate and impeach the person, in the name of the House and of the people of the United States, and state that the House of Representatives will proceed to draw out specific articles of charge again him. According to the case, they require that he shall be sequestered from his seat, be committed, or be held to bail. When this is done, a committee will be appointed to draw articles of impeachment.

The reason, Mr. S. said, why some steps should be taken at present was that means should be taken to secure the person of the offender, either by confinement or by bail, since it was the opinion of the law officers of Government that he could not be arrested by ordinary process. He could not be arrested by the Senate; they could send for him (as he understood they had done) by the Sergeant-at-Arms, to take his seat in the House; but when the House adjourned, they had no further power over him until an impeachment was made against him.

Gentlemen said there was no danger of escape. If it were not improper to state what had taken place out of doors, it might be said that there had already been an attempt at an escape. Besides, if no investigation were now to take place, how were they to come to a knowledge of the plot which gentlemen seemed so desirous to come to a knowledge of? When they had determined to make the impeachment, and an oral declaration was made of it to the Senate, when they were ready to go home, they might go, and exhibit the charges at the next session, when they should have leisure fully to consider the subject.

Mr. John Rutledge, Jr., of South Carolina, who had attended the trial of Warren Hastings, approved the form of procedure, but suggested that the handwriting of Mr. Blount should be proven, and submitted a motion to that effect.

The chairman [4] suggested that the proof should be taken in the House, and this opinion prevailed, it being urged that the Committee of the Whole did not have the power of taking evidence. The committee accordingly arose.

In the House the Speaker [5] suggested the propriety of calling in a magistrate, as the Speaker had no power to administer an oath except in the case of qualifying the Members of the House. A motion to authorize the Speaker to administer the oath was disagreed to, 29 yeas, 53 nays.[6]

Then it was [7]

[2] Journal, p. 70; Annals, pp. 448–458.
[3] Annals, p. 455.
[4] George Dent, of Maryland, Chairman.
[5] Jonathan Dayton, of New Jersey, Speaker.
[6] Annals, p. 458.
[7] Journal, p. 71.

Ordered, That William Barry Grove, Abraham Baldwin, Joseph McDowell, and Nathaniel Macon, Members of this House, be examined upon oath, at the bar of this House, touching their knowledge of the handwriting of William Blount, a Senator of the United States for the State of Tennessee; and that Reynold Keene, esq., one of the judges of the court of common pleas for the county of Philadelphia, and also one of the aldermen of the city of Philadelphia, in the State of Pennsylvania, administer the said oath.

The said Members were then sworn, and, being interrogated by the Speaker, severally answered that they believed the letter to be in the handwriting of William Blount.

It was then

Ordered, That the testimony of the said Members be reduced to writing by the Clerk, and that the same be referred to the Committee of the Whole House, to whom was committed the report of the committee to whom was referred the message of the President of the United States of the 3d instant.

On July 7 [8] the Speaker laid before the House a letter from Thomas Blount, a Member from North Carolina, and brother of William Blount, praying that he might be excused from voting on any question arising in the course of the impeachment proceedings. Thereupon it was

Ordered, That the said Thomas Blount be excused from voting on any question relating to the impeachment, now pending in this House, of William Blount, a Senator of the United States for the State of Tennessee.

On July 7,[9] also, the Committee of the Whole reported and the House agreed to the resolution that William Blount be impeached.

Then Mr. Sitgreaves moved an order which, with modification, was agreed to as follows:

Ordered, That Mr. Sitgreaves do go to the Senate, and, at the bar thereof, in the name of the House of Representatives, and of all the people of the United States, impeach William Blount, a Senator of the United States, of high crimes and misdemeanors; and acquaint the Senate that this House will in due time exhibit particular articles against him, and make good the same.

2295. Blount's impeachment continued.

In the Blount impeachment, following the precedent of the Hastings trial, the House did not send the articles to the Senate with the impeachment.

In the first impeachment the House followed English precedents to the extent of requiring the sequestration of the respondent from his seat in the Senate.

It was suggested by Mr. Albert Gallatin, of Pennsylvania, that the articles of impeachment should be prepared and presented with the impeachment. To this the reply was made: [10]

Mr. Sitgreaves said that the mode which he proposed was the same which was practiced in the case of Mr. Hastings. Mr. Burke went up to the House of Lords and impeached him in words similar to those now proposed to be used. Some time afterwards, the articles of impeachment having been drawn, Mr. Burke again went up to the House of Lords and exhibited them. Mr. S. spoke also of a work lately published, in continuation of Judge Blackstone's Commentaries, which had a chapter on parliamentary impeachment, and pointed out this as the proper mode of procedure. He had also looked into the proceedings on the trial of the Earl of Macclesfield, and found the same course was taken. It was true that in the case of a public officer of the State of Pennsylvania, which perhaps his col-

[8] Journal, p. 72; Annals, p. 458.
[9] Journal, p. 72; Annals, p. 459.
[10] Annals, p. 459.

league might have in his eye, the articles of impeachment were exhibited at the same time that the impeachment was made.

On motion of Mr. Sitgreaves it was:

Ordered, further, That Mr. Sitgreaves do demand that the said William Blount be sequestered from his seat in the Senate, and that the Senate do take order for the appearance of the said William Blount to answer to the said impeachment.

It was objected that it was not necessary to follow so closely the English precedents, since capital punishment could not follow a conviction on impeachemnt in this country. Therefore it would be unnecessary to confine the one impeached. But the House agreed to the order, ayes 41, noes 30.[11]

2296. Blount's impeachment, continued.

Form used in delivering the Blount impeachment at the bar of the Senate.

Upon the impeachment of William Blount the Senate took him into custody and required bonds for his appearance, and informed the House thereof.

Form of report to the House of an impeachment carried to the bar of the Senate.

On July 7,[12] while the Senate was engaged in proceedings for the expulsion of the said William Blount for the offense set forth in the message of the President, Mr. Sitgreaves appeared with the following message from the House:

Mr. President, I am commanded, in the name of the the House of Representatives and of all the people of the United States, to impeach William Blount, a Senator of the United States, of high crimes and misdemeanors, and to acquaint the Senate that the House of Representatives will, in due time, exhibit particular articles against him and make good the same.

I am further commanded to demand that the said William Blount be sequestered from his seat in the Senate, and that the Senate do take order for his appearance to answer the said impeachment.

Thereupon the Senate agreed to the following:

Pursuant to a message from the House of Representatives of the United States by Samuel Sitgreaves, esq., a Member of that House, that they, in their own name, and in the name of all the people of the United States, have impeached William Blount, a Member of the Senate, of high crimes and misdemeanors; and that, in due time, they will exhibit articles against him and make good the same; and they having demanded that the said William Blount be sequestered from his seat in this House, and that the Senate take order for his appearance to answer to the said impeachment:

Resolved, That the said William Blount be taken into custody of the messenger of this House until he shall enter into recognizance, himself in the sum of $20,000, with two sufficient sureties in the sum of $15,000 each, to appear and answer such articles of impeachment as may be exhibited against him.

Whereupon Mr. Blount named his sureties, and they were satisfactory to the Senate.

The President then named Mr. Blount and his sureties, who arose while the recognizance was read, and, being approved by the Senate, it was executed in their presence.

On the same day Mr. Sitgreaves returned to the House and reported:[13]

That, in obedience to the order of this House, he had been to the Senate, and in the name of this House and of all the people of the United States, had im-

[11] Annals, p. 462.
[12] Senate Journal, p. 388; Annals, p. 39.
[13] House Journal, p. 73.

peached William Blount, a Senator of the United States, of high crimes and misdemeanors, and had acquainted the Senate that this House will, in due time, exhibit particular articles against him and make good the same.

And, further, that he had demanded that the said William Blount be sequestered from his seat in the Senate, and that the Senate do take order for his appearance to answer to the said impeachment.

On July 8 [14] it was ordered by the Senate:

Ordered, That the Secretary of the Senate notify the House of Representatives that, in consequence of their message of yesterday, by the Hon. Mr. Sitgreaves, one of their Members, they have caused William Blount to recognize, in the sum of $20,000 principal, with two sureties in the sum of $15,000 each, to appear and answer to the impeachment mentioned in their message.

2297. Blount's impeachment, continued.

In the Blount impeachment the drawing up of the articles was confided to a select committee, with power to procure testimony.

In the Blount impeachment the House, after discussion, empowered the committee drawing the articles to sit during the recess of Congress.

On the same day and succeeding day, in the House, the following resolutions appear to have been agreed to: [15]

Resolved, That a committee be appointed to prepare and report articles of impeachment against William Blount, a Senator of the United States, impeached by this House of high crimes and misdemeanors, and that the said committee have power to send for persons, papers, and records.

Resolved, That the committee appointed to prepare and report articles of impeachment against William Blount, a Senator of the United States, impeached by this House of high crimes and misdemeanors, be authorized to sit during the recess of Congress.

Resolved, That the said committee be instructed to inquire, and by all lawful means to discover, the whole nature and extent of the offense whereof the said William Blount stands impeached, and who are the parties and associates therein.

The privilege of sitting during the recess was the subject of considerable debate, but precedents from English practice and from trials in South Carolina and Pennsylvania were cited.

Messrs. Sitgreaves, Baldwin, Dana, Dawson, and Robert Goodloe Harper, of South Carolina, were appointed to prepare and report articles of impeachment.

2298. Blount's impeachment, continued.

After his expulsion from the Senate William Blount was surrendered by his bondsmen, and gave bonds anew to answer to the impeachment.

On July 8 [16] in the Senate, the trial of William Blount terminated with his expulsion.

On this, Mr. Butler, in behalf of himself and Mr. Thomas Blount, the other surety, surrendered the person of William Blount, the principal, to the Senate, and requested to be discharged from their recognizance. Whereupon, it was

Ordered, That they be discharged from their recognizance, and that the Secretary enter an indorsement on the back of the bond as follows:

"And now, to wit, on this 8th day of July, 1797, the Hon. Thomas Blount and Pierce Butler, esqs., came into the Senate and surrendered William Blount, esq., for whom they became bound yesterday.

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[14] Senate Journal, p. 390; Annals, p. 40.

[15] House Journal, p. 74; Annals, pp. 463–466. The Journal appears to be defective in its record as to these resolutions, but the Annals seem to make certain that these resolutions were agreed to.

[16] Senate Journal, p. 392; Annals, p. 44.

On motion,

Resolved, That William Blount be taken into the custody of the Messenger of this House until he shall enter into recognizance, himself in the sum of $1,000, with two sufficient sureties in the sum of $500 each, to appear and answer such articles of impeachment as may be exhibited against him by the House of Representatives on Monday next.

A message was sent informing the House of Representatives of this action.[17]

On July 10 the Senate Journal records: [18]

Agreeably to the order of the Senate the within-mentioned William Blount having entered into recognizance, I have returned the same into the office of the Secretary of the Senate.

Ordered, That it be entered on the Journal of the Senate that William Blount failed making his appearance this day, agreeably to the recognizance entered into on the 8th instant.

2299. Blount's impeachment, continued.

A recess of Congress intervened between the impeachment of Blount and the framing of the articles of impeachment.

On July 10 [19] in the House, it was:

Ordered, That Mr. Dana be excused from serving on the committee appointed to prepare and report articles of impeachment against William Blount, a Senator of the United States, and that Mr. Bayard be appointed of the said committee in his stead.

On July 10 the Congress adjourned until the second Monday in November next.

2300. Blount's impeachment, continued.

The committee appointed to prepare articles of impeachment in the Blount case reported the evidence, and later the articles.

The articles of impeachment in Blount's case were considered by the House and not by the Committee of the Whole.

After considering English precedents the House chose the managers of the Blount impeachment by ballot.

In choosing managers by ballot the House guarded against complications in case more than the required number should have a majority.

A manager in impeachment proceedings is excused from service by authority of the House.

The managers carry the articles of impeachment to the Senate in accordance with a resolution agreed to by the House.

On December 4, 1797,[20] at the second session of Congress, Mr. Sitgreaves from the committee appointed to prepare articles of impeachment, submitted a report from which the injunction of secrecy was removed, and which was read in House on December 5 and ordered to lie on the table. This report did not embody the articles of impeachment, but simply set forth the facts, documents, subpoenas, etc., resulting from the investigation.[21]

On January 18 and 22, 1798,[22] Mr. Sitgreaves submitted supplementary reports, one representing an additional deposition and the

[17] House Journal, p. 74.
[18] Senate Journal, p. 393; Annals, p. 44.
[19] House Journal, p. 75.
[20] Second session Fifth Congress, Journal, pp. 96, 97; Annals, pp. 672–679.
[21] For the report in full, with exhibits, see Annals, vol. 5, part 2, pp. 2319–2415.
[22] Journal, pp. 135, 144; Annals, pp. 847, 890.

other two letters received by the committee. They were read to the House and ordered to lie on the table.

On January 25, 1798,[23] Mr. Sitgreaves, from the committee, reported the articles of impeachment, which were considered in Committee of the Whole, and on January 29 were agreed to by the House.

Thereupon, on motion of Mr. Sitgreaves:

Resolved, That eleven managers be appointed, by ballot, to conduct the said impeachment on the part of this House.

As to the method of appointment there was some debate.[24]

Mr. Sitgreaves said, with respect to the manner of appointing managers, he left it to the discretion of the House. The British House of Commons appointed their managers of impeachment by ballot, as they did all their large committees. In this House a different course was taken with respect to committees; they were always appointed by the Speaker, except specially ordered otherwise. The former committee on this business was appointed by the Speaker. He was not disposed to deviate from the usual practice. If, however, any gentleman wished to move that they be appointed by ballot, such a motion, he supposed, would be in order.

Mr. Albert Gallatin, of Pennsylvania, thought the rule directing the appointment of committees did not apply in the present case. It was true that managers of conferences of the Senate were thus chosen, but he thought there was an essential difference between the two cases. Managers of conferences reported to the House similarly with committees, and in fact they were a committee, though called by a different name. But managers of an impeachment on the part of this House appeared to him to be quite a different thing. They were not to make a report to the House which might be affirmed or negatived; they were the representatives of the House, and what they did would be final. Under this impression, in order to take the sense of the House upon the business, he moved that the managers be elected by ballot.

The motion that the managers be appointed by ballot was agreed to by the House.

On January 30[25] Mr. Sitgreaves, in view of the fact that the House should determine whether the choice should be determined by majority or plurality, offered the following resolution, which was agreed to:

Resolved, That in the ballot for managers to conduct the impeachment against William Blount, on the part of this House, a majority of the whole number of votes shall be necessary to a choice; and if it should happen that more than eleven members shall have a majority, that, in that case, the eleven highest in votes shall be considered as chosen; and if any two or more having a majority of votes should be equal in number, so as that the plurality can not be determined among them, the same shall be decided by a new ballot, subject to the preceding rules.

Proceeding to ballot, the House, on this and the succeeding day, chose the following managers:

Messrs. Sitgreaves; James A. Bayard, of Delaware; Harper; William Gordon, of New Hampshire; Thomas Pinckney, of South Carolina; Dana; Samuel Sewall, of Massachusetts; Hezekiah L. Hosmer, of New York; John Dennis, of Maryland; Thomas Evans, of Virginia; and James H. Imlay, of New Jersey.

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[23] Journal, pp. 149–153; Annals, pp. 919, 947–951.
[24] Annals, p. 952.
[25] Journal, p. 154; Annals, p. 953.

Mr. Baldwin, who had been elected a manager, was excused by the House.

On February 2 [26] it was—

Resolved, That the articles agreed to by this House, to be exhibited in the name of themselves and of all the people of the United States against William Blount, in maintenance of their impeachment against him for high crimes and misdemeanors, be carried to the Senate by the managers appointed to conduct the said impeachment.

2301. Blount's impeachment continued.

The ceremonies of presenting to the Senate the articles of impeachment of William Blount in 1797.

Rules established by the Senate to prescribe ceremonies for receiving House managers presenting articles in Blount's case.

Form of proclamation made in the Senate on attendance of House managers to present articles of impeachment against William Blount.

Upon receiving notice from the House that the managers would present articles against William Blount, the Senate set a time and informed the House thereof.

The managers who presented the articles impeaching William Blount were attended by some Members of the House.

Announcement of the chairman of the House managers in presenting to the Senate the articles against William Blount.

The manager having read the articles impeaching William Blount, the Sergeant-at-Arms received them and laid them on the Senate table.

Form of declaration of Vice-President upon presentation of articles of impeachment in Blount's case.

On February 5,[27] in the Senate, the following rules were agreed to:

Resolved, That the Doorkeeper of the Senate be, and he is hereby, invested with the authority of Sergeant-at-Arms, to hold said office during the pleasure of the Senate, whose duty it shall be to execute the commands of the Senate, from time to time, and all such process as shall be directed to him by the President of the Senate.

Resolved, That for regulating the proceedings of the Senate in cases of impeachment the following rule be adopted, viz:

When the House of Representatives, or managers by them appointed for that purpose, shall attend the Senate to present articles of impeachment, the President of the Senate shall cause proclamation to be made in the form following, viz:

All persons are commanded to keep silence while the Senate of the United States are receiving articles of impeachment against —— ——, on pain of imprisonment.

And shall then signify to the managers that the Senate are ready to receive the articles of impeachment, which, having been read by one of the managers, shall be received by the Secretary; and the managers shall thereupon be informed by the President that the Senate will take proper order on the subject, of which due notice will be given to the House of Representatives.

After which the Secretary shall read said articles of impeachment and enter the same on the Journals of the Senate.

On February 7,[28] in the Senate, a message, ordered to be sent by the House, was received from the House by its clerk, who said:

Mr. President: The House of Representatives have resolved that articles agreed by the House to be exhibited by them, in the name of themselves and of all the

[26] House Journal, p. 160.
[27] Senate Journal, p. 433; Annals, p. 498.
[28] Senate Journal, p. 435; Annals, p. 498.

people of the United States, against William Blount, in maintenance of their impeachment against him for high crimes and misdemeanors, be carried to the Senate by the managers, Messrs. Sitgreaves, Bayard, Harper, Gordon, Pinckney, Dana, Sewall, Hosmer, Dennis, Evans, and Imley, appointed to conduct the said impeachment.

On motion,

Resolved, That the Senate will, at 12 o'clock this day, be ready to receive articles of impeachment against William Blount, late a Senator of the United States from the State of Tennessee, to be presented by the managers appointed by the House of Representatives.

This was the same day communicated to the House by a message borne from the Senate by its Secretary.[29]

Mr. Sitgreaves having stated that it was usual on all solemn occasions like this for the House to give sanction to its managers by an attendance at the time, the managers of the impeachment, accompanied by some of the Members of the House, accordingly went up to the Senate for the purpose of exhibiting the articles of impeachment against William Blount.[30]

Later, in the Senate,[31] a message was announced from the House of Representatives by the above-mentioned managers, who, being introduced, and all but the chairman being seated,[30] Mr. Sitgreaves, their chairman, addressed the Senate as follows:

Mr. Vice-President: The House of Representatives having agreed upon articles in maintenance of their impeachment against William Blount for high crimes and misdemeanors, and having appointed on their part managers of the said impeachment, the managers have now the honor to attend the Senate for the purpose of exhibiting the said articles.

The Vice-President then ordered the Sergeant-at-Arms to proclaim silence, after which he notified the managers that the Senate was ready to hear the articles of impeachment; whereupon,

The chairman of the managers read the articles of impeachment, and they were received from him at the bar by the Sergeant-at-Arms and laid on the table.

The Vice-President[32] then said:[30]

Gentlemen, managers on the part of the House of Representatives: The Senate will take such order on the articles of impeachment which you have exhibited before them as shall seem to them proper, of which due notice will be given to the House of Representatives.

Upon which the managers and Members attending then retired.

2302. Blount's impeachment continued.

The articles in impeachment of William Blount.

The articles in the Blount impeachment were signed by the Speaker and attested by the Clerk.

The articles of impeachment in the Blount case appear in the House Journal on the day of their adoption, and in the Senate Journal on the day of their presentation.

The Secretary of the Senate then read the articles of impeachment, as follows:

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[29] House Journal, p. 163.
[30] Annals, p. 970.
[31] Senate Journal, p. 435; Annals, p. 499.
[32] Thomas Jefferson, of Virginia, Vice-President.

ARTICLES EXHIBITED BY THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES, IN THE NAME OF THEMSELVES AND OF ALL THE PEOPLE OF THE UNITED STATES, AGAINST WILLIAM BLOUNT, IN MAINTENANCE OF THEIR IMPEACHMENT AGAINST HIM FOR HIGH CRIMES AND MISDEMEANORS.

ARTICLE 1. That, whereas the United States, in the months of February, March, April, May, and June, in the year of our Lord 1797, and for many years then past, were at peace with His Catholic Majesty, the King of Spain; and whereas, during the months aforesaid, His said Catholic Majesty and the King of Great Britain were at war with each other; yet the said William Blount, on or about the months aforesaid, then being a Senator of the United States, and well knowing the premises, but disregarding the duties and obligations of his high station, and designing and intending to disturb the peace and tranquillity of the United States, and to violate and infringe the neutrality thereof, did conspire, and contrive to create, promote, and set on foot, within the jurisdiction and territory of the United States, and to conduct and carry on from thence, a military hostile expedition against the territories and dominions of His said Catholic Majesty in the Floridas and Louisiana, or a part thereof, for the purpose of wresting the same from his Catholic Majesty, and of conquering the same for the King of Great Britain, with whom His said Catholic Majesty was then at war as aforesaid, contrary to the duty of his trust and station as a Senator of the United States, in violation of the obligations of neutrality, and against the laws of the United States, and the peace and interests thereof.

[Then follows article 2, reciting that the said William Blount "did conspire and contrive to excite the Creek and Cherokee nations of Indians then inhabiting within the territorial boundary of the United States, to commence hostilities against the subjects and possessions of His Catholic Majesty," and article 3, reciting that the said Blount did "further conspire and contrive to alienate and divert the confidence of the said Indian tribes or nations from the said Benjamin Hawkins, the principal temporary agent aforesaid, and to diminish, impair, and destroy the influence of the said Benjamin Hawkins with the said Indian tribes, and their friendly intercourse and understanding with him, contrary to the duty of his trust and station as a Senator of the United States, and against the ordinances and laws of the United States, and the peace and interests thereof;" and article 4, reciting a similar attempt to seduce James Carey from his duty; and article 5, reciting similar efforts to foment disaffection among the Cherokee Indians toward the Government of the United States.]

And the House of Representatives, by protestation, saving to themselves the liberty of exhibiting at any time hereafter, any further articles, or other accusation, or impeachment, against the said William Blount, and also of replying to his answers, which he shall make unto the said articles, or any of them, and of offering proof to all and every the aforesaid articles, and to all and every other articles of impeachment, or accusation, which shall be exhibited by them, as the case shall require, do demand that the said William Blount may be put to answer the said crimes and misdemeanors, and that such proceedings, examinations, trials, and judgments may be thereupon had and given, as are agreeable to law and justice.

Signed by order and in behalf of the House.

JONATHAN DAYTON, *Speaker.*

Attest:

JONATHAN W. CONDY, *Clerk.*

These articles of impeachment appear in full in the Journals of both the House and Senate, in the House Journal on January 29,[23] the day of their adoption, and in the Senate Journal on February 7,[24] the day they were presented and read.

[23] House Journal, p. 151.
[24] Senate Journal, p. 435.

2303. Blount's impeachment continued.

Form of oath administered to Senators sitting for the impeachment of William Blount.

The Senate decided in the Blount impeachment that the oath might be administered by the Secretary and President without authority of law.

The Senate decided in the Blount impeachment that the Secretary should administer the oath to the President, and the President to the Senators.

On February 9 [35] the Senate considered the report of a committee appointed to determine the mode of administering oaths in cases of impeachment. This committee reported the following:

Resolved, That the oath or affirmation required by the Constitution of the United States to be administered to the Senate, when sitting for the trial of impeachment, shall be in the form following, viz:

"I, A B, solemnly swear (or affirm, as the case may be), that in all things appertaining to the trial of the impeachment of ——— I will do impartial justice, according to law."

Which oath or affirmation shall be administered by the Secretary to the President of the Senate, and by the President to each member of the Senate.

On motion that the report be amended by adding thereto these words "and that a bill be brought in conformable thereto," there were yeas 8, nays 20. Then, by a vote of 22 yeas to 6 nays, the resolution was agreed to as reported. On February 14 [36] the Senate postponed a bill regulating certain proceedings in case of impeachment, and on February 20 the bill failed to pass.

2304. Blount's impeachment, continued.

Form of the writ of summons issued for the appearance of William Blount to answer articles of impeachment.

Rule of the Senate prescribing method of service of writ of summons on William Blount.

In the Blount impeachment the Secretary was directed to serve the summons sixty days before the return day.

The Senate in its writ of summons in the Blount impeachment fixed respondent's appearance at the next session of Congress.

The Senate communicated to the House its form of summons in the Blount impeachment, and it was entered in the House Journal.

In the Blount impeachment the House, in conference, asked of the Senate an earlier return day of the summons, but the request was denied.

Instance of a conference on a subject of procedure in an impeachment.

On March 1 [37] the Senate concluded consideration of the report made on February 27 by Mr. Samuel Livermore,[38] of New Hampshire, from the committee to whom the subject had been recommitted on February 23, and, by a vote of yeas 22, nays 5, agreed to it as follows:

The committee to whom was recommitted the report of the committee appointed to prepare rules of proceeding in the case of the impeachment against

[35] Senate Journal, p. 438; Annals, p. 503.
[36] Senate Journal, pp. 441, 448.
[37] Senate Journal, pp. 447, 448; Annals, p. 514.
[38] The other members of the committee were Messrs. James Ross, of Pennsylvania, and Richard Stockton, of New Jersey.

William Blount, report, in part, that a writ of summons issue, directed to the said William Blount, in the form following:

"UNITED STATES OF AMERICA, *ss:*

"The Senate of the United States of America to William Blount, late a Senator of the United States for the State of Tennessee, greeting: Whereas the House of Representatives of the United States of America did, on the 7th day of July last past, in their own name, and in the name of all the people of the United States, impeach you, the said William Blount, of high crimes and misdemeanor before the Senate of the United States: And whereas the said House of Representatives did, on the 7th day of February, of the present year, exhibit to the Senate their articles of impeachment against you, the said William Blount, charging you with high crimes and misdemeanors, therein specially set forth (a true copy of which articles of impeachment is annexed to this writ), and did demand that you, the said William Blount, should be put to answer the said crimes and misdemeanors; and that such proceedings, examinations, trials, and judgments might be thereupon had as are agreeable to law and justice—you, the said William Blount, are therefore summoned to be and appear before the Senate of the United States of America, at their Chamber, in the city of Philadelphia, in the State of Pennsylvania, on the third Monday of December next, at the hour of 11 of that day, then and there to answer the said articles of impeachment, and then and there to abide by, obey, and perform such orders and judgments as the Senate of the United States shall make in the premises, according to the Constitution and laws of the said United States. And hereof you are in nowise to fail. Witness, the honorable Thomas Jefferson, esq., Vice-President of the United States of America, and President of the Senate thereof, at the city of Philadelphia, the 1st day of March, in the year of our Lord 1798, and of the independence of the United States the twenty-second.

"Which summons shall be signed by the Secretary of the Senate.

"That the said summons shall be served on the said William Blount by the Sergeant-at-Arms of this House, or a special messenger, who shall leave a true copy of the writ and the articles annexed with the said William Blount, if he can be found, showing him the original; or at the usual place of residence of the said William Blount, if he can not be found. Which messenger shall make return of the writ of summons, and of his proceedings in virtue thereof, to the Senate, on the appearance day therein mentioned.

"And that a message be sent to the House of Representatives, giving information that the Senate have directed the said writ to be issued, and of the day mentioned therein for the appearance of the said William Blount."

It was then

Resolved, That the Secretary of the Senate do issue the summons hereinbefore directed, and that service thereof be made sixty days at the least before the return day mentioned in the said writ of summons.

This report was communicated to the House by message and appears in full on the Journal of that body.[39] The following order was then agreed to:

Ordered, That the said proceedings of the Senate be referred to the managers appointed on the part of this House to conduct the said impeachment against William Blount, with instructions to inquire and report whether any, and, if any, what provisions are necessary to be made by law for regulating proceedings in cases of impeachment.

On April 6[40] Mr. Sitgreaves, from the managers, reported the following resolutions, which were agreed to:

Resolved, That a conference be desired with the Senate on the subject of their resolution of the 1st of March last, relative to the impeachment of William Blount, and that the managers appointed to conduct the said impeachment be the managers for this House at the proposed conference.

Resolved, That the managers of this House do request, at the said conference, that the Senate will appoint a day, during the present session of Congress, for

[39] House Journal, p. 211.
[40] House Journal, pp. 253, 254; Annals, pp. 1376, 1377.

the return of the summons directed by their resolution of the 1st of March aforesaid, to be issued to the said William Blount.

On April 9,[41] in the Senate,

Resolved, That they do agree to the proposed conference, and that Messrs. Ross and Livermore be managers at the same on the part of the Senate.

On April 13,[42] Mr. Bayard, from the managers appointed on the part of the House, submitted the following report, which was laid on the table:

That they laid before the conferees appointed by the Senate the resolution of the 6th instant, requesting the appointment of a day during the present session of Congress for the return of the summons against the said William Blount, the reasons upon which the said resolution was founded; and were assured by the conferees that the said request and the reasons for making it, suggested by the managers, should be reported and submitted to the Senate.

This report was ordered to lie on the table.

In the Senate, on April 16,[43] Mr. Ross, from the conferees, made a report; whereupon, it was

Resolved, That it is not, at this time, expedient to alter the return day of the summons directed to be issued to William Blount, so as to make it returnable in the present session of Congress as requested by the managers of the House of Representatives, there being no certainty that it will continue long enough to afford reasonable time for a proper service and return of this process.

On April 16 [44] this resolution was communicated to the House by message, and was read and ordered to lie on the table.

2305. Blount's impeachment, continued.

In Blount's impeachment the return of service of the summons was filed in the Senate before the day set for the appearance.

In the Blount impeachment a letter from respondent's attorneys announcing their readiness to attend was filed in the Senate before the day set for appearance.

In the Senate on December 6, 1798,[45] in the next and third session of the Congress, "the return of service on the summons to William Blount, made by the Sergeant-at-Arms, pursuant to the resolution of the Senate of the 1st of March last, was read." This is the entry of the Senate Journal, which does not give the return in full.

Then the President communicated a letter from Jared Ingersoll, esq., stating that he, together with A. J. Dallas, esq., were employed as counsel for William Blount, and that they were ready to attend the trial when ordered by the Senate. This letter does not appear in full in the Senate Journal.

2306. Blount's impeachment, continued.

A manager of an impeachment having accepted an incompatible office, the House chose a successor.

The chairman of managers of an impeachment having ceased to be a Member, the next in order succeeded to the chairmanship.

In the House, on December 13,[46] Mr. Harper, in the absence of

[41] Senate Journal, p. 469; Annals, p. 537.
[42] House Journal, p. 261; Annals, p. 1412.
[43] Senate Journal, p. 472; Annals, p. 541.
[44] House Journal, p. 263.
[45] Third session Fifth Congress, Senate Journal, p. 538; Annals, p. 2190.
[46] Third session Fifth Congress, House Journal, p. 406; Annals, pp. 2440, 2411.

Mr. Bayard, "the present chairman" of the managers,[47] offered the following, which was agreed to:

Resolved, That another Member be appointed, by ballot, as one of the managers to conduct the impeachment against William Blount, in the room of Mr. Sitgreaves, appointed a commissioner of the United States, under the sixth article of the treaty of amity, commerce, and navigation, with Great Britain.

The House accordingly chose Mr. John Wikes Kittera, of Pennsylvania.

2307. Blount's impeachment, continued.

The Senate, by message, informed the House that the summons had been served on William Blount and a return made thereon to the Secretary's office.

Rules adopted by the Senate for reading the return, calling the impeachment.

In the first impeachment the Senate by rule described itself as a court of impeachment.

Impeachment trials in the Senate have from the first been recorded in a separate journal.

Form used by the Sergeant-at-Arms in calling William Blount to appear and answer articles of impeachment.

Form of return of writ of summons in Blount impeachment.

William Blount appeared neither in person nor by attorney to answer the articles of impeachment.

The House did not attend the return of summons to William Blount to appear and answer articles of impeachment.

In the Senate on December 13:[48]

Ordered, That the Secretary notify the House of Representatives that the summons issued by order of the Senate of the United States against William Blount, on the 1st day of March last, to appear at their bar on the third Monday of December instant and answer to the impeachment made by the House of Representatives, for high crimes and misdemeanors, has been duly served on the said William Blount by the Sergeant-at-Arms, and a return thereon is made to the office of the Secretary of the Senate.

This message was received in the House on the same day.

On December 17,[49] In the Senate, Messrs. James Ross, of Pennsylvania; Jacob Read, of South Carolina, and Samuel Livermore, of New Hampshire, were appointed to report rules for conducting the trial of impeachment and reported—

That the legislative and executive business of the Senate be postponed, and that the Senate form itself into a court of impeachment by taking the oath prescribed by a resolution of this House on the 9th of February, last.

After the oath has been administered to the President and Senate, the process which, on the 1st of March last, was directed to be issued and served upon William Blount, and the return made thereupon, shall be read. The officer who served the process shall be sworn to the truth of the return thereof. The defendant, William Blount, shall be called to appear and answer the articles of impeachment exhibited against him. If he appears, his appearance shall be recorded. If he does not appear, his default shall be recorded.

The House of Representatives shall be notified of the appearance or default of the defendant, William Blount, and that the Senate will be ready at 12 o'clock to-morrow to receive the managers appointed by that House, and to take further order in this trial.

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[47] Mr. Bayard was second on the committee of managers and apparently succeeded to the position without election, although such usage was not incorporated in the rule until 1804.
[48] Senate Journal, p. 563; Annals, p. 2194.
[49] Senate Journal, p. 565; Annals, p. 2196.

The report was adopted, and the Senate "formed itself into a court of impeachment accordingly." The daily Journal of the Senate does not record the proceedings of the court of impeachment,[50] but they were as follows on this day:[51]

On this day the Senate formed itself into a high court of impeachment, in the manner directed by the Constitution, and the oath prescribed was administered to the Senators present. The process issued on the 1st of March last against William Blount, together with the return made thereon, was read, and the return was sworn to as follows:

"James Mathers, Sergeant-at-Arms of the Senate of the United States, maketh oath that, in obedience to the within summons, he did repair to the usual place of residence of the within-named William Blount, at Knoxville, in the State of Tennessee, and on the 27th day of August, in the present year, did then leave a true copy of the said writ of summons, and of the articles of impeachment annexed, with the wife of the said William Blount, he not being to be found; and that, on the next day, meeting with the said William Blount at the Blue Springs, the deponent showed and read the said original writ to the said William Blount, and informed him that he had left a copy at the usual place of his residence.

"JAMES MATHERS."

The doors of the court were then opened by order of the President, and by his order the Sergeant-at-Arms called the said William Blount three several times, in the words following, to appear and answer:

"Hear ye! Hear ye! Hear ye!

"William Blount, late a Senator from the State of Tennessee, come forward and answer the articles of impeachment exhibited against you by the House of Representatives."

William Blount not appearing, the court adjourned till 12 o'clock to-morrow.

2308. Blount's impeachment, continued.

The House being informed that William Blount had failed to appear and answer the articles, instructed the managers to ask of the Senate time to prepare proceedings.

After William Blount had failed to appear and answer, counsel were admitted on his behalf.

William Blount having failed to appear and answer, the House, after discussing English precedents, declined to ask that he be compelled to appear.

The House declined to instruct its managers as to further proceedings after William Blount had failed to appear and answer.

In the House on December 18,[52] a message was received from the Senate notifying the House that William Blount, impeached of high crimes and misdemeanors before the Senate, by this House, though he had been duly summoned, had not appeared at the bar of the Senate at the time appointed; and that the Senate would be ready to receive the managers at 12 o'clock this day, to take further order in this trial.

On motion of Mr. Harper, this message was referred to the managers of the impeachment, who had leave to sit during the session of the House.

Later, on the same day, Mr. Harper reported, and in accordance therewith it was—

Resolved, That the said managers do attend before the Senate, at 12 o'clock this day, and request a further day for preparing their proceedings in the said impeachment.

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[50] The Senate kept in journal form a "Record of the Proceedings of the High Court of Impeachment on the Trial of William Blount," which was published separately at a later date. Senate Journal, Eighth Congress, pp. 484–491.

[51] Annals, p. 2245.

[52] House Journal, p. 415; Annals, p. 2458.

In the Senate, on December 18,[53] Messrs. Ross, Livermore, and Stockton were appointed to a committee to take into consideration and report what rules were necessary to be adopted on the trial of the impeachment.

On the same day the Senate resolved itself into a court of impeachment, wherein occurred the following proceedings:[53]

The President communicated a letter, signed "Jared Ingersoll and A. J. Dallas," praying to be admitted to appear as counsel for the defendant. It was accordingly so ordered, and that the House of Representatives be informed thereof.

The managers on the part of the House of Representatives and the defendant's counsel appeared at the bar.

On motion of Mr. Harper (in the absence of Mr. Bayard, the chairman), in behalf of the managers that further time be allowed them to prepare their proceedings in the case, it was,

"*Ordered*, That they have time till Monday next, at 12 o'clock, for that purpose."

The court adjourned till that time.

In the House, on December 20,[54] Mr. Harper submitted the report of the managers, which was as follows:

That, pursuant to the resolution of this House, of the 18th instant, they did attend before the Senate of the United States, and request a further day for preparing their proceedings in the said impeachment; whereupon, a further day was granted till Monday next, at 12 o'clock.

That the managers, having carefully considered the subject, are of opinion that it is neither consistent with the solemnity which ought to attend this high constitutional proceeding, nor with the principles, which, as far as they have been able to discover, have invariably obtained in impeachments, and all other trials of a criminal nature, to proceed to trial against the defendant in this case in his absence; and that the said William Blount, having failed to make personal appearance, as has been notified to the House by the above-mentioned message from the Senate, the next step, on the part of this House, ought to be a motion before the Senate that further order be taken by them for compelling his personal appearance at their bar, to answer to the articles of impeachment exhibited against him by this House.

The managers, however, do not think it proper for them to take a step involving so important a principle without the direction of the House, for the purpose of obtaining which, they beg leave to submit to its consideration the following resolution:

"*Resolved*, That the managers appointed, on the part of this House, to conduct the impeachment against William Blount, late a Senator of the United States, be instructed to request, at their next attendance before the Senate, that further order be taken for compelling the personal appearance of the said William Blount, to answer to the articles of impeachment exhibited against him on the part of this House."

On the next day the House debated the report at length. It appeared that the managers were nearly unanimous in favor of their report, but it was vigorously assailed in the House. Mr. Harrison G. Otis, of Massachusetts, opposed:

Mr. Otis said he did not know what had been the rule observed in similar cases in England; he had not had leisure to examine; nor did he think we ought to be bound by British precedents in a case of this kind. It is, said he, a new case, and he saw no difficulty in determining to prosecute this man to conviction, and in obtaining for him the punishment which he deserves. There is some analogy between this process and a process (well known in common law) against a man's property, distinct from his person. Every one knows that such a prosecution is a prosecution of forfeiture. For instance, we libel a vessel, and notice is given to all the parties to defend. If they do not appear, judgment and execution are obtained.

[53] Annals, p. 2245.
[54] House Journal, pp. 416, 417; Annals, pp. 2469–2487.

The present process is against the office of William Blount; it has nothing to do with his person; he is afterwards liable to a prosecution at common law for any crime which he may have committed.

Mr. Samuel W. Dana, of Connecticut, also supported this view:

Let gentlemen who say that a person, in a case like the present, should be required to appear, answer, if a sentence can neither affect a man's person nor his property, why he should appear in person? If a man were liable to be punished with imprisonment, fine, or ransom, his person ought to be secured; and it is because courts will have security, that in such cases persons are either imprisoned or held by efficient bail is refused, it is where it does not afford a sufficient security. Is any such security required in this case? asked Mr. Dana. There is not. The process would be a rare one if the party were required to appear.

The Constitution, continued Mr. Dana, has proceeded on a different principle. The process in cases of impeachment in this country is distinct from either civil or criminal—it is a political process, having in view the preservation of the Government of the Union. Impeachments under the British Government are wholly different from impeachments carried on under this Government. The Constitution proceeds on the high authority of public opinion and of the high value of reputation to every man who is a candidate for public office, and that the declaration of public reprobation, expressed by the constitutional organ, is one of the severest punishments. It considers that the punishment of fine and imprisonment may be endured, but that public abhorrence is not to be borne.

The punishment in this case therefore is wholly a declaration of public opinion, not only that the person receiving it has proved himself unworthy of his present office, but that there is such a baseness attached to his character as to render him unfit for any office in future. Taking the matter up in this view, the propriety of not considering the offense as criminal will clearly appear. Were the offense to be considered as a crime merely, the judgment of the court should involve the whole punishment; whereas, it has no connection with punishment or crime, as, whether a person tried under an impeachment be found guilty or acquitted, he is still liable to a prosecution at common law. This process therefore is perfectly sui generis—equally unknown to the British Government or to this country.

Upon this view of the subject, Mr. Dana said his opinion was, that the House ought to instruct the managers, but in a way directly opposite to that proposed by the resolution under consideration.

Mr. Dana also cited the case of Robert Tresylliam and others, tried before the British House of Lords in 1388, in support of his opinion, but it was alleged in opposition that this precedent had been highly censured by English law writers.

Mr. Harper defended the report of the managers:

It had been the practice, from the earliest records of our jurisprudence to the present time, that a man shall never be tried in his absence for a criminal offense. Gentlemen say the reason for this is, that he may be ready to receive judgment. If so, it would be foolish, because the court might direct the person of a criminal to be brought before them to receive sentence as well as they could do it before his trial. What, then, said he, is the reason? Ask the great sages of the English law, and they will give an answer very different from his learned friends. They will say that it is because a man ought always to be face to face with his judges and accusers; that no witness ought to be heard against a man, or his life or property put in jeopardy, without his personal presence; and so sacred is the principle held that a man is not permitted to depart from it. This is not a solitary instance in which personal convenience is sacrificed to natural convenience; this is frequently the case, in order to make sure the barriers which protect individual security. It is in this respect that our jurisprudence is chiefly distinguished from the inquisitorial proceedings of former times, where a man might be found guilty of the highest crimes without knowing who were his accusers, witnesses, or judges. It is by this sacred maxim that no man can be put in jeopardy without being confronted by his accusers. And shall we, said he, depart from this principle? Why shall we do this? Because the judgment to be awarded in this case does not extend to person or property? Is the judgment less than if it affected person or property? Gentlemen will not say so. They will say that a man's reputation is the dearest possession which he can enjoy; and certain he was that gentlemen who are opposed in opinion to him on this subject would

sooner be deprived of their property or personal liberty than lose their fame and reputation. It was, in his opinion, the highest punishment that could be inflicted upon a man of worth.

The House disagreed to the resolution proposed by the managers, yeas 11, nays 69.

Mr. Samuel Sewall, of Massachusetts, one of the managers, in order that there might be positive instructions from the House, proposed this resolution:

Resolved, That the managers appointed on the part of this House for conducting the impeachment against William Blount proceed in the prosecution of the said impeachment, although William Blount shall not appear in person to answer to the same.

It was urged against this resolution that it was improper to give any instructions at all and that the Senate should be left to proceed as they should think proper.

The resolution was disagreed to, ayes 37, noes 46.

2309. Blount's impeachment, continued.

Rule adopted by the Senate for the trial of William Blount in 1797.

The rule providing for the putting in of the answer or plea in the Blount case.

The rules in the Blount case provided that respondent's answer should be communicated to the House of Representatives.

The Senate rules in the Blount case required that respondent's answer should be spread on the journal.

The Senate rules in the Blount case provided that all questions arising should be decided in secret session and by yeas and nays.

Form of oath and mode of examination of witnesses prescribed in the Blount impeachment.

It was provided in the Blount case that Senators called as witnesses should be sworn and testify standing in their places.

The Senate communicated to the House its rules for the trial of William Blount; and they appear in the House Journal.

The Senate decided that the counsel for William Blount need not file any warrant of attorney or other written authority.

During proceedings in impeachment before the Senate the President pro tempore presides during temporary absence of the Vice-President.

In the Senate, on December 20,[55] Mr. Ross, from the committee appointed to prepare rules, made a report which, after amendment, was on December 21 agreed to, as follows:

Resolved, That at the next opening of the court of impeachment the President shall inquire whether the managers have any request to make before the counsel of the defendant are called on to put in his answer.

If no motion or request is made, the defendant's counsel shall be required to put in his answer or plea to the articles of impeachment.

The answer or plea shall be read by the Secretary and entered by him on the Journal.

A copy of the defendant's answer or plea shall be communicated to the House of Representatives by the Secretary.

The President shall then inform the managers that the Senate is ready to hear any reply or motion which they may think proper to make.

[55] Senate Journal, p. 566; Annals, p. 2197.

All questions, arising in the course of the trial, shall be decided with closed doors. The decisions shall be by ayes and noes, which shall be entered upon the Journal. When the question is decided, the doors shall be opened, the parties called in, and the result made known to them by the President.

Witnesses shall be sworn by the Secretary, and shall take the following oath:

"I, A, B, do swear (or affirm, as the case may be) that the evidence I will give to this court, touching the impeachment of William Blount, now here depending, shall be the truth, the whole truth, and nothing but the truth. So help me God."

Witnesses shall be examined by the party producing them, and then cross-examined in the usual form. If a Senator wishes any question to be asked, it shall be put by the President.

If Senators are called as witnesses, they shall be sworn, and give their testimony standing in their places.

It was also—

Ordered, That the Secretary inform the House of Representatives that the Senate, taking into their care the ordering of the trial of William Blount, late a Senator of United States from the State of Tennessee, on Monday, the 24th of December instant, have prepared some rules to be observed at said trial, which they have thought fit to communicate to the House of Representatives.

The message was accordingly delivered in the House, and the rules appear in full in the House Journal of December 21.[56]

On December 24 [57] the Senate resolved themselves into a court of impeachment whereupon the proceedings were as follows:

The manager and counsel attended as on the 18th instant.

On the motion of Mr. Harper, in behalf of the managers, that the counsel exhibit and file the power, or powers, by which they are authorized to appear in behalf of William Blount, and that the managers be furnished with a copy thereof.

Mr. Dallas, one of the counsel, exhibited sundry letters to the President, which, he alleged, contains the powers and also the confidential instructions of Mr. Blount to his counsel.

The court was cleared in order to take into consideration the motion made by the managers of the impeachment; and, on the motion that it be ruled.

"That the court having, on the 18th day of the present month, admitted Jared Ingersoll and A. J. Dallas, esqs., to appear and plead for William Blount, to the impeachment now pending against him, and the court having then been satisfied that the said counsel were duly authorized to appear for the said William Blount, are of opinion that it is not necessary that any warrant of attorney, or other written authority, be now filed in this court."

It was determined in the affirmative, 20 to 2.

The managers and counsel being again admitted, the President [58] stated to them the opinion of the court on the motion of the managers, and returned to Mr. Dallas the letters by him exhibited, unopened.

The President then asked the managers if they had further motion to make prior to permission to the counsel for the defendant to file a plea on his behalf.

To which the managers replied in the negative.

2310. Blount's impeachment, continued.

The plea filed by counsel of William Blount in answer to the articles of impeachment.

William Blount, in his plea, demurred to the jurisdiction of the Senate to try him on impeachment charges.

William Blount pleaded that he was not, at the time of pleading, a Senator; and that a Senator was not impeachable as a civil officer.

The plea of William Blount being received by the House of Representatives, was referred to the managers.

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[56] House Journal, p. 416.
[57] Annals, p. 2246.
[58] It is evident that in the absence of the Vice-President the President pro tempore presided. The Vice-President had not attended this session at this time. Senate Journal, p. 367.

Whereupon the President notified to the counsel that they were permitted to file their plea, which was done by Mr. Ingersoll and read by the Secretary as follows:

UNITED STATES *v.* WILLIAM BLOUNT

Upon impeachment of the House of Representatives of the United States, of high crimes and misdemeanors.

IN THE SENATE OF THE UNITED STATES, *December 24, 1798.*

The aforesaid William Blount, saving and reserving to himself all exceptions to the imperfections and uncertainty of the articles of impeachment, by Jared Ingersoll and A. J. Dallas, his attorneys, comes and defends the force and injury, and says, that he, to the said articles of impeachment preferred against him by the House of Representatives of the United States, ought not to be compelled to answer, because he says that the eighth article of certain amendments of the Constitution of the United States, having been ratified by nine States, after the same was, in a constitutional manner, proposed to the consideration of the several States of the Union, is of equal obligation with the original Constitution, and now forms a part thereof, and that by the same article it is declared and provided, that "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

That proceedings by impeachment are provided and permitted by the Constitution of the United States, only on charges of bribery, treason, and other high crimes and misdemeanors, alleged to have been committed by the President, Vice-President, and other civil officers of the United States, in the execution of their offices held under the United States, as appears by the fourth section of the second article, and by the seventh clause of the third section of the first article, and other articles, and clauses contained in the Constitution of the United States.

That although true it is, that he, the said William Blount, was a Senator of the United States, from the State of Tennessee, at the several periods in the said articles of impeachment referred to; yet, that he, the said William, is not now a Senator, and is not, nor was at the several periods, so as aforesaid referred to, an officer of the United States; nor is he, the said William, in and by the said articles, charged with having committed any crime or misdemeanor, in the execution of any civil office held under the United States, or with any malconduct in civil office, or abuse of any public trust, in the execution thereof.

That the courts of common law, of a criminal jurisdiction, of the State, wherein the offenses in the said articles recited are said to have been committed, as well as those of the United States, are competent to the cognizance, prosecution, and punishment, of the said crimes and misdemeanors, if the same have been perpetrated, as is suggested and charged by the said articles, which, however, he utterly denies. All which the said William is ready to verify, and prays judgment whether this high court will have further cognizance of this suit, and of the said impeachment, and whether he, the said William, to the said articles of impeachment, so as aforesaid preferred by the House of Representatives of the United States, ought to be compelled to answer.

JARED INGERSOLL.
A. J. DALLAS.

On request of Mr. Harper, in behalf of the managers, that they be allowed a further delay, to wit, until Thursday sennight, to file their replication, it was allowed and the court adjourned at that time.

On December 26 [59] a message from the Senate, by their Secretary, announced:

[59] House Journal, p. 419; Annals, p. 2491.

Mr. Speaker, the counsel in behalf of William Blount, by permission of the Senate, having filed their plea, I am directed to communicate a copy thereof to the House of Representatives.

This plea, as above given, appears in full in the Journal of the House. It does not appear from the Senate Journal that the Senate itself ordered this message sent. If the court of impeachment ordered it sent, the fact is not noted in the proceedings. But under the rule the Secretary would send it without further order of the Senate or court.

The House:

Ordered, That the said message be referred to the managers appointed on the part of this House to conduct the impeachment against William Blount, with instructions to proceed thereon as they shall deem advisable.

2311. Blount's impeachment, continued.

The House sent to the Senate a replication to respondent's plea; and his counsel presented a rejoinder.

The replication of the House was signed by the Speaker and attested by the Clerk.

In the Blount impeachment the rejoinder on behalf of respondent was signed by his attorneys.

In the Blount impeachment the replication was presented by the House managers, but was read by the Secretary of the Senate.

In the Blount impeachment the Senate dispensed with the requirement for yeas and nays on questions of adjournment and on allowing further time for the parties.

On December 31,[60] in the House, Mr. Bayard, from the managers appointed on the part of this House to conduct the impeachment against William Blount, to whom was referred, on the 26th instant, a message from the Senate communicating a copy of the plea filed by the counsel in behalf of the said William Blount, with instructions to proceed thereon, as they shall deem advisable, made a report, which he delivered in at the Clerk's table, where the same was twice read and agreed to by the House, as follows:

That the replication annexed be put into the said plea on behalf of this House, and that the managers be instructed to proceed to maintain the said replication at the bar of the Senate, as such time as shall be appointed by the Senate:

"The replication of the House of Representatives of the United States, in their own behalf, and also in the name of the people of the United States, to the plea of William Blount, to the jurisdiction of the Senate of the United States, to try the articles of impeachment exhibited by them to the Senate against the said William Blount:

"The House of Representatives of the United States, prosecuting, on behalf of themselves and the people of the United States, the articles of impeachment exhibited by them to the Senate of the United States against the said William Blount, reply to the plea of the said William Blount, and say, that the matters alleged in the said plea are not sufficient to exempt the said William Blount from answering the said articles of impeachment, because they say that, by the Constitution of the United States, the House of Representatives had power to prefer the said articles of impeachment, and that the Senate have full and the sole power to try the same: Wherefore, they demand that the plea aforesaid of the said William Blount be not allowed, but that the said William Blount be compelled to answer the said articles of impeachment."

It does not appear from the Journals of either the Senate or House that this replication was transmitted to the Senate by message before it was presented in the court of impeachment by the managers.

[60] House Journal, p. 423; Annals, p. 2551.

In the Senate, on January 3, 1799 [61] it was

Resolved, That in all questions of adjournment of the court of impeachment, as also in all questions on a motion that further time be allowed to the parties, the taking the question by yeas and nays be dispensed with.

Also on January 3 the Senate resolved itself into a court of impeachment, the proceedings of which are recorded: [62]

The court being opened, and the managers and counsel being present.

Mr. Bayard, chairman of the managers, in behalf of the House of Representatives, offered a replication, which was read by the Secretary as follows:

"The replication of the House of Representatives of the United States, in their own behalf. [Here follows the text of the replication as given above.]

"Signed by order, and in behalf of the House.

"JONATHAN DAYTON, *Speaker*.

"Attest:

"JON. W. CONDY, *Clerk*."

Mr. Ingersoll, counsel for the defendant, thereupon presented a rejoiner, which was read by the Secretary, as follows:

"UNITED STATES *v.* WILLIAM BLOUNT.

In the Senate of the United States.

"And the aforesaid William Blount, by Jared Ingersoll and Alexander J. Dallas, his attorneys, says that the matter by him before alleged which he is ready to verify, is sufficient reason in law to show that this court ought not to hold jurisdiction of the said impeachment, and the articles therein set forth; which said matter so as aforesaid by him alleged, the said House of Representatives not having denied or made answer thereto, he prays the judgment of this honorable court, whether they will hold further jurisdiction of the said impeachment or take cognizance thereof, and whether the said William Blount shall make further answer thereto.

"JARED INGERSOLL.
"A. J. DALLAS.

"JANUARY 3, 1799."

It does not appear that this rejoinder was transmitted by message to the House.

2312. Blount's impeachment, continued.

In the Blount impeachment it was arranged that the managers should open and close in arguing respondent's plea in demurrer.

Mr. Bayard, the chairman, having communicated with Mr. Ingersoll, the leading counsel for the defendant, it was agreed between them that the managers should proceed in the argument first on the part of the prosecution, and that the right to reply should belong to the managers, whereupon,

Mr. Bayard rose and proceeded.

At the conclusion of his address Mr. Ingersoll, on behalf of the defendant, moved [63] for further time to reply, and it was allowed until 11 o'clock the next day to which time the court adjourned.

On January 4, [63] the court having convened, Mr. Dallas, in behalf of the defendant, spoke during that day's sitting.

On January 5 [64] the court convened again, Mr. Ingersoll speaking further in defense. Mr. Ingersoll having concluded, Mr. Harper, [65] of the managers, closed.

After Mr. Harper had closed his observations, the Vice-President inquired of the managers if they had any further observations to offer, on

[61] Senate Journal, p. 568; Annals, p. 2199.
[62] Annals, p. 2248.
[63] Annals, p. 2262.
[64] Annals, p. 2278.
[65] Annals, p. 2318.

which Mr. Bayard, in their behalf requested permission to withdraw for a few moments; and, returning into the court, he replied in the negative.

The argument touched upon five points, although on two of these little stress was laid.

2313. Blount's impeachment continued.

Discussion as to the right to demand a trial by jury in a case of impeachment.

(1) The plea of the respondent had set forth that the power of impeachment as established in the original Constitution had been limited by the eighth amendment. Mr. Bayard, of the managers, answering this, contended that it had no bearing on the question of jurisdiction in this case, whatever it might have should there be a trial. But he further urged that if the contention of the plea were well founded there would be an end of the judicial character of the Senate and it must part with the power expressly given it by the Constitution to try all impeachments. The same rule of construction would require jury trials in courts-martial.[66]

In reply on this point Mr. Dallas, speaking for the respondent, said:

The honorable manager had misunderstood the object of the plea when he supposed it asserted a right to a trial by jury in cases properly impeachable, since the clause to which he referred was merely inserted to show that, unless this was a case in which an impeachment would lie, the party was entitled to a trial by jury in the ordinary courts having cognizance of the matters charged.

2314. Blount's impeachment continued.

Argument that impeachment should not fail simply because the offense may be within jurisdiction of the courts.

(2) The plea that the courts of law were competent to try the cause was answered by Mr. Bayard by calling attention to the fact that no court at common law could give judgment of disqualification; and that the just punishment for the offenses alleged.

He also said:

In the second place, if the suggestion were true it would not be effectual, because by the seventh clause of the seventh section of the first article of the Constitution delinquents shall be liable both to the punishment upon impeachment and that inflicted in the courts of common law. It is no objection to say that the courts have cognizance of the offense, because it is expressly provided that the one punishment shall not be an exemption from the other.

2315. Blount's impeachment continued.

In the Blount impeachment the managers contended, although in vain, that all citizens of the United States were liable to impeachment.

The law of Parliament was referred to in 1797 in discussing the power of impeachment.

(3) The first point of essential importance in the contending arguments of managers and counsel related to the nature of the power of impeachment. Mr. Bayard showed that in no places had the Constitution defined the cases or described the persons who should be objects of impeachment.[67] This, like other portions of the Constitution, left one to seek in the common law the answer to the questions.

[66] Annals, p. 2250.
[67] Annals, p. 2251.

The question,[68] therefore, is, what persons, for what offenses, are liable to be impeached at common law? And I am confident, as to this point, the learning and liberality of the counsel will save me the trouble of argument, or the citation of authorities, to establish the position that the question of impeachability is a question of discretion only, with the Commons and Lords. Not that I mean to insist that the Lords have legal cognizance of a charge of a capital crime against a commoner, but simply that all the King's subjects are liable to be impeached by the Commons, and tried by the Lords, upon charges of high crimes and misdemeanors. And this, sir, goes to the extent of the articles exhibited against William Blount. And for my part I do not conceive it would have been sound policy to have laid any restriction as to person upon the power of impeaching.

It is not difficult to imagine a case in which the punishment it imposes would be the most suitable which could be inflicted. Let us suppose that a citizen not in office, but possessed of extensive influence, arising from popular arts, from wealth or connections, actuated by strong ambition, and aspiring to the first place in the Government, should conspire with the disaffected of our own country, or with foreign intriguers, by illegal artifice, corruption, or force, to place himself in the Presidential chair. I would ask, in such a case, what punishment would be more likely to quell a spirit of that description than absolute and perpetual disqualification for any office of trust, honor, or profit under the Government; and what punishment could be better calculated to secure the peace and safety of the State from the repetition of the same offense?

Mr. Dallas, counsel for the respondent, combated this proposition at length. It was contrary to the "principles of the Federal compact:" [69]

For although it is in some of its features Federal, in others it is consolidated; in some of its operations it affects the people as individuals; in others it applies to them in the aggregate as States; yet, in every view, all the powers and attributes of the National Government are matters of express and positive grant and transfer; whatever is not expressly granted and transferred must be deemed to remain with the people, or with the respective States; and as the motive for establishing the Federal Constitution arose from the want of a competent national authority in cases in which it was essential for the people inhabiting the different States to act as a nation, so far the people gave power to the Federal Government; but the delegation of that power is evidently limited by the reason which produced it.

Mr. Dallas asserted that the United States, as a nation distinguished from the States, had no common law, and that it would be unwise to apply the theory of impeachments taken "from the dark and barbarous pages of the common law" to the existing situation, since it would render the Government dependent upon the laws and usages of a foreign country. The same doctrine would also give the Federal courts jurisdiction beyond the enumerated cases. The doctrine was also inconsistent with the general policy of the law of impeachments, which was to afford a means of reaching offenders who could not be reached by the ordinary tribunals. The doctrine was also inconsistent with a fair construction of the terms of the Constitution itself:

The operative words[70] are express: "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."—Art. 2, sec. 4. The previous clauses are only descriptive of the power and distributive of its exercise; declaring that the sole power to institute and the sole power to try impeachments shall belong to the branches of the Legislature respectively. They contain no description of the persons liable to impeachment, nor of the offenses for which the impeachment may be brought. To suppose that they include a jurisdiction over all persons, for all offenses, is to annihilate the trial by jury where a punishment more severe than death to an honorable mind may be inflicted; it is to overthrow all the barriers of criminal jurisprudence;

[68] Annals, p. 2254.
[69] Annals, p. 2263.
[70] Annals, p. 2267.

for every petty rogue may be tried by impeachment before this high court for every offense within the indefinite classification of a misdemeanor.

The reason of the thing, as well as the expression, shows, however, that the offender must be a civil officer to vest the jurisdiction of impeachment. For every other offender a competent punishment is provided in the ordinary tribunals; but, in the case of a public officer, no sentence strictly judicial, in any common law court, can affect the tenure of his office. In the business of offices, to appoint, to reappoint, or to abstain from reappointing are attributes and exercises of Executive authority; the ordinary judicial authority can not exercise them, nor restrain or regulate their exercise by the proper magistrate. Hence arose the necessity of the judgment in case of a conviction on impeachment, which, by declaring that the delinquent officer shall be removed, and that he shall never be reappointed, affixes, in effect, a check or limitation to the general power of the Executive.

But, if civil officers are not exclusively contemplated, why limit the judgment on impeachment simply to a removal and disqualification? The common law maxim says that no man shall be twice tried for the same offense; and if the Senate may, on any charge against any offender, try the whole merits of the accusation and defense, why restrain them from pronouncing the whole judgment? Why multiply trials, and parcel out jurisdictions, when one trial, one jurisdiction, would accomplish every purpose of justice? There is an appearance of absurdity in the doctrine that can not be overlooked. A private citizen who holds an office may be impeached on the speculation that, at some period of his life, it is possible he should be appointed a public officer. And if any sentence is pronounced it must, in his case, be a perpetual disqualification; whereas, in the case of a man actually in office, the sentence may only extend to a present removal.

Again, if the bare designation of the party who should impeach, and of the party who should try impeachments, creates a jurisdiction over all persons for all offenses, why should the subsequent clause specially name the President, Vice-President, and all civil officers of the United States? They would certainly be included in the general authority; and it can be no answer to say that it was with a view, imperatively, to command their removal on conviction, because the restricted judgment of the Senate points emphatically at their case—a removal from office and a perpetual disqualification. Would not those officers be removed or disqualified for any offense for which a private citizen might be disqualified on impeachment, though it is not one of the enumerated offenses? It is here, likewise, to be remarked that the persons subject to removal are to be "civil officers of the United States," excluding all idea of affecting the station of State officers; and yet State officers as well as private citizens are liable to impeachment before this Senate, according to the present claim of jurisdiction.

Mr. Ingersoll also argued on this point in support of the contention of his colleague.

In concluding for the managers, Mr. Harper replied: [71]

The learned counsel who first replied to my colleague took great pains and displayed much ability to show the pernicious and absurd consequences which would result from adopting the penal common law of England, or the penal code of any State, as a rule of conduct for the Federal Government. But this was merely fighting a phantom; for my colleague contended for no such thing, nor is it in the least necessary for our purpose. We do not wish the Federal Government to adopt the penal laws of England or of any particular State in the Union, but we contend that when a term, borrowed from the law of England, is introduced without comment or explanation into our Constitution or our statutes, every question respecting the meaning of that term must be decided by a reference to the code from whence it was drawn in the same manner as a term in chemistry, or any other science, being introduced into one of our statutes or constitutions, must be explained by a reference to the writers on that science. Surely this is a different thing from adopting the penal code of England or of any particular State as a rule of conduct for the Federal Government.

Mr. Harper further said: [72]

Nor can I conceive how the universal extent of the power of impeachment, contended for by my honorable colleague, is contrary to the spirit, the objects, or

[71] Annals, p. 2298.
[72] Annals, p. 2299.

the policy either of the law of impeachment or of the Federal Constitution. The use of the law of impeachment is to punish, and thereby prevent, offenses which are of such a nature as to endanger the safety or injure the interests of the United States; and the object of the Federal Constitution was to provide that safety and to protect those interests. Such offenses may be committed as well by persons out of office as by persons in office; and although the punishment can go no further than removal and disqualification, which restriction was, perhaps, wisely introduced in order to prevent those abuses of the power of impeachment which had taken place in another country, yet it may often be extremely important to prevent such offenders from getting into office, as well as to remove them when they are in; and it is, therefore, as consistent with the policy of impeachments and the principles of the Federal compact to punish them in the one case as in the other. This doctrine, it is further said, would enable Congress to interfere with the State governments by impeaching their officers. But those impeachments must be founded on offenses against the United States; and if such offenses were committed by State officers, I can not see why they ought not to be punished as well as in any other case. Surely they would not be less dangerous. If the convictions in such impeachments could remove men from State offices, or disqualify them for holding such offices, there might be something in the objection; but that could not be the case, since the removal and disqualification apply to offices under the General Government alone. * * * But the learned counsel for the defendant have told us that the power of impeachment is limited in the Constitution itself by the restriction which it imposes on the power of punishment. The power of punishment on conviction by impeachment is restricted, say they, to "removal from office and disqualification to hold or enjoy any office of honor, trust, or profit under the United States;" and it would be absurd to impeach, try, and convict a man who held no office from which he could be removed, and could, of consequence, be not otherwise affected than by a disqualification to hold in future offices which he, perhaps, never had a prospect of obtaining. Of this absurdity the Constitution cannot be supposed to be guilty; and therefore it could not have intended to subject to the power of impeachment any persons except those who actually hold offices and may be punished by removal.

But where, Mr. President, did the honorable counsel for the defendant learn than disqualification to hold any office of trust, honor, or profit under the Government of our country is no punishment? Would either of those honorable gentlemen think it no punishment in his own case?

2316. Blount's impeachment, continued.

Elaborate argument of the question whether or not a Senator is a civil officer within the meaning of the impeachment clause of the Constitution.

(4) The fourth branch of the discussion involved an inquiry as to whether or not—it being assumed that only officers of the United States might be impeached—a Senator was an officer within the meaning of the Constitution.

Mr. Bayard, for the managers, contended that he acted as a legislator, an executive magistrate, and a judge. The ordinance of Congress for establishing a government for the Northwest Territory, passed in 1787, had contemplated members of the legislature as officers. This use of the word "office" was contemporaneous with the formation of the Constitution.

Furthermore, he contended that a Senator was not only an officer, but was an officer within the meaning of the Constitution itself. He then discussed the following portions as confirmatory of this view:

Article I, section 3, clause 7; Article I, section 6; Article I, section 9, clause 7; Article II, sections 3 and 4.

As to two of these provisions he said: [73]

The first of these is the third section of the second article, which declares that the President shall commission all officers of the United States; and as it

[73] Annals, p. 2258.

is clearly not designed that he should commission a Senator, it will be inferred that a Senator is not to be considered as an officer.

I humbly trust I can show, that it was not the intention of the Constitution that these words should take effect in their full extent; and I shall submit that they ought to be understood according to the subject to which they apply.

A commission is simply an evidence of authority delegated to a particular person. And surely it is proper that that evidence should show from the same source from which the appointment is derived. By the Constitution the President is made the fountain of office. The officers, properly speaking under the United States are all appointed by him; and it was right, therefore, as the general power of appointing was given to him, that he should also have the general power of commissioning.

It is certain that it was intended that the power of commissioning should not exceed that of appointing, because the President does not commission anyone whom he does not appoint. The provision in question was not intended to define who should be considered as officers, but to introduce a plain and just rule of policy that the power of appointing and commissioning should reside in the same person. The practice under this constitutional regulation, explains its meaning and extent. It is clearly not true that he commissions all officers of the United States. He is an officer himself, and so expressly denominated throughout the second article, and yet he has no commission. It is equally clear that the Vice-President is an officer, and yet not commissioned. Again, the Speaker of the House of Representatives is an officer, as I shall have occasion to show hereafter, but has no commission. And there are also a variety of subordinate officers, appointed by heads of Departments and courts of justice, whom the President does not commission. I am therefore justified in concluding that it does not follow, because a person has no commission from the President, that therefore he is not to be considered as an officer.

There is another objection of a similar nature, arising from the provision in the sixth section of the first article, of which it is probable much use will be made. That section declares that no person holding an office under the United States shall be a Member of either House during his continuance in office. It will therefore be said, if the place of a Senator is an office, this clause is repugnant and absurd.

This provision, I humbly apprehend, has the same limits with the one which I have just adverted to. The intention of it was to erect a barrier between the Executive and legislative departments; to prevent Executive patronage from influencing legislative councils. It was designed therefore to apply solely to the officers of Executive appointment. I am not much disposed, sir, to place reliance in an argument upon so great a subject, upon nice distinctions or verbal criticism; but I think I shall be excused for paying some attention to the peculiar language of the clause in question. The regulation is that no person holding an office under the United States shall be a Member of either House during his continuance in office. The United States here means the Government of the United States, for the United States grants no office but through the Government. Now, it is clear that a Senator is not an officer under the Government. The Government consists of the President, the Senate, and House of Representatives, and they who constitute the Government can not be said to be under it. Besides, a Senator does not derive his authority from the Government. The Senatorial power is an emanation of the State sovereignties; it is coordinate with the supreme power of the United States; in its aggregate, it forms one of the highest branches of the Government. Giving every effect to this section, it would only prove that a Senator is not an officer under the Government of the United States, but still he may be an officer of the United States; and give me leave to say that the distinction which I have here taken is supported by the variance of language to be found in another part of the Constitution.

Mr. Bayard also cited the law of March 1, 1792, enacting that in case of vacancy in the office of President the Speaker of the House of Representatives should exercise the office, as showing that in legislative interpretation the Speaker is an officer.

Mr. Dallas, in replying, discussed the articles of the Constitution referred to by Mr. Bayard, especially to show that a distinction could

not be drawn between "officers of" and "officers under" the United States. The two terms, in his view, were used indiscriminately.

There were no words in the Constitution extending the impeaching power to a Senator:[74]

The second section of the second article provides, that "the President shall nominate, and, by and with the advice and consent of the Senate, shall appoint ambassadors, or other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law." The President having then power to appoint all the officers of the United States, including military as well as civil officers; the the third section of the same article, declaring that "he shall commission all the officers of the United States;" and the fourth section, providing for the removal of all civil officers excluding military officers, on impeachment and conviction; it would seem inevitably to result that no man is an officer of the United States unless he has been appointed and commissioned by the President; and that, therefore, unless he is so appointed and commissioned, he can not be an object of impeachment. Here Mr. Dallas requested that it might be remembered that the provision respecting impeachments was a part of the Executive article of the Constitution; and was immediately connected with the arrangements for making appointments, and issuing commissions, under the authority of the President.

Then Mr. Dallas proceeded to inquire, Does the President nominate or commission Senators or Representatives? No; nor does the Constitution, in any part of it, term them officers, or call their representative station an office. But the honorable manager has said that the latitude to which this position extends would render it necessary that the President should issue a commission to himself, to the Vice-President, and to the Speaker of the House of Representatives, since they are all expressly denominated officers. The Constitution, however, is not chargeable with this absurdity. The President and Vice-President have their commissions from the Constitution itself, and the speaker of the House of Representatives is emphatically an officer of the House, not of the United States. But the objection affords an opportunity to illustrate the meaning of the Constitution. It is provided that the President shall commission all officers, and that all civil officers shall be removed on impeachment and conviction; but the President does not commission himself and the Vice-President, and therefore as it was intended to affect them by the impeachment power, it became necessary expressly to name them. The President does not commission Senators and Representatives; but it was not intended to affect them by the impeachment, and therefore they are not named.

Mr. Dallas continued to analyze various parts of the Constitution, and argued from the operation of them that a legislator never was considered as an officer of the United States, in the ordinary or constitutional acceptation of the term. The sixth section of the first article contains the following passage: "No Senator or Representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created, or the emoluments whereof shall have been increased during such time; and no person holding any office under the United States shall be a member of either House during his continuance in office." Nothing could more strongly mark the discrimination between a legislator and an officer than the language which is here used. It is declared that no member holding any office shall be a member of either House while he continues in office. If a member was deemed an officer, the phraseology would doubtless have been, "no member holding any other office." Again let it be supposed that previously to the amendment of the Constitution (which merely provides that no law varying the compensation for the services of Senators and Representatives shall take effect until an election of Representatives has intervened) the pay of Senator had been increased by an act of Congress, could not a Representative, who had assisted in passing the act, be chosen a Senator before the expiration of the two years for which he was originally elected? Again let it be supposed that a new State was erected and admitted into the Union; if a Senator is an officer, the office of Senator for the new State would be created during the time for which Congress, who created it, was elected; and yet might not a member of that Congress be chosen a Senator for the new State, before the expiration of the

[74] Annals, pp. 2271–2274.

time for which he was elected a Representative? When, for instance, Kentucky was separated from Virginia, and erected into a State, was not a Representative elected for Virginia, residing within the boundaries of Kentucky, eligible immediately as a Senator of Kentucky, though he resigned his Representative seat before the term of his election had elapsed?

The first section of the second article likewise pointedly distinguishes between a legislator and a public officer, declaring "that no Senator or Representative, or person holding an office of trust or profit under the United States, shall be appointed an elector." If Senators or Representatives were considered as persons holding offices of profit or trust under the United States, it was superfluous to specify them at all; or, if named, it would have been correct to say, "no Senator or Representative, or person holding any other office of trust or profit," etc. But it is important also to remark that here, where the Constitution intends to work a disqualification, as to Senators and Representatives, they are expressly named; and no sound reason can be offered why they should not have been equally named, if the Constitution had intended to subject them to impeachment. * * * But, Mr. D. contended, that, independent of all precedent and authority, the distinction was founded upon the very nature of a free Government. The legislature is, in theory, the people; they do not themselves assemble, but they depute a few to act for them; and the laws which are thus made are the expressions of the will of the people. Over their Representatives the people have a complete control, and if one set transgress they can appoint another set, who can rescind and annul all previous bad laws. But the power of the people is only to make the laws; they have nothing to do with executing them; they have nothing to do with expounding them; and hence arises the diversity in the modes of remedying any grievance which they may suffer from the conduct of their Representatives or agents. If a legislator acts wrong, he may be expelled before the term for which he was chosen has expired; he may be rejected at the next periodical election; and the laws which he has sanctioned may be repealed by a new representation. But if an executive, or a judicial magistrate, acts wrong, the people have no immediate power to correct; prosecution and impeachment are the only remedies for the evil. Then, it is manifest, that, by the power of impeachment, the people did not mean to guard against themselves, but against their agents; they did not mean to exclude themselves from the right of reappointing, or pardoning; but to restrain the Executive magistrate from doing either with respect to officers whose offices were held independent of popular choice.

The argument that every person who executes an authority is in fact an officer was, in Mr. Dallas's opinion, too broad. The Speaker of the House of Representatives was an officer of the House, but not of the United States. And it was only on being chosen to the chair that he acquired the denomination of officer, contradistinguished from the character of Member.

Mr. Dallas continued further:[75]

From a just consideration of the principles of our Government, it was thus manifest that the moment there was a departure from the immediate choice of the people, the law of impeachment became necessary to secure them from the favoritism, or perverseness of the Executive Magistrate. Impeachment, he observed, is, with respect to executive and judicial officers, what expulsion is with respect to the members of the legislature. As expulsion enables the people to decide whether they will restore the evicted Member to their service, a conviction on impeachment enables the Representatives of the people to decide whether the delinquent shall be partially or totally excluded from the honors and emoluments of public office. But the very circumstance of declaring that a pardon shall not avail in cases of impeachment, though a reelection shall avail in cases of expulsion, demonstrates (as was before intimated) that the people did not mean to guard against the exercise of their own sovereignty, but against an abuse of the power delegated to their agents.

Mr. Ingersoll, speaking also in behalf of the respondent, discussed the extent of the power of impeachment under the Constitution, which as he claimed,[76] was restricted to the President, Vice-President, and civil officers of the United States, for malconduct in office. He stated that he should afterwards endeavor to make it appear that Senators

[75] Annals, p. 2275.
[76] Annals, p. 2282.

were not the objects of this power, not being comprehended under the designation of civil officers of the United States.

After discussing the limited powers granted by the Constitution, he said: [77]

My position is that the clause in question was intended and operates for the purpose of designating the extent of the power of impeachment, both as to the offenses and the persons liable to be thus proceeded against. It will be of use here to recollect that the Constitution had previously provided for the purity of the legislature in the second clause of the fifth section of the first article by empowering each House to punish its Members for disorderly behavior, and, with the concurrence of two-thirds, to expel a Member. No clause similar to that which is introduced into some of the State constitutions (that a member expelled and then returned is not liable to be expelled again for the same offense) is to be met with in the Constitution of the United States; and therefore the Senate has an unlimited power to expel any Member they shall deem unworthy their society.

Here, then, I flatter myself, the dispute admits of a clear solution—is reduced within a narrow compass, and brought to a point.

It is a rule of construction that every part of an instrument be, if possible, made to take effect and every word operate in some shape or other.

There are but two constructions suggested as possible—the one for which the honorable managers contend, to wit: That the fourth section of the second article was intended as an imperative injunction upon the Senate that when judgment was rendered against a civil officer of the United States it should be for removal from office; the other, that for which we, as counsel for the defendant, insist—that is, that it was intended to designate the extent of the practice of proceeding by impeachment, specifying who are the persons to be proceeded against, and for what offenses. If, then, I am able to show that the words of the fourth section of the second article will not have any effect or operation at all, unless they receive the construction for which I contend; if I establish these premises, the inference will necessarily follow that the construction for which the honorable managers contend is not well founded, and that the construction for which we contend is the true meaning of the Constitution in this particular. To this fair, short, and decisive test be the appeal.

He then proceeded to give emphasis to the word "further" in the Constitution, and to show that disqualification of office necessarily implied removal: [78]

It is impossible to pronounce a judgment that a man shall be incapable of holding an office and not remove him. The incapacity takes effect immediately. It is coeval with the judgment. There is not any interval between the judgment pronounced and the disqualification and incapacity. It is of course ridiculous to say that the fourth section of the second article was introduced to make it imperative upon the Senate to remove from office on conviction, when it was previously made so imperative that it was impossible to avoid pronouncing a judgment that would operate a removal from office. As it is thus clear beyond the possibility of doubt that the fourth section of the second article was not introduced for the purpose suggested by the honorable managers, which I have considered, and as no third construction has been attempted on either side, I infer that the construction contended for by the counsel for the defendant is well founded, to wit: That the fourth section of the second article was intended for the purpose of designating the extent of the power of proceeding my impeachment, at least so far as respects the persons liable to be thus proceeded against.

Further, if anything further be necessary upon a matter so very plain, if, as the honorable managers insist, all persons are within the extent of this mode of proceeding, why make it imperative on the Senate to remove civil officers only? Why make it absolutely imperative to remove the marshal of a district, whose sphere of influence is comparatively inconsiderable, and leave a general at the head of an army or an admiral in the command of a navy? Would not the public security be much more endangered by leaving a man convicted of high crimes and misdemeanors in these situations than those of many civil offices? It may

[77] Annals, p. 2283.
[78] Annals, p. 2286.

be said that these military characters are liable to be proceeded against by courts-martial. Be it so; that consideration is a good reason why they should not be considered as within the power of impeachment, as we assert to be the case; but none at all for not removing them on conviction, if they are within the provision of the Constitution in this particular. And if Senators were within the power of proceeding by impeachment, would it not also have been made imperative upon the Senate to remove them, or have a veto upon every bill proposed to be passed into a law and every nomination for appointment to office?

I add, that I conceive the proceedings by impeachment are restricted not only to civil officers, but that the only causes cognizable in this mode of proceeding are malconduct in office.

Proceeding to consider whether or not Senators are "civil officers of the United States," after quoting Blackstone's definition, "a right to exercise a public or private employment, and to take the fees and emoluments thereunto belonging," Mr. Ingersoll called attention to the fact that an officer excluded from his office might obtain admission by mandamus proceedings. Might a Senator avail himself of these remedies? This question he answered in the negative.

To be an officer of the Government one must receive a commission from the Executive. A Senator was not such an officer. Nor was there force in the argument that a Senator had a judicial as well as an executive character. All those qualities of his position emanated from the same source as his legislative qualities.

He said on another point: [79]

Senators and Members of the House of Representatives have one set of words appropriated to them in the Constitution—civil officers, other terms; as thus, "office," "appointment," "commission," "removal;" Senator, or one of the House of Representatives. "Member," "election," "expulsion," "seat vacated."

What interpretation shall we give to the sixth section of the fourth article? "No person holding any office under the United States shall be a Member of either House during his continuance in office;" and yet a Senator is, ipso facto, it is said, an officer of the United States. Identity is incompatibility. The exception of a Senator is implied, say the honorable managers; but how do they show it? Is not this section to be understood as importing that the character of a Member of either House and that of an officer of the United States are, by the Constitution, distinct and incompatible? The distinction is observed throughout. Can the Clerk of this House, or the Clerk of the other House, be proceeded against by impeachment? I conceive not; because they are not appointed nor commissioned by the United States Government, or by the Executive thereof, but by the respective Houses. I believe that not an instance can be found in the Constitution of the United States in which a Senator is classed under the denomination of an officer, or civil officer of the United States.

Some observation was made on the ninth section of the first article of the Constitution of the United States, "that no person holding any office of profit or trust under the United States should, without the consent of Congress, accept of any present from any king, prince, or foreign state." Might a Senator, one in so important a public situation, accept of a present from a foreign state? No, I answer. The power of expulsion is a sufficient check. The impropriety of the measure would be a sufficient guard. The laws, in consonance with the Constitution of the United States, distinguish between the Members of the legislature and the officers of the United States, and also of the several States.

In the first volume of the laws of the United States, page 18, section 3, it is provided "that all members of the State legislatures, and the executive and judicial officers of the several States, shall take an oath to support the Constitution;" and by section 2 it is provided "that the Members of the Senate and House of Representatives," and by section 4, "that all officers of the United States" shall take the same oath, distinguishing between the Members of either House and the officers of the United States. In the constitution of the State of Pennsylvania, of New York, of Massachusetts, and of New Hampshire the same distinction of language is observed. The distinction is equally familiar in the English law. In

[79] Annals, p. 2291.

the first volume of Blackstone's Commentaries, page 368, it is said "that the oath of allegiance must be taken by all persons in any office, trust, or employment;" yet members of either House are not considered as included. On page 374 of the same volume it is declared "that no denizen can be of the Privy Council, or either House of Parliament, or have any office of trust, civil or military." Such, I believe, has been the universal understanding of the expressions until the present prosecution.

It is a rule of construction that when a law is only doubtful, arguments ab inconvenienti are most powerful. The rule will apply, with equal propriety, to the construction of a constitution. If the most numerous branch, already, I repeat it, sufficiently formidable, may proceed by impeachment against a Senator—at their will doom to temporary disgrace any Member—this would form an engine of immense additional weight in their hands. I know that it is not always an objection against intrusting power that it may be abused; but when it is unnecessary to make the trust, and the danger great, the risk ought not to be incurred.

In concluding for the managers, Mr. Harper joined issue [80] with Mr. Ingersoll as to the intent of the clause relating to impeachments:

But admitting, Mr. President, that the power of impeachment is restricted by the Constitution to officers of the Government of the Unied States, still I contend that a Senator of the United States, a Member of this honorable body, is an officer of the Government, in the constitutional meaning of the word, and consequently liable to impeachment on the doctrine of the learned counsel themselves.

The learned counsel have, indeed, contended by their plea and in their arguments that none but civil officers are liable to impeachment by the Constitution; but in this they are plainly contradicted by the Constitution itself. They found their argument on that clause which provides "that 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." But this clause is, evidently, not restrictive, but imperative. It does not point out what persons or what officers shall be liable to impeachment, but expressly orders that such and such officers, when convicted on impeachment, shall be punished to the extent, at least, of removal from office. The former clause had declared that "judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold or enjoy any office of honor, trust, or profit, under the United States," leaving the Senate to apportion the punishment, according to its discretion, within those limits. They might censure the person convicted, suspend him for a limited time, or disqualify him perpetually for certain offices, or for all offices during a certain period. But beyond absolute removal and perpetual disqualification for all offices they could not go. This was fixed as the utmost limit of their power and of their discretion.

It was judged, however, that in case of the President, Vice-President, or any civil officer the punishment ought not to be less than removal, though it might be more, according to circumstances. This provision was, therefore, inserted. Its object, manifestly, is, not to designate the persons who shall be liable to impeachment, but to prevent the Senate, in the exercise of their discretion, from retaining in a civil office a person convicted of "treason, bribery, or other high crimes and misdemeanors." As to the distinction here made between civil officers and other officers, there is no need to examine or defend it. It may, however, be supposed to have arisen from an opinion, certainly well founded, that, under certain circumstances, there might be danger or great inconvenience in removing from his command a military officer, whom, nevertheless, it might be very proper to censure or suspend, or even to disqualify for some particular offices. As to military officers, therefore, a complete discretion was left to the Senate; but not in the case of civil officers, to whom the same reasons could not apply. They, on conviction, must be removed. Military officers may be removed or not, according to circumstances.

He further contended that a Senator was an officer in the sense of the Constitution, and after exhaustively considering the definitions of the term "office," he said: [81]

[80] Annals, p. 2302.
[81] Annals, p. 2307.

The manner in which the term "office" is used by legal writers, and their formal definitions of it, support the interpretation which I have drawn from its received and common acceptation. Without going into a detail on this point, which might be tedious, let it suffice, Mr. President, to refer to Blackstone, who has been justly relied on by the learned counsel for the defendant, as a standard authority on subjects of this kind. Speaking of "offices," in the second volume of his Commentaries, page 36, as cited by the learned counsel who preceded me, that great writer lays it down that "offices are a right to exercise a public or private employment, and to take the fees and emoluments thereunto belonging." Now, let me ask, is not a seat in this honorable body "a public employment?" Has not the Member "a right to exercise this employment, and to receive the emoluments thereunto belonging?" Surely to answer in the negative would be a strange abuse of language.

The learned counsel who immediately preceded me has contended that a Senator can not be considered as an "officer," because there could be no quo warranto to remove him from his place if he held it improperly, nor mandamus to place him in it if unjustly kept out. But surely this can not be a well-founded argument, for, if it be, it applies as well to the President, the Judges, the Secretaries, and the Commander in Chief of the Army as to a Senator. Not one of them could be removed by quo warranto or replaced by mandamus. Did anyone ever hear of a quo warranto to remove a colonel of a regiment? Was a quo warranto ever brought in England against the Chancellor of the Exchequer or a Secretary of State, or a Lord of the Admiralty? Certainly not, and yet that these are officers will not be denied. The truth is, Mr. President, that the doctrine of quo warranto and mandamus, as far as it relates to officers, is confined exclusively to certain local municipal officers of a subordinate nature, who are placed, by the common law of England, under the superintendence of the supreme court of justice; to which, from the nature of their offices, recourse could most conveniently and effectually be had for their punishment, their removal, or their reinstatement. But this reason did not extend to the great officers of the State, of the Army, or the Navy, or to any of their subordinates. They could best be punished, removed, and replaced in a different manner and by a different authority. To them, therefore, nobody ever dreamt of extending the power of the supreme courts by quo warranto and mandamus, and yet nobody ever, on this account, thought of denying that they were "officers," which, however, would be just as reasonable as to contend that a Senator of the United States is not an "officer," because he can not be removed by a quo warranto or admitted by mandamus. I admit that it would be absurd to talk of an office from which a man could not be removed, however flagitious his conduct; or into which, when entitled to it, and improperly kept out, he had no means of obtaining admission. But a Senator may be removed by a vote of expulsion, and if duly elected, but not returned, may obtain his seat by a petition to the Senate.

I conceive, therefore, that no argument can be more destitute of foundation than that which would divest a seat in this honorable body of the quality of an "office," because it is not within the scope of write of mandamus and quo warranto.

If from Blackstone, Mr. President, we turn to our own laws, our own writers, and even our own constitutions, we shall equally find that a seat in the legislature is considered as an "office."

After discussing the legislator as an officer, especially in the light of the State and national constitutions and laws, especially discussing one clause of the National Constitution—[82]

A clause from the sixth section of the first article, in the following words, has also been relied on:

"No Senator or Representative shall, during the time for which he was elected, be appointed to any civil office, which shall have been created, or the emoluments whereof shall have been increased, during such time; and no person holding any office under the United States shall be a Member of either House during his continuance in office."

I am ready to admit, Mr. President, with my honorable colleague, who opened the case, that this clause wears an aspect more hostile to our construction of the term "office" than any other part of the Constitution, but I contend with him that the Constitution, like all other instruments, must be construed in each

[82] Annals, p. 2312.

separate part of it, secundum subjectam materiem, according to the subject-matter of each part, and in such a manner as to effectuate every part and render the whole consistent. These rules of construction will not be denied. When this clause comes to be analyzed and tried by these rules, it will, I think, appear satisfactorily that our construction is not infringed by it.

What is the object of this clause? It is threefold: First, to prevent a blending of the different departments of Government—the legislative, executive, and judicial—by uniting their functions in the hands of the same individual, which would be contrary to the spirit of the Constitution; secondly, to prevent the executive from acquiring an undue influence in the legislature, by appointing its most active and able Members to offices which must be held at his pleasure, and, thirdly, to take away from aspiring or avaricious Members the temptation to create offices or increase their emoluments, which might arise from the expectation of speedily filling those offices themselves. What description of officers was it necessary to exclude from the legislature in order to effect these three objects? First, those whose duties might be incompatible with a strict and regular attendance in the legislature; secondly, those who derive their appointments from the Executive, and, thirdly, those whose offices are of a nature to be considered as lucrative—to be sought after on account of their pecuniary emoluments. It is evident that some one or other of these characteristics belongs to every description of officers, except "legislative"—to military, to executive, judicial, and diplomatic. It is to be presumed that the Constitution here used the word "office" in that sense, and that only, which was necessary in order to effectuate its intentions, and consequently that the clause extends to those officers only whom it was the intention of the Constitution to exclude from the legislature. The clause therefore is to be understood as if, instead of the general expressions, "any civil office," "any office," it had said, "any other civil office," "any other office." This will render the whole Constitution consistent with itself and with the well-established meaning of language. In the clause relative to commissions we have an instance where, in order to prevent the Constitution from pronouncing a palpable absurdity, it was necessary to explain the general term "all officers," so as to mean "all officers appointed by the President." If the general expression may be controlled by the subject-matter and intent in one case, it may in another, and certainly the subject-matter and intent could not speak more strongly against the general expression in the former, or in any other case, than in this.

If this reasoning be well founded, it follows that the clause in question proves nothing against our doctrine of a Senator being an officer in the sense of the Constitution. It only proves that the Constitution, being obliged to use the same word in application to different matters, and for different purposes, has used it generally and left it to be explained by a reference to the intent and subject-matter, instead of explaining it by express modifications. The object here was to exclude certain officers from the legislature, and the term is used generally; but it by no means follows, from thence, that Members of the legislature are not themselves officers.

Also another argument was answered:[83]

An objection has also been drawn from the supposed intention with which the power of impeachment was established by the Constitution. The sole object of this power, it is said, was to provide a remedy against the favoritism or obstinacy of the Supreme Executive Magistrate, by affording a means of removing from office improper persons, whom he might be inclined to retain in place to the detriment of the nation. This necessity does not exist, we are told, with respect to members of the legislature who are removable by the people themselves at stated periods, and to whom, consequently, the power of impeachment ought not to extend.

But this can not be the sole object of the power of impeachment, because the President himself is liable to be impeached, as well as the officers whom he appoints. So also is the Vice-President. And yet these two great officers are appointed by the people themselves, in a manner far more direct and immediate than Senators and removable at shorter periods. If the power of impeachment be, as the learned counsel insist, intended as an aid to the control which the people, by the right of election, have over their public servants, or to supply the place of that control where it does not exist, surely there is much stronger reason for its extending to Senators than to the President or Vice-President, for

[83] Annals, p. 2315.

Senators are much farther removed from the power of the people and the control of elections than those officers. They are elected for a much longer period; their election being made by legislative bodies, who are chosen by the people for other purposes and, for a considerable time, is far less influenced by popular opinion or popular feelings than that of the President, who is chosen by electors elected for that sole purpose, and selected, in almost every instance, according to their known attachment to the favored candidate. The election of the President and Vice-President therefore partakes far more of the nature of a popular election than that of Senators. Indeed, of all the component members of our Government the Senate, both in the mode of its appointment and the term of its duration, is intended to be, and actually is, the most permanent and independent—the furthest elevated above the region and the influence of those storms whereby a popular government must sometimes be agitated. God forbid, Mr. President, that I should find fault with these ingredients in the composition of the Senate or do anything which could tend in the least to diminish their efficiency. I consider them as among the most valuable principles of the Constitution.

And finally he urged: [84]

But the effect of an impeachment, it is said, may be produced in another manner, more conformable to the dignity of the Senate. The same majority of two-thirds which can convict on an impeachment may also expel, and thus an improper person may be driven from the Senate. But, in the first place, he can not be thus kept out in future; for, though the Senate may expel, it can not disqualify. And if we suppose the case (which may very well happen) of a great and wicked man, supported by a strong party in the legislature of his own State, he may return again, after being expelled and may go on in the commission of "high crimes and misdemeanors," in the very station which gives him the greatest means of committing them with effect.

In the second place, an offender has a much better chance to escape from an expulsion than from an impeachment. Where the offense is of a very dark and complicated nature, consists in transactions or plots carried on at a distance or in many places at once, and of consequence can not be brought to light and fully substantiated without a laborious, long-continued and systematic inquiry, it must be admitted that the aid of a prosecutor will be necessary, and that the Senate of itself and for the mere purpose of expulsion will be little disposed to undertake so tedious and disagreeable a task.

2317. Blount's impeachment, continued.

In the Blount case it was conceded that a person impeached might not avoid punishment by resignation.

(5) As to the status of Mr. Blount at the time of the argument, Mr. Bayard said: [85]

It is also alleged in the plea that the party impeached is not now a Senator. It is enough that he was a Senator at the time the articles were preferred. If the impeachment were regular and maintainable when preferred, I apprehend no subsequent event, grounded on the willful act, or caused by the delinquency of the party, can vitiate or obstruct the proceeding. Otherwise the party, by resignation or the commission of some offense which merited and occasioned his expulsion, might secure his impunity. This is against one of the sagest maxims of the law, which does not allow a man to derive a benefit from his own wrong.

Speaking for the respondent, Mr. Dallas said: [86]

It is among the less objections of the cause that the defendant is now out of office, not by resignation. I certainly shall never contend that an officer may first commit an offense and afterwards avoid punishment by resigning his office; but the defendant has been expelled. Can he be removed at one trial and disqualified at another for the same offense? Is it not the form rather than the substance of a trial? Do the Senate come, as Lord Mansfield says a jury ought, like blank paper, without a previous impression upon their minds? Would not error in the first sentence naturally be productive of error in the second instance? Is there not reason to apprehend the strong bias of a former decision would be apt to prevent the influence of any new lights brought forward upon a second trial?

[84] Annals, p. 2317.
[85] Annals, p. 2261.
[86] Annals, p. 2293.

23.18. Blount's impeachment, continued.

The Senate decided that it had no jurisdiction to try an impeachment against William Blount, a Senator.

The Senate notified the House that it had made a decision in the Blount case and set a time for receiving the managers and rendering judgment.

The House did not attend its managers during the Blount impeachment, even at the judgment.

Form of judgment pronounced by the Vice-President in the Blount impeachment.

Judgment being given in the Blount impeachment, the managers submitted to the House a report in writing.

The Senate delivered to the managers for transmission to the House an attested copy of its judgment in the Blount case.

On January 7 [87] the Senate resolved itself into a court of impeachment, and the following resolution was offered:

That William Blount was a civil officer of the United States within the meaning of the Constitution of the United States, and therefore liable to be impeached by the House of Representatives;

That as the articles of impeachment charge him with high crimes and misdemeanors, supposed to have been committed while he was a Senator of the United States, his plea ought to be overruled.

This resolution was debated in the court of impeachment until January 10,[88] when it was disagreed to, yeas 11, nays 14.

On January 11,[89] it was determined by a vote of 14 yeas and 11 nays, the division of Members being exactly as on the preceding day:

The court is of opinion that the matter alleged in the plea of the defendant is sufficient in law to show that this court ought not to hold jurisdiction of the said impeachment, and that the said impeachment is dismissed.

It was further ordered by the court of impeachment:

Ordered, That the Secretary notify the House of Representatives that the Senate will be ready to receive the manners of the House of Representatives and the counsel of the defendant on Monday next, at 12 o'clock, to render judgment on the impeachment against William Blount.

The Journal of the Senate has no record of this order; but it was received in the House the same day as a message from the Senate.[90]

On January 14,[91] the managers alone attended, the House going on with the transaction of its business. The court being opened and silence being proclaimed, the parties attending, judgment was pronounced by the Vice-President as follows:

Gentlemen, managers of the House of Representatives, and gentlemen, counsel for William Blount: The court, after having given the most mature and serious consideration to the question, and to the full and able arguments urged on both sides, has come to the decision which I am now about to deliver.

The court is of opinion that the matter alleged in the plea of the defendant is sufficient in law to show that this court ought not to hold jurisdiction of the said impeachment, and that the said impeachment is dismissed.

Copies of the judgment were delivered to the managers and to the counsel for the defendant, respectively.

After which they withdrew; and, on motion, the court adjourned without day.

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[87] Senate Journal, p. 568; Annals, p. 2318.
[88] Annals, p. 2318.
[89] Annals, p. 2319.
[90] House Journal, p. 430.
[91] House Journal, pp. 431, 432; Annals, pp. 2648, 2319.

On the same day, in the House,[92] Mr. Bayard, from the managers appointed on the part of this House to conduct the impeachment against William Blount, made a further report, which was read, as follows:

That agreeably to the notification of the Senate they attended at their bar to hear their judgment upon the plea of the said William Blount, and that the President of the Senate pronounced judgment upon the said plea, a copy whereof was ordered to be delivered to the managers and is annexed to this report.

"UNITED STATES OF AMERICA, FRIDAY, JANUARY 11, 1799. HIGH COURT OF IMPEACHMENT.

"UNITED STATES *v.* WILLIAM BLOUNT.

"The court is of opinion, etc. [Here follows the decision as given above.]
"Attest:

"SAM A. OTIS, *Secretary.*"

The report and copy were ordered to lie on the table.

[92] House Journal, pp. 431, 432.

The Impeachment and Trial of John Pickering*

1. Preliminary inquiry and action by House. Section 2319.
2. Presentation of impeachment at bar of Senate. Section 2320.
3. The articles and their presentation. Sections 2321–2328.
4. The summons and return. Sections 2329–2330.
5. Rules and organization of Senate. Section 2331.
6. The calling of respondent and presentation of his petition. Sections 2332, 2333.
7. Hearing on a preliminary question. Section 2334.
8. Presentation of testimony. Sections 2335–2336.
9. Judgment pronounced. Sections 2337–2341.

2319. The impeachment and trial of John Pickering, judge of the United States district court for New Hampshire, in 1803.

The impeachment proceedings against Judge Pickering were set in motion by a message from the President.

The committee recommended and the House voted the impeachment of Judge Pickering on the strength of certain ex parte affidavits.

The House decided to proceed in the Pickering impeachment, although the session and the Congress neared an end.

The Pickering impeachment was carried to the Senate by a committee of two.

Forms of resolutions for impeachment of Judge Pickering and directing the carrying of the same to the Senate.

On February 4, 1803,[1] a message was received from the President of the United States transmitting a "letter and affidavits exhibiting matter of complaint against John Pickering, district judge of New Hampshire, which is not within executive cognizance."

The message was read, and with the accompanying papers, was referred to a committee composed of Messrs. Joseph H. Nicholson, of Maryland; James A. Bayard, of Delaware; John Randolph, jr., of Virginia; Samuel Tenney, of New Hampshire; and Lucas Elmendorf, of New York.

Accompanying the message were the following documents: (1) A letter from Albert Gallatin, Secretary of the Treasury, to the President, stating that it appeared that Judge Pickering, in a suit wherein the revenue was concerned, had "acted in a manner which showed a total unfitness for the office," and which showed "some legislative interference absolutely necessary;" (2) a letter from John S. Sherburne, United States district attorney for New Hampshire, to the Secretary of the Treasury, transmitting affidavits and making a statement as to the conduct of the judge; (3) affidavits of Thomas

* Hinds Precedents, Vol. 3, p. 681 (1907).
[1] Second session Seventh Congress, Journal, p. 322; Annals, p. 460.

Chadbourne, Jonathan Steele, Daniel Humphrey, John Wentworth, Joseph Whipple, and R. C. Shannon setting forth specific acts of said judge. These affidavits were taken ex parte.[2]

On February 18[3] Mr. Nicholson submitted the report of the committee:

That from the face of the said depositions it appears that the said John Pickering has been guilty of high misdemeanor in the exercise of his judicial functions, and recommend the adoption of the following resolution:

"*Resolved*, That John Pickering, judge of the district court of the district of New Hampshire, be impeached of high crimes and misdemeanors."

On March 2[4] the report was considered by the Committee of the Whole, who recommended concurrence in the report, after a debate which is very briefly reported and during which the principal question seems to have been the advisability of proceeding in the case at so late a period in the session. A proposition to postpone the resolution to the next session was disagreed to, ayes 9, noes 43.

The House agreed to the resolution, yeas 45, nays 8.

Thereupon it was

Ordered, That Mr. Nicholson and Mr. Randolph be appointed a committee to go to the Senate, and, at the bar thereof, in the name of the House of Representatives and of all the people of the United States, to impeach Judge Pickering, judge of the district court of the district of New Hampshire, of high crimes and misdemeanors; and to acquaint the Senate that the House of Representatives will, in due time, exhibit particular articles of impeachment against him and make good the same.

Ordered, That the committee do demand that the Senate take order for the appearance of the said John Pickering to answer to the said impeachment.

2320. Pickering's impeachment, continued.

Ceremonies of presenting the Pickering impeachment at the bar of the Senate.

Form of declaration by House committee in presenting the impeachment of Judge Pickering in the Senate.

Verbal report made by the House committee on returning from presenting in the Senate the impeachment of Judge Pickering.

Proceedings and resolutions adopted by the Senate in taking order on the presentation of the Pickering impeachment.

The impeachment of Judge Pickering was presented in the Senate on the last day of the Seventh Congress.

On March 3,[5] in the Senate, a message was received from the House of Representatives by Mr. Nicholson and Mr. Randolph, as follows:

Mr. President, we are commanded, in the name of the House of Representatives and of all the people of the United States, to impeach John Pickering, judge of the district court of the district of New Hampshire, of high crimes and misdemeanors; and to acquaint the Senate that the House of Representatives will, in due time, exhibit particular articles of impeachment against him and make good the same.

We are further commanded to demand that the Senate take order for the appearance of the said John Pickering to answer to the said impeachment.

Then they withdrew.

On the same day in the House,[6] Mr. Nicholson reported verbally:

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[2] These documents were published with the report of the committee. Copies are rare, but may be found in the Library of Congress.

[3] Second session Seventh Congress, House Report, p. 252; Journal, p. 351; Annals, p. 544.

[4] Journal of House, pp. 383, 384; Annals, p. 642.

[5] Senate Journal, p. 284; Annals, p. 267.

[6] House Journal, p. 387.

That, in obedience to the order of the House, the committee had been to the Senate, and, in the name of the House of Representatives and of all the people of the United States, had impeached John Pickering, judge of the district court of the district of New Hampshire, of high crimes and misdemeanors; and had acquainted the Senate that the House of Representatives will, in due time, exhibit particular articles against him and make good the same.

And, further, that the committee had demanded that the Senate take order for the appearance of the said John Pickering to answer to the said impeachment.

On the same day, in the Senate,[7]

Ordered, That the message received this day from the House of Representatives respecting the impeachment of John Pickering, judge of a district court, be referred to Messrs. Tracy [Uriah, of Connecticut], Clinton [De Witt, of New York], and Nicholas [Wilson C., of Virginia].

Later on this day Mr. Tracy reported from the committee the following resolution and preamble, which were agreed to by the Senate:

Whereas the House of Representatives have this day, by two of their Members, Messrs. Nicholson and Randolph, at the bar of the Senate, impeached John Pickering, judge of the district court for the district of New Hampshire, of high crimes and misdemeanors; and have acquainted the Senate that the House of Representatives will, in due time, exhibit particular articles of impeachment against him and make good the same.

And have likewise demanded that the Senate take order for the appearance of the said John Pickering to answer to the said Impeachment: Therefore,

Resolved, That the Senate will take proper order thereon, of which due notice shall be given the House of Representatives.

Resolved, That the Secretary of the Senate notify the House of Representatives of this resolution.

On the same day a message announcing this resolution was received in the House.[8]

And late on the same day, March 3, 1803, both House and Senate adjourned sine die, the term of the Seventh Congress having expired.

2321. Pickering's impeachment, continued.

At the beginning of the Eighth Congress the House continued the Pickering impeachment by appointing a committee to prepare articles.

The Eighth Congress met in its first session on October 17, 1803, it being the day appointed by law. The proceedings against Judge Pickering were continued from the point where they had been interrupted by the expiration of the Seventh Congress.

On October 20,[9] in the House, Mr. Nicholson stated that during the last session the House had voted an impeachment against John Pickering, judge of the district court for New Hampshire, for high crimes and misdemeanors. But the impeachment had been voted at so late a period of the session as rendered it impossible to act then finally upon it. In order that it might be now acted upon, and the impeachment proceed, he moved the adoption of the following:

Resolved, That a committee be appointed to prepare and report articles of impeachment against John Pickering, district judge of the district of New Hampshire, who was impeached by this House during the last session of high crimes and misdemeanors: and that the said committee have power to send for persons, papers, and records.

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[7] Senate Journal, p. 285; Annals, p. 268.
[8] House Journal, p. 392.
[9] First session Eighth Congress, House Journal, p. 411; Annals, p. 380.

The committee were appointed as follows: Messrs. Nicholson, John Randolph, jr., Roger Griswold, of Connecticut; Peter Early, of Georgia, and Samuel Thatcher, of Massachusetts.

2322. Pickering's impeachment, continued.

The Senate declined to order compulsory process to compel the appearance of Judge Pickering, but authorized a committee to examine the subject.

On October 27,[10] in the Senate, the following resolution was proposed, but was laid on the table:

Resolved, That a committee be appointed to prepare the process to compel the attendance of John Pickering to answer the charge exhibited against him by the House of Representatives at their last session.

On November 14 [11] the Senate resumed consideration above given and, having amended it, agreed to it as follows:

Resolved, That a committee be appointed to inquire if any, and what, further proceedings at present ought to be had by the Senate respecting the impeachment of John Pickering, made at the bar of this Senate by two Members of the House of Representatives on the last day of the last session of Congress.

The following committee were appointed: Uriah Tracy, of Connecticut; Stephen R. Bradley, of Vermont; Abraham Baldwin, of Georgia; Robert Wright, of Maryland, and William Cocke, of Tennessee.

2323. Pickering's impeachment, continued.

The House considered the articles of impeachment of Judge Pickering in Committee of the Whole House.

The articles of impeachment of Judge Pickering were enrolled after they were agreed to by the House.

In the Pickering impeachment the House decided that the managrs should not be appointed by the Speaker or by viva voce vote, but by ballot.

The House having excused a Member elected manager in the Pickering case, another was chosen by ballot.

Form of resolution directing the carrying of the articles of impeachment of Judge Pickering to the Senate.

Form of resolution directing that the Senate be informed of the appointment of managers and that they will carry articles to the Senate.

It does not appear that the message announcing the appointment of managers of the Pickering impeachment included their names.

On December 27 [12] Mr. Nicholson, from the committee appointed to prepare articles of impeachment, presented them to the House; and having been read, the same were referred to a Committee of the Whole House.

On December 30 [13] the articles were considered in Committee of the Whole and being reported therefrom without amendment, were agreed to by the House. They appear in full in the Journal. During the proceedings [14] on the articles Mr. Samuel Tenney, of New Hampshire,

[10] Senate Journal, p. 303; Annals, p. 27.
[11] Senate Journal, p. 310; Annals, p. 75.
[12] House Journal, p. 503.
[13] House Journal, p. 507.
[14] Annals, pp. 794, 795.

called for the reading of several depositions to show that Judge Pickering had sustained a respectable character and that his recent conduct had arisen from insanity. In reply Mr. Nicholson said that the House had determined that they would impeach, and it was therefore the present duty to furnish the Senate with the articles. Mr. Nicholson further said that he was informed from respectable sources that Judge Pickering was habitually intoxicated. The articles were agreed to without division.

On motion of Mr. Nicholson, according to the Annals [15] the articles were ordered to be enrolled, in correspondence with the practice of the House. The Journal does not mention this.

It was then ordered that eleven managers be appointed on the part of the House. A discussion arose as to the manner of selection. A motion that they be appointed by the Speaker was decided in the negative. Then it was decided that they be appointed by ballot, although several Members, notably Mr. Nicholson, urged that they should be elected by viva voce vote.

It does not appear that a special rule was made to govern the balloting, which was presumably conducted under the then existing rule of the House.

The following were chosen managers: Messrs. Nicholson, Early, Cæsar A. Rodney, of Delaware; William Eustis, of Massachusetts; John Randolph, jr., of Virginia; Roger Griswold, of Connecticut; Samuel L. Mitchell, of New York; George W. Campbell, of Tennessee; William Blackledge, of North Carolina; John Boyle, of Kentucky, and Joseph Clay, of Pennsylvania.

On motion,

Ordered, That Mr. Roger Griswold be excused from serving as one of the managers appointed to conduct the said impeachment; and that the House do now proceed, by ballot, to the appointment of another manager to serve in his stead.

Thereupon Mr. Thomas Newton, jr., of Virginia, was chosen.

On January 3, 1804,[16] it was

Resolved, That the articles agreed to by this House, to be exhibited in the name of themselves, and of all the people of the United States, against John Pickering, in maintenance of their impeachment against him for high crimes and misdemeanors, be carried to the Senate by the managers appointed to conduct the said impeachment.

Ordered, That a message be sent to the Senate, to inform them that this House have appointed managers, on their part, to conduct the impeachment against John Pickering, and have directed the said managers to carry to the Senate the articles agreed upon by the House, to be exhibited in maintenance of their impeachment against the said John Pickering; and that the Clerk of this House do go with the said message.

On the same day in the senate:[17]

A message from the House of Representatives informed the Senate that the House have appointed managers, on their part, to conduct the impeachment against John Pickering, judge of the district court of the United States for the district of New Hampshire, and have also directed the said managers to carry to the Senate the articles agreed upon by the House of Representatives to be exhibited against the said John Pickering.

It does not appear that the message announced the names of the managers.

[15] Annals, p. 795.
[16] House Journal, pp. 511, 512; Annals, p. 797.
[17] Senate Journal, p. 332.

2324. Pickering's impeachment, continued.

The Senate decided, in the Pickering case, that it would take order for respondent's appearance only after articles had been exhibited.

The Senate committee concluded, in the Pickering case, that there was no impeachment before the Senate until articles were exhibited.

It was concluded by a Senate committee in Pickering impeachment that the Senate had no power to take into custody the body of the accused.

A notification to the accused with a copy of the articles was deemed, in the Pickering impeachment, all the process necessary.

A Senate committee concluded, in the Pickering impeachment, that respondent might answer in person, by attorney, or not at all.

In the Pickering case the Senate committee concluded that after service of notice of the articles, the Senate might proceed to trial whether respondent entered appearance or not.

The Senate committee advised, in Pickering's case, that the Senate had the sole power to regulate forms, substances, and proceedings when acting as a court of impeachment.

On the same day in the Senate, after the receipt of the above message a report submitted by Mr. Tracy, from the committee appointed to inquire as to further proceedings, was submitted as follows: [18]

That they find the following facts, which have an immediate relation to the subject committed to them, viz: "On the last day of the last session of Congress two Members of the House of Representatives came to the Senate, and in the name of the House, and of all the people of the United States, verbally impeached John Pickering, district judge of the district of New Hampshire, of high crimes and misdemeanors, without any specification; and likewise, they verbally acquainted the Senate that the said House of Representatives would in due time exhibit particular articles of impeachment against him, the said Pickering, and make good the same. And they verbally demanded that the Senate should take order for the appearance of the said John Pickering, to answer to the said impeachments;" and that said verbal declaration of impeachment was committed by the Senate to a select committee, who reported thereon, in the following words, viz: "*Resolved*, That the Senate will take the proper order thereon (that is, of the verbal impeachment aforesaid), of which due notice shall be given to the House of Representatives," of which resolution, the Secretary of the Senate gave information to the House of Representatives.

With these facts in view, your committee have attended to the constitutional powers vested in the Senate as a court of impeachment, and they find that "judgment in case of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust, or profit under the United States;" and that "the party convicted shall nevertheless be liable and subject to indictment, trial, judgment, and punishment, according to law." Hence your committee suppose that no power is constitutionally vested in the Senate to take into custody, or hold the body of the person impeached for trial; but that a notification to the party of the impeachment, with a copy of the articles exhibited, is all the process requisite in the case; and that it is optional with the party to appear in propria persona, by attorney, or not at all; and that after the notice given as aforesaid, it is competent for the Senate to proceed to a trial and judgment on said impeachment, whether the party shall appear by himself, his attorney, or not at all. And although your committee would not in the smallest degree interfere with the House of Representatives, in the manner of instituting the process of impeachment, since the sole right of impeaching is vested in the Constitution in that House, yet they believe the

[18] Senate Journal, p. 332; Annals, p. 224.

Senate, in common with other courts, have the sole power, while acting as a court of impeachment, to regulate all forms as well as substance of impeachments which shall be presented to them, and all proceedings to be had thereon. They therefore are of opinion that at present no further proceeding ought to be had by the Senate respecting the verbal impeachment of John Pickering, made at the bar of the Senate by two Members of the House of Representatives, on the last day of the last session of Congress; and that in strict and proper construction there is no impeachment before the Senate, until exhibited to them by the House of Representatives, in written articles.

On a full view of the subject, the committee respectfully submit for the consideration and adoption of the Senate the following resolution, viz:

"*Resolved*, That the Senate can not with propriety take any order upon the verbal notification to them by the House of Representatives, on the last day of the last session of Congress, that they did impeach John Pickering of high crimes and misdemeanors. And that all proceedings thereon by the Senate must be deferred until written articles shall, in due form, be presented by said House of Representatives."

It does not appear that the above resolution was formally agreed to by the Senate.

2325. Pickering's impeachment, continued.

Rule of the Senate prescribing forms and ceremonies for receiving managers in presenting articles of impeachment against Judge Pickering.

The Senate organized as a court before receiving the articles in the Pickering case.

The oath administered by the Secretary to the President and by him to the Senators in the Pickering impeachment.

The Senate set a day and hour for receiving the managers to exhibit articles impeaching Judge Pickering, and informed the House thereof.

The Senate appointed a committee to search the Journals for precedents for the Pickering impeachment.

The same committee further reported the following resolution:

Resolved, That, at 12 o'clock to-morrow, the Senate will resolve itself into a court of impeachment, at which time the following oath or affirmation shall be administered by the Secretary to the President of the Senate, and, by him, to each member of the Senate, viz: "I, ——, solemnly swear (or affirm, as the case may be), that, in all things appertaining to the trial of the impeachment of John Pickering, judge of the district court of the district of New Hampshire, I will do impartial justice, according to law," which court of impeachments, being thus formed, will, at the time aforesaid, receive the managers appointed by the House of Representatives to exhibit articles of impeachment, in the name of themselves and of all the people of the United States, against John Pickering, judge of the district court for the district of New Hampshire, pursuant to notice given to the Senate this day by the House of Representatives, that they had appointed managers for the purposes aforesaid.

Ordered, That the Secretary lay this resolution before the House of Representatives.

It was further—

Ordered, That a committee be appointed to search the Journals and report precedents in cases of impeachments; and that Messrs. Tracy, Bradley, Baldwin, Wright, and Cocke, to whom it was referred on the 14th of November last, to consider and report, if any, what further proceedings ought to be had by the Senate, respecting the impeachment of John Pickering, by this committee.

On January 4,[19] in the House, the following message was received from the Senate:

[19] House Journal, p. 513.

Mr. Speaker: I am directed to inform this House that the Senate will, at 12 o'clock this day, be ready to receive articles of impeachment against John Pickering, judge of the district court of United States for the district of New Hamphire, to be presented by the managers appointed by this House.

2326. Pickering's impeachment continued.

The Senate prescribed by rule the ceremonies for receiving the House managers to present articles of impeachment against Judge Pickering.

Form of proclamation made by the Sergeant-at-Arms, under direction of the President, when the managers presented articles in the Pickering impeachment.

Articles of impeachment being exhibited against Judge Pickering, the President of the Senate was directed by rule to state that order would be taken and the House would be notified.

On January 4,[20] in the Senate, before it resolve itself into a court of impeachment, Mr. Tracy, from the committee appointed to examine precedents, reported the following:

Resolved, That, after the managers of the impeachment shall be introduced to the bar of the Senate, and shall have signified that they are ready to exhibit articles of impeachment against John Pickering, the President of the Senate shall direct the Sergeant-at-Arms to make proclamation; who shall, after making proclamation, repeat the following words: "All persons are commanded to keep silence, on pain of imprisonment, while the grand inquest of the nation is exhibiting to the Senate of the United States, sitting as a court of impeachment, articles of impeachment against John Pickering, judge of the district court for the district of New Hampshire."

After which the articles shall be exhibited; and then the President of the Senate shall inform the managers that the Senate will take proper order on the subject of the impeachment, of which due notice shall be given to the House of Representatives.

The resolution was agreed to.

2327. Pickering's impeachment continued.

In the Pickering trial a Senator, who as a Member of the House had voted for impeachment, was challenged, but voted.

Thereupon Mr. John Quincy Adams, of Massachusetts, offered the following:

Resolved, That any Senator of the United States, having previously acted and voted as a Member of the House of Representatives, on a question of impeachment, is thereby disqualified to sit and act, in the same case, as a member of the Senate, sitting as a court of impeachment.

It was agreed that this motion should lie for consideration.

An appendix to the records of the court of impeachment has the following:[21]

Early in the trial a question was raised as to the propriety of those gentlemen, viz, Samuel Smith, Israel Smith, and John Smith, of New York, who were during the last session Members of the House of Representatives, and voted here upon the question for impeaching Judge Pickering, sitting and voting as judges upon the trial.

Mr. Smith, of New York, wished to be excused.

Mr. S. Smith declared that he would not be influenced from his duty by any false delicacy; that he, for his part, felt no delicacy upon the subject, the vote he had given in the other House to impeach Judge Pickering would have no influence upon him in the court; his constituent had a right to his vote, and he would not by any act of his deprive or consent to deprive them of that right, but would claim

[20] Senate Journal, pp. 382, 383; Annals, p. 225.
[21] Annals, p. 368.

and exercise it upon this as upon every other question that might be submitted to the Senate whilst he had the honor of a seat.

All these men appear as voting during the trial.

2328. Pickering's impeachment continued.

In the Pickering impeachment the Senate organized itself as a court before receiving the articles.

The Journal of the Pickering trial was kept separate from the regular Senate Journal.

Ceremonies of presenting the articles against Judge Pickering before the high court of impeachment.

In the Pickering impeachment the chairman of the managers read the articles and then delivered them at the table of the Senate.

The articles impeaching Judge Pickering, with signature of the Speaker and attestation of the Clerk.

The chairman of the managers reported verbally to the House after having presented in the Senate the articles impeaching Judge Pickering.

On this day, January 4 [22] the Senate resolved itself into a court of impeachment. The ordinary Senate Journal merely records this fact, but does not contain the record of the court's proceedings.[23]

On February 20, 1805,[24] the Senate resumed consideration of the motion for printing the Journals of their proceedings, while sitting for the purpose of trying impeachments, and agreed to it as follows:

Resolved, That the proceedings of the Senate while sitting for the purpose of trying impeachments shall be published in the same manner in which the legislative proceedings are now published, and this resolution shall have relation to all proceedings in trials of impeachments which have heretofore taken place.

The Senate having resolved itself into a court of impeachment, proceeded agreeably to its resolution to organize the court.[25]

The Secretary administered the following oath to the President:

You solemnly swear that, in all things appertainnig to the trial of the impeachment of John Pickering, judge of the district court of the district of New Hampshire, you will do impartial justice, according to law.

The President administered the oath, respectively, to Messrs. Adams, Armstrong, Anderson, Bailey, Baldwin, Bradley, Breckenridge, Brown, Cocke, Condit, Ellery, Franklin, Hillhouse, Jackson, Olcott, Pickering, Potter, Israel Smith, Samuel Smith, John Smith, Tracy, Venable, Wells, and Worthington; and the affirmation to Messrs. Logan, Maclay, and Plumer.

A message was received from the House of Representatives.

The managers on the part of the House of Representatives, Messrs. Nicholson, Early, Rodney, Eustis, John Randolph, jr., Samuel L. Mitchill, George W. Campbell, Blackledge, Boyle, Joseph Clay, and Newton, were admitted; and Mr. Nicholson, the chairman, announced that they were the managers instructed by the House of Representatives to exhibit certain articles of impeachment against John Pickering, district judge of the district of New Hampshire.

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[22] Senate Journal, p. 333.

[23] The Senate, however, kept in Journal form a record of "The trial of John Pickering, etc., on a charge exhibited to the Senate of the United States for high crimes and misdemeanors," which was published later. Senate Journal, Eighth Congress, pp. 493–507.

[24] Second session Eighth Congress, Annals, p. 63.

[25] Annals, p. 319.

They were requested by the President to take seats assigned them within the bar.

The Sergeant-at-Arms was directed to make proclamation, in the words following:

Oyes! Oyes! Oyes! All persons are commanded to keep silence on pain of imprisonment while the grand inquest of the nation is exhibiting to the Senate of the United States, sitting as a court of impeachments, articles of impeachment against John Pickering, judge of the district court of the district of New Hampshire.

The managers then rose, and Mr. Nicholson, their chairman, read the articles, as follows:

Articles exhibited by the House of Representatives of the United States, in the name of themselves and of all the people of the United States, against John Pickering, judge of the district court of the district of New Hampshire, in maintenance and support of their impeachment against him for high crimes and misdemeanors.

ARTICLE 1. That whereas George Wentworth, surveyor of the district of New Hamsphire, did, in the port of Portsmouth, in the said district, on waters that are navigable from the sea by vessels of more than 10 tons burden, on the 15th day of October, in the year 1802, seize the ship called the *Eliza*, of about 285 tons burden, whereof William Ladd was late master, together with her furniture, tackle, and apparel, alleging that there had been unladen from on board of said ship, contrary to law, sundry goods, wares, and merchandise, of foreign growth and manufacture, of the value of $400 and upwards, and did likewise seize on land within the said district, on the 7th day of October, in the year 1802, two cables of the value of $250, part of the said goods which were alleged to have been unladen from on board the said ship as aforesaid, contrary to law; and whereas Thomas Chadbourn, a deputy marshal of the said district of New Hampshire, did, on the 16th day of October, in the year 1802, by virtue of an order of the said John Pickering, judge of the district court of the said district of New Hampshire, arrest and detain in custody for trial before the said John Pickering, judge of the said district court, the said ship, called the *Eliza*, with her furniture, tackle, and apparel, and also the two cables aforesaid:

And whereas by an act of Congress, passed on the 2d day of March, in the year 1789, it is among other things provided that "upon the prayer of any claimant to the court that any ship or vessel, goods, wares, or merchandise so seized and prosecuted, or any part thereof, should be delivered to such claimant, it shall be lawful for the court to appoint three proper persons to appraise such ship or vessel, goods, wares, or merchandise, who shall be sworn in open court, for the faithful discharge of their duty; and such appraisement shall be made at the expense of the party on whose prayer it is granted; and on the turn of such appraisement, if the claimant shall, with one or more sureties to be approved of by the court, execute a bond in the usual form to the United States for the payment of a sum equal to the sum of which the ship or vessel, goods, wares, or merchandise so prayed to be delivered and appraised and moreover produce a certificate from the collector of the district wherein such trial is had and of the naval officer thereof, if any there be, that the duties on the goods, wares, and merchandise, or tonnage duty on the ship or vessel so claimed have been paid or secured in like manner as if the goods, wares, or merchandise, ship or vessel, had been legally entered, the court shall, by rule, order such ship or vessel, goods, wares, or merchandise, to be delivered to the said claimant;" yet the said John Pickering, judge of the said district court of the said district of New Hampshire, the said act of Congress not regarding, but with intent to evade the same, did order the said ship called the *Eliza*, with her furniture, tackle, and apparel, and the said two cables, to be delivered to a certain Eliphalet Ladd, who claimed the same, without his, the said Eliphalet Ladd, producing any certificate from the collector and naval officer of the said district that the tonnage duty on the said ship or the duties on the said cables had been paid or secured, contrary to his trust and duty as judge of the said district court, against the law of the United States and to the manifest injury of their revenue.

ART. 2. That whereas, at a special district court of the United States, begun and held at Portsmouth on the 11th day of November, in the year 1802, by John Pickering, judge of said court, the United States, by Joseph Whipple, the col-

lector of said district, having libeled, propounded, and given the said judge to understand and be informed that the said ship *Eliza*, with her furniture, tackle, and apparel, had been seized as aforesaid, because there had been unladen therefrom, contrary to law, 2 cables and 100 pieces of check, of the value of $400, and having prayed in their said libel that the said ship, with her furniture, tackle, and apparel, might by the said court be adjudged to be forfeited to the United States and be disposed of according to law; and a certain Eliphalet Ladd, by his proctor and attorney, having come into the said court, and having claimed the said ship *Eliza*, with her tackle, furniture, and apparel, and having denied that the said 2 cables and the said 100 pieces of check had been unladen from the said ship contrary to the law, and having prayed the said court that the said ship, with her furniture, tackle, and apparel, might be restored to him, the said Eliphalet Ladd, the said John Pickering, judge of the said district court, did proceed to the hearing and trial of the said cause thus pending between the United States on the one part, claiming the said ship *Eliza*, with her furniture, tackle, and apparel, as forfeited by law, and the said Eliphalet Ladd on the other part, claiming the said ship *Eliza*, with her furniture, tackle, and apparel, in his own proper right; and whereas John S. Sherburne, attorney for the United States in and for the said district of New Hampshire, did appear in the said district, as his special duty it was by law, to prosecute the said cause in behalf of the United States, and did produce sundry witnesses to prove the facts charged by the United States in the libel filed by the collector as aforesaid in the said court, and to show that the said ship *Eliza*, with her tackle, furniture, and apparel, was justly forfeited to the United States, and did pray the said court that the said witnesses might be sworn in behalf of the United States, yet the said John Pickering, being then judge of the said district court, and then in court sitting, with intent to defeat the just claims of the United States, did refuse to hear the testimony of the said witnesses so as aforesaid, produced in behalf of the United States, and without hearing the said testimony so adduced in behalf of the United States in the trial of the said cause did order and decree the said ship *Eliza*, with her furniture, tackle, and apparel, to be restored to the said Eliphalet Ladd, the claimant, contrary to his trust and duty as judge of the said district court, in violation of the laws of the United States and to the manifest injury of the revenue.

ART. 3. That whereas it is provided by an act of Congress, passed on the 24th day of September, in the year 1789, "that from all final decrees of the district court in cases of admiralty and maritime jurisdiction, where the matter in dispute exceeds the sum or value of $300 exclusive of costs, an appeal shall be allowed to the next circuit court to be held in such district;" and whereas on the 12th day of November, in the year 1802, at the trial of the aforesaid cause between the United States on the one part, claiming the said ship *Eliza*, with her furniture, tackle, and apparel, as forfeited for the cause aforesaid, and the said Eliphalet Ladd on the other part, claiming the said ship *Eliza*, with her furniture, tackle, and apparel, in his own proper right, the said John Pickering, judge of the said district of New Hampshire, did decree that the said ship *Eliza*, with her tackle, furniture, and apparel, should be restored to the said Eliphalet Ladd, the claimant; and whereas the said John S. Sherburne, attorney for the United States in and for the said district of New Hampshire, and prosecuting the said cause for and on the part of the United States, on the said 12th day of November, in the year 1802, did, in the name and behalf of the United States, claim an appeal from said decree of the district court to the next circuit court to be held in the said district of New Hampshire, and did pray the said district court to allow the said appeal, in conformity to the provisions of the act of Congress last aforesaid, yet the said John Pickering, judge of the said district court, disregarding the authority of the laws and wickedly meaning and intending to injure the revenues of the United States and thereby to impair their public credit, did absolutely and positively refuse to allow the said appeal, as prayed for and claimed by the said John S. Sherburne in behalf of the United States, contrary to his trust and duty of judge of the district court, against the laws of the United States, to the great injury of the public revenue, and in violation of the solemn oath which he had taken to administer equal and impartial justice.

ART. 4. That whereas for the due, faithful, and impartial administration of justice, temperance and sobriety are essential qualities in the character of a judge, yet the said John Pickering, being a man of loose morals and intemperate habits, on the 11th and 12th days of November, in the year 1802, being then judge of the district court in and for the district of New Hampshire, did appear on the bench of the said court for the administration of justice in a state of total

intoxication, produced by the free and intemperate use of intoxicating liquors; and did then and there frequently, in a most profane and indecent manner, invoke the name of the Supreme Being, to the evil example of all the good citizens of the United States; and was then and there guilty of other high misdemeanors, disgraceful to his own character as a judge and degrading to the honor of the United States.

And the House of Representatives, by protestation, saving to themselves the liberty of exhibiting at any time hereafter any further articles or other accusation or impeachment against the said John Pickering; and also of replying to his or any answers which he shall make to the said articles, or any of them; and of offering proof to all and every other articles, impeachment, or accusation which shall be exhibited by them as the case shall require, do demand that the said John Pickering may be put to answer the said high crimes and misdemeanors; and that such proceedings, examinations, trials, and judgments may be thereupon had and given as may be agreeable to law and justice.

Signed by order and in behalf of the House.

NATHANIEL MACON, *Speaker.*
JOHN BECKLEY, *Clerk.*

He then delivered the articles at the table; whereupon,

The President notified the managers that the Senate would take proper order on the subject of the impeachment, of which due notice should be given to the House of Representatives, and they withdrew.

The court adjourned to 12 o'clock to-morrow.

In the House,[26] on the same day, Mr. Nicholson, from the managers appointed on the part of this House to conduct the impeachment against John Pickering, judge of the district court of the United States for the district of New Hampshire, reported that the managers did this day carry to the Senate the articles of impeachment agreed to by this House on the 30th ultimo, and the said managers were informed by the Senate that their House would take proper measures relative to the said impeachment, of which this House should be duly notified.

2329. Pickering's impeachment continued.

In the Pickering case the rules were reported directly to the court of impeachment and agreed to therein.

Form of summons prescribed to command appearance of respondent in the Pickering impeachment.

Form of precept prescribed by the Senate to be indorsed on the writ of summons to Judge Pickering.

In the Pickering case the Senate provided for issuing subpoenas of a specified form on application of managers or of respondent or his counsel.

In the Pickering impeachment the subpoenas were directed to the marshal of the district wherein the witness resided.

The forms of summons and subpoena in the Pickering case were communicated to the House and entered on its Journal.

Form of direction to the marshal for service of subpoenas in the Pickering trial.

On January 5 [27] the Senate in high court of impeachment assembled, and the President administered the oath to Mr. Jonathan Dayton, of New Jersey.

On January 9,[28] in the high court, Mr. Tracy reported from the committee appointed to examine precedents and prepare forms. The Sen-

[26] House Journal, p. 515; Annals, p. 802.
[27] Annals, p. 322.
[28] Annals, p. 323; Senate Journal, p. 335.

ate Journal makes no mention of this or other proceedings of the court, although the committee was appointed by the Senate.

On January 10 and 11 [29] the report was considered in the high court, and amendments were voted on and agreed to. The yeas and nays were taken, although it does not appear in what way they were ordered.

On January 12 [30] the report was agreed to as follows:

Resolved, That a summons issue, directed to the said John Pickering, in the form following:

"UNITED STATES OF AMERICA, *ss:*

"*The Senate of the United States of America, in their capacity of a court of impeachments, to John Pickering, judge of the district court for the district of New Hampshire, greeting:*

"Whereas the House of Representatives of the United States of America did, on the 4th day of January, exhibit to the Senate, then sitting as a court of impeachments, articles of impeachment against you, the said John Pickering, charging you with high crimes and misdemeanors, therein specially set forth in the words following, viz: [Here insert the articles]; and did demand that you, the said John Pickering, should be put to answer the accusations of high crimes and misdemeanors as set forth in said articles; and that such proceedings, examinations, trials, and judgments might be thereupon had as are agreeable to law and justice. You, the said John Pickering, are therefore hereby summoned to be and appear before the Senate of the United States of America in their capacity of a court of impeachments, at their Chamber in the city of Washington, on the 2d day of March next, then and there to answer to the said articles of impeachment, and then and there to abide by, obey, and perform such orders and judgments as the Senate of the United States, acting in their said capacity of a court of impeachments, shall make in the premises, according to the Constitution and laws of the said United States. Hereof you are not to fail."

Witness, Aaron Burr, Vice-President of the United States of America and President of the Senate thereof, at the city of Washington, this 12th day of January, in the year of our Lord 1804, and of the independence of the United States the twenty-eighth.

Which summons shall be signed by the Secretary of the Senate and sealed with their seal, and served by James Mathers, Sergeant-at-Arms to the Senate, who shall serve the same pursuant to the directions given in the next following resolution:

Second. *Resolved*, That a precept shall be indorsed on said writ of summons in the form following, viz:

"UNITED STATES OF AMERICA, *ss:*

"*The Senate of the United States, in their capacity of a court of impeachments, to James Mathers, Sergeant-at-Arms to the Senate, greeting:*

"You are hereby commanded to deliver to and leave with John Pickering, esq., district judge of the district of New Hampshire, if to be found, a true and attested copy of the within writ of summons, together with a like copy of this precept, showing him both; or in case he can not with convenience be found, you are to leave true and attested copies of the said summons and precept at his usual place of residence; and in whichever way you perform the service, let it be done at least thirty days before the appearance day mentioned in the said writ of summons. Fail not, and make return of this writ of summons and precept, with your proceedings thereon indorsed, on or before the appearance day therein mentioned in said writ of summons."

Witness, Aaron Burr, Vice-President of the United States of America and President of the Senate thereof, at the city of Washington, this 12th day of January, in the year of our Lord 1804, and of the Independence of the United States the twenty-eighth.

Which precept shall be signed by the Secretary of the Senate and sealed with their seal.

Third. *Resolved*, That the Secretary of the Senate be, and he is hereby, directed to pay the necessary expenses arising upon the process aforesaid, after

[29] Annals, p. 323.
[30] Annals, pp. 323, 325.

the same shall be allowed by the President of the Senate for the time being, out of the fund appropriated to defray the contingent expenses of the two Houses of Congress, and the Secretary of the Senate is hereby authorized and directed to advance out of said fund, to said James Mathers, for his traveling expenses, the sum of two hundred dollars, to be by said James Mathers accounted for in a final settlement for his services.

Fourth. *Resolved*, That the Secretary of the Senate do acquaint the House of Representatives of the foregoing resolutions, and deliver to them a copy of the same.

Mr. Tracy, from the committee last mentioned, further reported in part, and the report was amended, as follows:

Resolved, That whenever application shall be made to the Secretary of the Senate for a subpoena or subpoenas for witnesses by the House of Representatives, either by their managers of the impeachment or in any other proper way, or by the party impeached or his counsel, acknowledged as such by the Senate sitting as a court of impeachments, he shall issue to such applicant a subpoena or subpoenas in the following form, viz:

"To [here name the witnesses and residence] greeting: You and each of you are hereby commanded, laying aside all excuses, to appear before the Senate of the United States, in their capacity of a court of impeachments, on the——— day of ———, at the Senate Chamber, in the city of Washington, then and there to testify your knowledge in the cause which is before said court of impeachments for trial, in which the House of Representatives have impeached John Pickering, judge of the district court for the district of New Hampshire, of high crimes and misdemeanors. Fail not."

Witness, Aaron Burr, Vice-President of the United States of America and President of the Senate thereof, at the city of Washington, this ——— day of ———, in the year of our Lord 1804, and of the Independence of the United States the twenty-eighth.

Which shall be signed by the Secretary of the Senate and sealed with their seal.

Which subpoenas shall be directed in every case to the marshal of the districts where such witnesses reside, to serve and return.

Resolved, That the Secretary of the Senate do issue twelve subpoenas for witnesses in the above form for the use of the said Pickering, with blanks therein for such witnesses as he, the said Pickering, may think proper to summon, which subpoenas shall be delivered by the Sergeant-at-Arms to him at the time he shall serve the summons aforesaid on the said Pickering.

As amended, the report was agreed to, yeas 23, nays 5.

It was then—

Ordered, That the Secretary lay these resolutions before the House of Representatives.

The above resolutions were communicated to the House by message on this day,[31] and on January 13 were read and laid on the table. The resolutions of the Senate are printed in full in the House Journal.

On January 13[32] the high court appears to have agreed on a "form of direction to the marshal for the service of the subpoena:"

[L. S.] THE SENATE OF THE UNITED STATES OF AMERICA, SITTING AS A COURT OF IMPEACHMENTS.

To the Marshal of the District of ——:

You are hereby commanded to serve and return the within subpoena according to law.

Dated at Washington this ——— day of ———, in the year of our Lord 1804, and of the Independence of the United States the twenty-eighth.

It does not appear that this form was communicated to the House of Representatives.

[31] House Journal, pp. 531, 533, 534.
[32] Annals, p. 326.

2330. Pickering's impeachment continued.

Returns of the Sergeant-at-Arms on the summons and a subpoena in the Pickering trial were read in the court before the return day.

On February 9,[33] in the high court, the following returns were filed:

UNITED STATES OF AMERICA, *ss:*

I, James Mathers, Sergeant-at-Arms to the Senate of the United States, in obedience to the within summons, did proceed to the house of the within-named John Pickering on the 25th day of January, in the year 1804, and did then and there leave a true copy of the said writ of summons, together with a true copy of the articles of impeachment annexed, with him, the said John Pickering.

JAMES MATHERS.

UNITED STATES OF AMERICA, *ss:*

I, James Mathers, Sergeant-at-Arms to the Senate of the United States, did, on the twenty-sixth day of January, in the year one thousand eight hundred and four, proceed to the house of the within-named Michael McClary and served this subpoena by reading the same and leaving with him a copy thereof.

JAMES MATHERS.

On February 20 these returns were read in the high court.

2331. Pickering's impeachment continued.

Rules adopted by the Senate as a court to govern the trial of Judge Pickering.

The Senate sitting as a court did not communicate to the House the rules for governing the trial.

By the rules for the Pickering trial the President of the Senate was given general authority to direct forms of proceeding not otherwise provided for.

Form of oath taken by the Sergeant-at-Arms and entered on the record, on the making of the return of service of summons on Judge Pickering.

Rule framed to govern ceremonies for appearance and answer of respondent in the Pickering impeachment.

The rules for the Pickering trial provided that a record should be made if respondent appeared in person or by counsel, or if he failed to appear.

Rule for offering motions during the Pickering trial.

In the Pickering trial a rule provided that the Senate might retire for consultation on demand of one-third.

The rule of the Pickering trial required all decisions to be in open court, by yeas and nays, and without debate.

Form of oath and method of examination for witnesses in the Pickering trial.

Rule of the Senate, in the Pickering trial, for examination of a Senator.

The rules of the Pickering trial provided that a question by a Senator should be in writing and be put by the Presiding Officer.

On March 1[34] Mr. Tracy, from the committee appointed by the Senate to examine precedents and prepare forms, reported to the court (not to the Senate) the following resolutions, which were agreed to by the court:

[33] Annals, p. 326.
[34] Annals, pp. 326, 327; Senate Journal, p. 368.

Resolved, That the President of the Senate shall direct all the forms of proceeding, while the Senate are sitting as a court to impeachments, as to opening, adjourning, and all forms during the session not otherwise specially provided for by the Senate.

And that the President of the Senate be requested to direct the preparations in the Senate Chamber for the accommodation of the Senate while sitting as a court, and for the reception and accommodation of the parties to the impeachment, their counsel, witnesses, etc.

And that he be authorized to direct the employment of the marshal, or any officer of officers of the District of Columbia during the session of the court of impeachments whose services he may think requisite and which can be obtained for the purpose.

And all the expenses arising under this resolution, after being first allowed by the President of the Senate, shall be paid by the Secretary, out of the fund appropriated to defray the contingent expenses of both Houses of Congress.

Resolved, That on the 2d day of March instant, at 1 o'clock, the legislative and executive business of the Senate be postponed, and that the court of impeachments shall then be opened, after which the process, which, on the 12th day of January last, was directed to be issued and served on John Pickering, and the return thereof, shall be read, and the Secretary of the Senate shall administer an oath to the returning officer in the following form, to wit:

"I, James Mathers, do solemnly swear that the return made and subscribed by me, upon the process issued on the 12th day of January last by the Senate of the United States against John Pickering, is truly made, and that I have performed said services as there described, so help me God."

Which oath shall be entered at large on the records.

The Secretary shall then give notice to the House of Representatives that the Senate, in their capacity of a court of impeachments, are ready to proceed upon the impeachment of John Pickering in the Senate Chamber, which Chamber is prepared with accommodations for the reception of the House of Representatives.

Resolved, That counsel for the parties shall be admitted to appear and be heard upon said impeachment. And upon the attendance of the House of Representatives, their managers, or any person or persons admitted to appear for the impeachment, the said John Pickering shall be called to appear and answer the articles of impeachment exhibited against him. If he appears, or any person for him, the appearance shall be recorded, stating particularly if by himself or if by agent or attorney, naming the person appearing and the capacity in which he appears. If he does not appear either personally or by agent or attorney the same shall be recorded. All motions made by the parties or their counsel shall be addressed to the President of the Senate, and, if he shall require it, shall be committed to writing and read at the Secretary's table, and after the parties shall be heard upon such motion the Senate shall retire to the adjoining committee room for consideration, if one-third of the members present shall require it; but all decisions shall be had in open court, by ayes and noes and without debate, which shall be entered on the records.

Witnesses shall be sworn in the following form, viz: "I, A B, do swear (or affirm, as the case may be) that the evidence I shall give to this court in the case now depending shall be the truth, the whole truth, and nothing but the truth, so help me God."

Witnesses shall be examined by the party producing them, and then cross-examined in the usual form.

If a Senator is called as a witness he shall be sworn and give his testimony standing in his place.

If a Senator wishes a question to be put to a witness it shall be reduced to writing and put by the President.

These rules were not communicated to the House of Representatives.

2332. Pickering's impeachment continued.

Ceremonies at the calling of Judge Pickering to answer the articles of impeachment.

The House did not accept the invitation of the Senate to accompany its managers at the return of summons in Pickering's impeachment.

On the same day, in the high court, the summons to John Pickering was read, together with the return made thereon by the Sergeant-at-Arms, and the oath prescribed was administered to the returning officer by the Secretary.

Subpoenas having been issued in the form prescribed and directed to Ebenezer Chadwick and others, the following return was made to them respectively:

NEW HAMPSHIRE DISTRICT, *ss:*

January 28, 1804.

Pursuant to this precept, I have served the same by reading it to the within-named Ebenezer Chadwick, etc.

MICHAEL MCCLARY,
Marshal for the New Hampshire District.

Then it was, by the high court of impeachments—

Ordered, That the Secretary give notice to the House of Representatives that the Senate, in their capacity of a court of impeachments, are ready to proceed upon the impeachment of John Pickering in the Senate Chamber, which Chamber is prepared with accommodations for the reception of the House of Representatives, and that the Secretary communicate a copy of the regulations agreed on to that House.

On March 2 [35] the substance of this order was by message communicated to the House, whereupon it was—

Resolved, That the managers appointed on the 2d of January last do now attend in the Senate Chamber for the purpose of conducting the impeachment against John Pickering on the part of this House.

It does not appear that attendance by the House itself was proposed.

Thereupon the managers attended in the high court, whereupon John Pickering was three times called to answer the articles of impeachment exhibited against him by the House of Representatives, but came not.

2333. Pickering's impeachment continued.

No appearance was made on behalf of Judge Pickering and no answer was made to the articles of impeachment.

In the Pickering impeachment counsel for respondent's son presented a petition of the latter setting forth that his father was insane, and asking for time to show this.

In the Pickering case, against the objection of the managers, the court determined to hear the counsel of respondent's son and evidence to show the insanity of the accused.

On a question of permitting counsel for respondent's son to appear in the Pickering trial, the said counsel was not permitted to argue.

The Vice-President then submitted a petition of Jacob S. Pickering, son of John Pickering, and a letter from Robert G. Harper, inclosed to the Vice-President.

PETITION OF JACOB S. PICKERING.

At a court of impeachments holden before the honorable the Senate of the United States of America, sitting in their capacity of a high court of impeachment at the city of Washington, on the 2nd day of March, 1804:

[35] House Journal, p. 613; Annals, p. 1087.

The House of Representatives of the United States *v.* John Pickering, judge of the district court for the district of New Hampshire.

Jacob S. Pickering, of Portsmouth, in the district of New Hampshire, and son of the said John Pickering, against whom articles of impeachment have been exhibited by the House of Representatives of the United States, conceives it his duty most respectfully to state to this high and honorable court the real situation of the said John Pickering, the facts and circumstances relative to said articles, wherein he stands charged of supposed high crimes and misdemeanors, and to request that this court would grant him such term of time as they shall think fit and reasonable to substantiate this statement.

Your petitioner will be able to show that at the time when the crimes wherewith the said John stands charged are supposed to have been committed, the said John was, and for more than two years before, and ever since has been, and now is, insane, his mind wholly deranged, and altogether incapable of transacting any kind of business which requires the exercise of judgment, or the faculties of reason; and, therefore, that the said John Pickering is incapable of corruption of judgment, no subject of impeachment, or amenable to any tribunal for his actions.

That this derangement has been constant and permanent, every day of his life completely demonstrating his insanity; every attempt for his relief, which has been prescribed by the faculty who have been consulted on his case, has proved unavailing, and his disorder has baffled all medical aid.

Your petitioner is well aware that the most conclusive evidence of the aforegoing fact would result from an actual view of the respondent, which unfortunately, by reason of his great infirmities can not now be, but at the hazard of his life—he is wholly unable at this inclement season to support the fatigue of so long a journey; yet if the respondent's life be spared, and his health in any degree restored, it will be the endeavor of your petitioner that the said John shall make his personal appearance before this honorable court at any future day they shall think proper to assign.

Your petitioner will be able to show, any pretense to the contrary notwithstanding, that the decisions made in the cause stated in the first article of impeachment, although not the result of reflection, or grounded on any deductions of reason, were, nevertheless, correct, perfectly consonant to the principles of justice, and conformable to the laws of the land; and the refusal of the said judge to grant the appeal claimed by the said John S. Sherburne, in behalf of the United States, was not against law, or to the injury of the public revenue, as the third article of the impeachment supposes; there being no law to warrant such appeal in such a case.

While, with deep humility, your petitioner admits and greatly laments the indecorous and improper expressions used by the said judge on the seat of justice, as mentioned in the last article of impeachment, he will clearly evince the injustice of that part thereof which respects his moral character, and show abundantly, that from his youth upward, through a long, laborious and useful life, and until he was visited by the most awful dispensation of Providence, and the most deplorable of all human calamities, the loss of reason, he was unexceptionable in his morals, remarkable for the purity of his language, and the correctness of his habits, and the deviations in these particulars now complained of, are irresistible evidence of the deranged state of his mind.

When this high and honorable court shall take into their consideration the situation of this respondent, oppressed with infirmity, incapable of making arrangements for his defense, the inclemency of the season, his great distance from the place of trial, and the shortness of notice—when your honors reflect on the high and atrocious crime with which he stands charged; in the decision of which is involved, not his life (indeed his remains of life would be but a slender sacrifice), but that which, to an honest mind, is more dear than life itself, his good name—when you advert to the consequences attached to a conviction; the indelible stigma which will befall a numerous family whose only patrimony was the unsullied reputation of their parent, which they have ever cherished, and of which they fondly, perhaps too fondly, hoped, no time, or circumstance, or adverse fortune could deprive them—when your honors shall think of these things, your petitioner has strong confidence that the wisdom and justice of this court will permit a respondent, whose integrity until now has been unquestioned; who has sustained offices high and honorable, through a long life, and the general tenor of whose character and conduct has hitherto furnished him with a coat of armor against the assaults of his enemies, but who is now incapable of defending himself, to be defended by his friends.

Audi alteram partem is a maxim held in reverence wherever liberty yet remains. The Senate of America will be the last tribunal on earth that will cease to respect it; they will never condemn unheard; they will never refuse time for a full and impartial trial.

That time, that impartial trial, your petitioner prays for; the charity of the law presumes the innocence of the respondent; and your petitioner, also, respectfully entreats that, in the meantime, and more especially as the evidence on which the impeachment is founded, was taken ex parte, no unfavorable impressions may be made on the minds of this honorable court, by any report or extra-judicial representations which may have been made on the subject before them.

JACOB S. PICKERING.

LETTER OF ROBERT G. HARPER

SIR: Mr. Jacob S. Pickering, the son of Judge Pickering, of New Hampshire, has forwarded to me, through one of his friends here, the inclosed petition, with a request that I will lay it before the court of impeachments, and will appear on his part, if permitted, and support the prayer of it. I am also furnished with several depositions, showing that Judge Pickering, from bodily infirmity and total derangement of mind, is wholly incapable of appearing before the court at this time, of making a defense, or of giving authority to any person to appear for him.

The process of subpoena heretofore issued by the court not being compulsory, and Judge Pickering's narrow circumstances not enabling his son to defray the expenses of the witnesses whose testimony it is important for him to produce, it was judged necessary to serve the subpoena. The object of the petition is to obtain a postponement of the trial, and either compulsory process, or an order to take depositions, which may be received in evidence. Be pleased, sir, to lay the petition before the court, and to inform me whether I shall be received to appear on the part of the petitioner, Mr. Jacob S. Pickering, in its support. In that case I will attend in the capacity of agent or counsel for the petitioner, and submit to the court the reasons and proofs with which I am furnished in support of his application.

With the highest respect, I have the honor to be, sir, your most obedient very humble servant,

ROBERT G. HARPER.

The VICE-PRESIDENT OF THE UNITED STATES.

The President inquired if Mr. Harper was in court, and invited him to a seat within the bar, which having taken, he made the following address:

Mr. President: Before I proceed to address this honorable court in the case now before it, I think it proper to repeat explicitly what is stated in the letter just now read, that I do not appear as the counsel, agent, or attorney of Judge Pickering, or by virtue of any authority derived from him, he being in a state of absolute and long-continued insanity, can neither appear himself nor authorize another to appear for him. I present myself to this honorable court, at the request of Jacob S. Pickering, son of Judge Pickering, stating his father's insanity, and praying that time may be allowed for collecting and producing complete proof of the melancholy fact. This application for postponement I am prepared to support by depositions now in my possession; and it is also my intention, if permitted, to make a further application on the part of Judge Pickering for compulsory process to compel the attendance of such witnesses as it may be necessary to produce in proof of the fact of insanity, or for an order to take their depositions in writing on interrogatories, and notice to the prosecutors. It rests with this honorable court whether it will receive such an application, and hear counsel so appearing in its support.

After a short pause, Mr. Harper again rose and inquired whether his appearance in support of the petition would be construed as the appearance of John Pickering by counsel.

The President [36] answered that he presumed that it would not be so construed.

[36] Aaron Burr, of New York, Vice-President and President of the Senate.

Mr. Nicholas, on behalf of the House managers, objected to the hearing of Mr. Harper in any other capacity than as counsel of the accused, and remarked that as Mr. Harper disclaimed appearing in that capacity, he could not in his opinion be heard. Other managers spoke, especially Mr. Rodney, who said:

I understand the President as having declared that, agreeably to the rules of proceeding adopted by the Senate, no person can be heard in this case but the accused, or his agent or counsel.

The Vice-President nodded assent.

Mr. Rodney continued:

I also understand the gentleman who appeared on this occasion, as clearly and explicitly stating that he does not appear as the counsel of Mr. Pickering, nor does he wish it so to be understood. That gentleman has informed us in a very fair and candid manner of the only character in which he does appear, and has assumed very properly and correctly the only ground upon which he wishes to stand. He has in positive terms disavowed the idea of his being the agent or counsel of the accused, because he has protested against Mr. Pickering's being affected by any act done by him. On this single ground, then, I respectfully submit whether it would be proper to hear the gentleman under these circumstances, and whether it be not manifested that he does not come within the rules laid down by the Senate for the government of this high court of impeachments.

But if the gentleman is to be heard on this subject in the anomalous character in which he appears, with a view of postponing the proceedings of this court, it will first be necessary for the court to decide that the case is properly before them, agreeably to the rules which have been established. If no appearance in person or by attorney has been entered, unless proceedings have been had which they shall consider tantamount to an appearance, there is no cause regularly in court, and it would be idle for any person to talk of postponing the consideration of that which really was not before the court. A question of this kind must, from the nature of it, ever be incidental to the principal or main question. When a writ is in court according to the rules of the court, a motion for postponment may, with propriety, if the circumstances justify it, be made. This must always be a subsequent consideration, after the court are in full possession of the case. Agreeably to the correct course of proceeding in ordinary courts, until bail and appearance, there can be no case in court. The party has no day given him, because he is, until this takes place, considered to be out of court; nor would any counsel, though duly authorized, be heard in his behalf. There has, in this case, then, been no appearance in person or by agent or counsel. The accused has made default, and no agent or attorney has been recorded for him. Surely, then, *his* default should be first recorded, and if the court consider that after his having been duly served, and making default, they will proceed to a hearing and determination of the principal question, it will then be proper to listen to those which are necessarily incidental. It will be at this stage of the business competent for the court, if at all, to hear the gentleman. But I am decidedly of the opinion there is no period in which it will be proper so to do unless he claims this right as the agent or counsel of the accused. In that capacity he has a right to be heard; and in that capacity alone. Our Constitution has wisely secured to every man this privilege, and I would not deprive the humblest object in the community of this inestimable benefit. I flatter myself, therefore, that this honorable court will adhere strictly to the rules which they have prescribed for themselves, and that they will for these reasons, and those which have been assigned by my colleague, refuse the present application.

Mr. Harper inquired whether it would be regular in him to reply to these remarks?

The President said it would not: and immediately after put the question to the Senate, whether Mr. Harper should be heard in support of the prayer of the petition of Jacob S. Pickering.

Whereupon the Senate retired to a private Chamber, from which they returned about 3 o'clock, when the President advised the managers that the Senate would take further time to consider the question before them, and would make them acquainted with their decision.

Finally, with open doors, the court took a vote on the question:

Will the court hear evidence and counsel respecting the insanity of John Pickering, upon the suggestion contained in the petition of Jacob S. Pickering, and the letter of R. G. Harper?

It was decided in the affirmative, yeas 18, nays 12.

It was then—

Resolved, That, on the motion made and seconded, the court shall retire to the adjoining committee room, if one-third of the Senators present shall require it.

The court adjourned to 12 o'clock the next day.

2334. Pickering's impeachment continued.

The court having determined, in the Pickering impeachment, to hear counsel of a third person on a preliminary question, the managers withdrew to consult the House.

The Senate declined to await the consultation of the managers with the House before hearing evidence as to Judge Pickering's sanity.

The House, in the Pickering impeachment, deemed it unnecessary to approve the conduct of its managers in declining to discuss in the court a matter from a third party.

In the Pickering case the Presiding Officer ruled that in presenting affidavits to show the insanity of the accused only the pertinent parts should be read.

The Presiding Officer held that counsel of the son of Judge Pickering, admitted to show the insanity of the accused, might not offer a motion to the court.

On March 6,[37] the court was opened, and the managers of the impeachment, on the part of the House of Representatives, against John Pickering, attended.

Mr. Harper also attended.

The President informed Mr. Harper that the court would hear evidence and counsel respecting the insanity of John Pickering upon the suggestion contained in the petition of Jacob S. Pickering and the letter of R. G. Harper.

Mr. Nicholson, in behalf of the managers, said he was instructed to ask for the reading of the proceedings of the court on the last day of its sitting.

The clerk having read the record, by which it appeared that John Pickering had been called three times without appearing.

Mr. Nicholson inquired at what point of time it was intended that Mr. Harper should be heard, and whether this was to be a step preliminary to the trial.

The President said he could not undertake to give an explanation of the proceedings of the Senate, adding that their meaning must be gathered from the proceedings themselves.

Mr. Nicholson then said that he begged leave to state that the managers were ready to proceed with the trial of the articles preferred by the House of Representatives.

The President said that under the decision of the Senate it had been determined in the first instance to hear Mr. Harper in support of the petition of Jacob S. Pickering.

[37] Annals, p. 333.

Mr. Nicholson said he was instructed by the managers again to state that they were ready to support the articles of impeachment. They, however, not being at present under the consideration of the Senate, they did not consider themselves under any obligation to discuss a preliminary question raised by a third person unauthorized by the person charged. He was therefore instructed to state to the Senate that the managers would, under these circumstances, retire, and take the opinion of the House of Representatives respecting their further procedure.

The managers thereupon retired.

Then a proposition that the Senate retire to its private chamber was disagreed to, only six voting aye.

Mr. John Quincy Adams, apparently to second a suggestion of Mr. James Jackson, of Georgia, that proceedings should be delayed until the Senate had heard from the managers of the House of Representatives, moved an adjournment, but the motion was disagreed to, only 10 voting aye.

A motion by Mr. Robert Wright, of Maryland, that the counsel in support of the petition of J. S. Pickering be not heard until the return of the managers, or until their intention should be signified, was disagreed to, the ayes being seven.

Then Mr. Harper rose and presented affidavits, evidently ex parte, to show the insanity of Judge Pickering. One affidavit expressing the opinion that Judge Pickering could not "from his bodily infirmities" proceed on a journey to Washington, was ruled out by the President, as the order of the Senate confined the proof to the single allegation of insanity. On the presentation of another affidavit the President ruled that only the parts relating to insanity should be read.

After the reading of the affidavits,[38] Mr. Harper said this was the testimony on which he founded the application—which was to postpone the trial until such time as the court might think fit, in order to take depositions.

The President said:

It does not seem to me proper to receive any motion from you. The Senate will attend to what you have said and take proper order upon it.

Mr. Harper thereupon addressed the court briefly, expressing the wish that opportunity should be allowed and the necessary facilities afforded to obtain testimony.

The court thereupon adjourned.

In the House of Representatives,[39] meanwhile, a short time after the managers returned from the court, Mr. Nicholson, in their behalf, made to the House of Representatives the following communication:

That on Friday, the 2d of March, the managers, agreeably to the directions of the House, appeared at the bar of the Senate, to support the said articles of impeachment, when John Pickering was three times solemnly called, but did not answer or appear, either in person or by counsel. The President of the Senate then stated that he had received a letter, signed R. G. Harper, accompanying a petition, signed Jacob S. Pickering, who called himself the son of the party charged. The petition being read, was found to contain a statement of a variety of matter, particularly the insanity of Judge Pickering, upon which the prayer of the petition was founded for a postponement of the trial to some future day. Mr. Harper was called to the bar of the Senate; he entered, and stated that he wished it to be distinctly understood that he did not appear at the bar of the

[38] Annals, p. 342.
[39] House Journal, pp. 625, 626; Annals, p. 343.

Senate as counsel for John Pickering, from whom he had received no authority for that purpose; but that his object was to support the facts contained in the petition of Jacob S. Pickering, and the prayer thereof. There was a short pause, when Mr. Harper rose again and inquired whether his appearance in support of the petition would be construed as the appearance of John Pickering, by counsel. The President of the Senate answered, he presumed that Mr. Harper's appearance would not be considered as the appearance of John Pickering by counsel.

The managers, under these circumstances, felt themselves bound to object to Mr. Harper's being heard in any other capacity than as counsel for the party who was impeached; and briefly stated their reasons for the objection.

The Senate withdrew to a private chamber, where it is presumed the question was debated. The managers again appeared at the bar of the Senate this day, and were informed by the President that it had been resolved to hear Mr. Harper in support of the allegations contained in the petition of Jacob S. Pickering, and the prayer thereof. The managers inquired at what point of time it was intended that Mr. Harper should be heard, and whether this was to be a measure preliminary to the trial. The President of the Senate declared that he could not undertake to explain the resolutions of the Senate, but that their sense must be collected from the resolutions themselves. The managers then offered themselves ready for trial, declaring that they were prepared to open the prosecution on behalf of the House of Representatives, and that the witnesses were ready to prove the facts charged in the articles of impeachment. Upon this offer being made, the President of the Senate stated that he considered it to be the sense of the Senate that Mr. Harper was to be heard before the trial commenced.

The managers considered this as an irregular step, and not believing that they ought to discuss any petition presented to the Senate from a person who was not a party to the impeachment, and this, too, before the party charged, although duly notified, had appeared, either in person or by attorney, withdrew from the Senate Chamber. They will not feel themselves either bound or authorized to appear again until the Senate shall inform them that they are prepared to proceed in the trial, unless specially directed by this House.

Mr. John Smilie, of Pennsylvania, thereupon proposed the following:

Resolved, That this House doth approve of the conduct of the managers appointed to support the articles of impeachment in the case of John Pickering, as stated in their report of this day, and that the said managers do not appear at the bar of the Senate, until they shall be specially instructed by this House.

There was objection to the resolution on the ground that it was not necessary for the House to express its opinion of the conduct of the managers at every stage. There was so much objection that Mr. Smilie on the next day withdrew the resolution.

2335. Pickering's impeachment, continued.

After hearing evidence as to the sanity of the accused, the court of impeachment notified the House of its readiness to hear the managers on the articles.

There being no appearance for Judge Pickering, witnesses presented by the managers were not cross-examined, except for a few questions by the Presiding officer.

On March 7,[40] in the high court of impeachments, it was ordered that the Secretary inform the House of Representatives that the court was open and ready to receive and hear the managers in support of the articles of impeachment. This motion was agreed to by a vote of yeas 19, nays 8.

Accordingly, on March 8,[41] the court was opened, the managers attended, and one of them, Mr. Early, after opening remarks, pro-

[40] Annals, p. 345; House Journal, pp. 626, 627.
[41] Annals, p. 346. The Senate Journal simply records the fact of the sitting of the court of impeachments on this as on other days.

ceeded to produce testimony in support of the first article of impeachment, and then, in order, evidence supporting the other articles. This evidence consisted of the reading of statutes of the United States, an attested copy of the record of the court, with the seal of said court annexed, and the examination of witnesses.

Judge Pickering not being represented by counsel, the witnesses were not cross-examined, except in certain instances [42] when the President addressed questions to a witness.

The testimony tended to substantiate the charge that the said judge was an inebriate.

Mr. Nicholson then informed the court that the managers here closed the testimony, and then the managers withdrew.

2336. Pickering's impeachment, continued.

No defense being made in the Pickering impeachment, the two Senators from the State of the accused were examined at suggestion of the court.

In the Pickering case one of the managers submitted the case finally without extended argument.

The Senate declined to postpone the Pickering trial after the evidence had been submitted.

On March 9,[43] on the suggestion of Mr. Tracy, the Senator who was chairman of the committee having in charge the preparation of forms of procedure of the trial, Simeon Olcott and William Plumer, the Senators from New Hampshire, were respectively sworn and affirmed. They testified that in their opinion the troubles of Judge Pickering were not due to intemperance. Mr. Plumer thought the intemperance the result of insanity.

Four witnesses were introduced, at whose suggestion does not appear, and testified in rebuttal.

Mr. Nicholson then observed that the managers would withdraw for a few minutes. Accordingly they withdrew, and shortly returned.

Mr. Nicholson then, in their behalf, addressed the court briefly, saying that he was directed by the managers to inform the court that they submitted the articles on the evidence offered, entertaining no doubt of full justice being done by the decisions of the Senate.

Thereupon the managers retired.

Mr. Tracy then offered the following motion:

Resolved, As the opinion of this court, that the proceedings on the articles of impeachment exhibited by the House of Representatives against John Pickering be postponed to the —— day of —— next.

This resolution was disagreed to, yeas 10, nays 20.

Thereupon the court adjourned to the next day.

2337. Pickering's impeachment, continued.

In the absence of the Vice-President a President pro tempore was chosen to preside over the court trying Judge Pickering.

The Senate informed the House of the day and hour fixed for pronouncing judgment in the Pickering impeachment.

The court of impeachment declined to postpone judgment until Judge Pickering could be brought personally before it for inspection as to sanity.

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[42] Annals, p. 357.
[43] Annals, pp. 359, 362.

On March 10 [44] the record of the court of impeachment shows:

Mr. Franklin was chosen President pro tem.

The Journal of the Senate for this day shows that the Vice-President was absent and that the Senate chose Mr. Jesse Franklin, of North Carolina, President pro tempore.[45]

On this day, also the Senate, before sitting as high court of impeachments, ordered, [46] by a vote of yeas 20, nays 9—

That the Secretary do acquaint the House of Representatives that the court of impeachments will, on Monday at 12 o'clock, proceed to pronounce judgment on the articles of impeachment exhibited by them against John Pickering.

Afterwards, the high court of impeachments having convened, Mr. Samuel White, of Delaware, submitted the following: [47]

Resolved, That this court is not at present prepared to give their final decision upon the articles of impeachment preferred by the House of Representatives against John Pickering, district judge of the district of New Hampshire, for high crimes and misdemeanors, the said John Pickering not having appeared, or been heard, by himself or by counsel; and it having been suggested to the court by Jacob S. Pickering, son of the said John Pickering, that the said John Pickering, at the time of the conduct charged against him in the said articles of impeachment as high crimes and misdemeanors, was, and yet is, insane, which suggestion has been supported by the testimony of two members of the court and by the affidavits of sundry persons, whose integrity is unimpeached; and it being further suggested in the said petition that at such future day as the court may appoint the body of the said Pickering shall be produced in court, and further testimony in his behalf, which will enable the court to judge for themselves as to the insanity of the said John Pickering and to act more undertsandingly in the premises: but that the said John Pickering, owing to bodily infirmity, could not be brought to court at present, at so great a distance, and at this inclement season of the year, without imminent hazard of his life.

Mr. Wilson Carey Nicholas, of Virginia (not Mr. Nicholson, the House manager) and Mr. Robert Wright, of Maryland, and others, objected to the resolution as not being in order.

Mr. Joseph Anderson, of Tennessee, asked if it would be in order to move an amendment to it.

Mr. John Quincy Adams, of Massachusetts, said he would object to any amendment to it, as, by the rule of the court, a gentleman had a right to a vote upon any specific proposition he might please to submit connected with the trial.

Mr. Samuel White, of Delaware, called for the reading of the rule.

Mr. Anderson then moved that the resolution submitted by the gentleman from Virginia yesterday be taken up as being entitled to be acted upon first.

The President pro tempore declared that the resolution of the gentleman from Delaware was fairly before the court and must be disposed of in some way before anything else could be taken up.

A motion for postponing the further consideration of it was then made and withdrawn.

Mr. Nicholas hoped it would not be permitted to go upon the journals of the court.

Mr. Jackson moved the previous question, viz: "Shall the main question be now put?"

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[44] Annals, p. 862; Senate Journal, p. 372.

[45] It seems hardly necessary to support that the court of impeachments ratified this selection of the Senate. The records of the court are not made with technical care, and the entry probably refers to action of the Senate.

[46] Senate Journal, p. 373; House Journal, p. 682. The record of the court of impeachment also shows the adoption of this order.

[47] Annals, p. 862.

Mr. White hoped that whatever question should be taken on the subject should be by yeas and nays; that his resolution and the manner in which it might be got rid of should be seen and understood.

Mr. Anderson then moved to amend the resolution by striking out the words, "not having been heard by himself or counsel," and all after the words "was, and yet is, insane" to the end of the resolution.

On motion of Mr. Jonathan Dayton, of New Jersey, the gallaries were cleared and the doors closed.

At 3 o'clock the doors were opened and the question was taken upon the resolution as at first submitted—yeas 9, nays 19.

So the resolution was disagreed to.

2338. Pickering's impeachment, continued.

The House attended its managers to the Senate to hear the Senate pronounce judgment in the Pickering impeachment.

The House having heard judgment in the Pickering impeachment, the managers made no report, and no record appears on the House Journal.

On March 12,[48] in the House of Representatives, it was

Ordered, That this House do now attend in the Senate Chamber to hear the Senate, in their capacity of a court of impeachments, pronounce judgment on the articles of impeachment exhibited against John Pickering, judge of the district court of the United States for the district of New Hampshire, agreeably to the notification contained in a message from the Senate, by their Secretary, on Saturday last.

The Speaker, attended by the Members, accordingly withdrew to the Senate Chamber for the purpose expressed in the foregoing order; and being returned, etc., proceeded to other business. The House Journal has no record of the decision of the court.

2339. Pickering's impeachment continued.

The court determined to confine the question in the judgment on Judge Pickering to the simple question of guilt on the charges.

The court, in the Pickering judgment, declined to permit an expression as to whether the offenses constituted high crimes and misdeameanors.

In conformity with English precedents the Senate pronounced judgment, article by article, in the Pickering case.

The final question in the Pickering judgment was on the removal of the accused from office.

Meanwhile, on the same day, the Court of Impeachment had convened, and Mr. Samuel White, of Delaware, inquired whether the question was to be taken on each article separately, as practiced in the House of Lords, or on the whole together. He hoped upon each separately, as gentlemen might wish to vote affirmatively on some and negatively on others, from which privilege they must be precluded by giving but one general vote of guilty or not guilty. He would, therefore, beg leave to submit to the consideration of the court the following as the form of the question to be put to each member upon each article of impeachment, viz:

Is John Pickering, district judge of the district of New Hampshire, guilty of high crimes and misdemeanors upon the charges contained in the—article of impeachment or not guilty?

[48] House Journal, pp. 642, 643; Annals, p. 1169.

For this form of question, Mr. White observed, he could adduce precedent. It was nearly the same as was used in the very celebrated case of Warren Hastings, and he presumed would collect the sense of the court with as much certainty as any that could be proposed, which was his only object.

After some conversation, Mr. Joseph Anderson, of Tennessee, moved the following as the form and prayed that it might be taken up:

Is John Pickering, district judge of the district of New Hampshire, guilty as charged in the—article of impeachment exhibited against him by the House of Representatives?

The President pro tempore declared that it would not be in order to take it up till the motion of the gentleman from Delaware was acted upon, as it was first before the court and had not yet been disposed of in any way, and was about to put the question following upon it, when—

Mr. Joseph Anderson, of Tennessee, mentioned that he had objections to the form of question proposed by the gentleman from Delaware and moved to strike out the words "of high crimes and misdemeanors."

On motion, the galleries were cleared and the doors closed. After some debate, Mr. White's form of question was lost—only 10 voting in favor of it and 18 against it.

Mr. Anderson's form was then adopted—yeas 18, nays 9.

Mr. White stated that he believed Judge Pickering had practiced much of the indecent and improper conduct charged against him in the articles of impeachment; that he had been seen intoxicated and heard to use very profane language upon the bench; that he had acted illegally and very unbecoming a judge in the case of the ship *Eliza*, as charged against him in the articles, but that he was very far from believing that any part of his conduct amounted to high crimes and misdemeanors or that he was in any degree capable of such an offense, because, after the testimony the court had heard, scarcely a doubt could remain in the mind of any gentleman but that the judge was actually insane at the time; and Mr. White wished to know whether it was to be understood by the two last votes just taken that the court intended only to find the facts and to avoid pronouncing the law upon them; that they could have it in view to say merely that Judge Pickering had committed the particular acts charged against him in the articles of impeachment and upon such a conviction, to remove him, without saying directly or indirectly whether those acts amounted to high crimes and misdemeanors or not; for in the several articles they are not so charged, though judgment is demanded upon them as such. Upon such a principle and by such a mode of proceeding good behavior, he observed, would be no longer the tenure of office; every officer of the Government must be at the mercy of a majority of Congress, and it would not hereafter be necessary that a man should be guilty of high crimes and misdemeanors in order to render him liable to removal from office by impeachment, but a conviction upon any facts stated in articles exhibited against him would be sufficient.

Mr. Jonathan Dayton, of New Jersey, observed that the honorable gentleman from Virginia seemed to be offended at the language of his honorable friend from Delaware, who, in speaking of the proceedings on the impeachment, had called them a mere mockery of

trial. To such terms, however, the ears of that honorable gentleman must be accustomed and accommodated, for, whilst either he or his friend had the honor of a seat in that body, they should designate this trial by no other character. It deserved no better appellation and would be thus characterized in all parts of the United States where these proceedings could be seen and understood.

That the conclusion of this exhibition might perfectly correspond with its commencement and progress, that the catastrophe might comport with the other parts of the piece, the Senate were now to be compelled, by a determined majority, to take the question in a manner never before heard of on similar occasions. They were simply to be allowed to vote, whether Judge Pickering was guilty as charged—that is, guilty of the facts charged in each article—aye or no. If voted guilty of the facts, the Senate was to follow, without any previous question whether those facts amounted to a high crime and misdemeanor. The latest reason of this course was, Mr. Dayton said, too obvious. There were numbers who were disposed to give sentence of removal against this unhappy judge, upon the ground of the facts alleged and proved, who could not, however, conscientiously vote that they amounted to high crimes and misdemeanors, especially when committed by a man proved at the very time to be insane and to have been so ever since, even to the present moment. The Constitution gave no power to the Senate, as the High Court of Impeachments, to pass such a sentence of removal and disqualification, except upon charges and conviction of high crimes and misdemeanors. The House of Representatives had so charged the judge and had exhibited articles in maintenance and support, as they themselves declared, of those charges. The Senate had received and heard the evidence adduced by the managers and had gone through certain forms of a trial, and they now, by a majority, dictated the form of a final question the most extraordinary, unprecedented, and unwarrantable. For himself, Mr. Dayton said, he felt at a loss how to act. He was free to declare that he believed the respondent guilty of most of the facts stated in the articles, but, considering the deranged state of intellect of that unfortunate man, he could not declare him guilty of the words of the Constitution; he could not vote it a conviction under the impeachment. Let the question be stated, as had been proposed by his honorable friend from Delaware, agreeably to the form observed in the well recollected case of Warren Hastings:

Is John Pickering guilty of a high crime and misdemeanor upon the charge contained in the first, the second, the third, or the fourth article of the impeachment, or not guilty?

Or, if the court preferred it, he should have no objection against taking the preliminary question, whether guilty of the facts charged in each article, provided they would allow it to be followed by another most important question, viz: Whether those facts, thus proved and found, amounted to a conviction of high crimes and misdemeanors, as charged in the impeachment, and expressly required by the Constitution. Both these forms of stating the question were, it was now too evident, intended to be refused by the majority, and thus a precedent established for removing a judge in a manner unauthorized by that charter.

Mr. White asked whether, after the question now before the court—which goes merely to settle, as gentlemen themselves believe, the point

whether Judge Pickering has committed the particular acts charged against him in the articles of impeachment or not—should be decided, it would then be in his power to obtain a vote of the court upon another question which, without presenting at present, he would state in his place, viz: Is it the opinion of this court that John Pickering is guilty of high crimes and misdemeanors, upon the charges exhibited against him in the articles of impeachment preferred by the House of Representatives?

The President pro tempore replied that he thought such a motion could not be received after the vote had been taken.

Mr. Wright submitted the following as the final question, viz:

Is the court of opinion that John Pickering be removed from the office of judge of the district court of the district of New Hampshire?

This form was agreed to.

2340. Pickering's impeachment, continued.

In the Pickering impeachment certain Senators retired from the court because dissatisfied with form of the question on final judgment.

Messrs. John Armstrong, of New York; Stephen R. Bradley, of Vermont; David Stone, of North Carolina; Jonathan Dayton, of New Jersey; and Samuel White, of Delaware, retired from the court. The two last not because they believed Judge Pickering guilty of high crimes and misdemeanors, but because they did not choose to be compelled to give so solemn a vote upon a form of question which they considered an unfair one, and calculated to preclude them from giving any distinct and explicit opinion upon the true and most important point in the case, viz, as to the insanity of Judge Pickering, and whether the charges contained in the articles of impeachment, if true, amounted in him to high crimes and misdemeanors or not.

2341. Pickering's impeachment, continued.

In final judgment the court found Judge Pickering guilty in all the articles and decreed his removal from office.

Final judgment being pronounced, the court of impeachment in Pickering's case adjourned sine die.

The question was then taken in the presence of the managers and of the House of Representatives, and decided as follows:

On the question—

Is John Pickering, district judge of New Hampshire, guilty as charged in the first article of impeachment exhibited against him by the House of Representatives?

It was determined in the affirmative, yeas 19, nays 7.

The same question was put, in the same way, on the three remaining articles, and decided by a like result.

On the question—

Is the court of opinion that John Pickering be removed from the office of judge of the district court of the district of New Hampshire?

It was determined in the affirmative, yeas 20, nays 6.

The court then adjourned sine die.

The Senate Journal [49] records simply the fact of the sitting and adjournment of the court, as on other days, and makes no mention of the result of the trial.

[49] Senate Journal, p. 374.

The Impeachment and Trial of Samuel Chase*

2342. The impeachment and trial of Samuel Chase, associate justice of the Supreme Court of the United States, in 1804.

The investigation of the conduct of Richard Peters, United States district judge for Pennsylvania, in 1804.

The impeachment of Mr. Justice Chase was set in motion on the responsibility of one Member of the House, sustained by the statement of another Member.

In the case of Mr. Justice Chase the House, after long debate and a review of precedents, decided to order investigation, although Members could give only hearsay evidence as to the facts.

English precedents reviewed in the Chase case on the question of ordering an investigation on the strength of common rumor.

The House declined to state by way of preamble its reason for investigating the conduct of Mr. Justice Chase and Judge Peters.

Form of resolution authorizing the Chase and Peters investigation in 1804.

Two of the seven Members of the committee for the Chase investigation were from the number opposing the investigation.

Mr. John Randolph, who had moved the Chase investigation, was made chairman of the committee.

On January 5, 1804,[1] Mr. John Randolph, of Virginia, arising in his place in the House, spoke of the necessity of "preserving unpolluted the fountain of justice," and then said:

> At the last session of Congress a gentleman from Pennsylvania did, in his place (on the bill to amend the judicial system of the United States, state certain facts in relation to the official conduct of an eminent judicial character, which I then thought, and still think, the House bound to notice. But the lateness of the session (for we had, if I mistake not, scarce a fortnight remaining) precluding all pos-

* Hinds' Precedents, vol. 3, p. 711 (1907).
[1] First session Eighth Congress, House Journal, p. 516, Annals, pp. 805–874.

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sibility of bringing the subject to any efficient result, I did not then think proper to take any steps in the business. Finding my attention, however, thus drawn to a consideration of the character of the officer in question, I made it my business, considering it my duty as well to myself as to those whom I represent, to investigate the charges then made, and the official character of the judge, in general. The result having convinced me that there exists ground of impeachment against this officer, I demand an inquiry into his conduct, and therefore submit to the House the following resolution:

"*Resolved*, That a committee be appointed to inquire into the official conduct of Samuel Chase, one of the associate justices of the Supreme Court of the United States, and to report their opinion whether the said Samuel Chase hath so acted in his judicial capacity as to require the interposition of the constitutional power of this House."

Objection being made that the House should have further information before taking a step, which would cast discredit on the character of a judge, Mr. John Smilie, of Pennsylvania, who had made the statement in the preceding Congress referred to by Mr. Randolph, arose and, in the course of his remarks, said:

A man of the name of Fries was prosecuted for treason in the State of Pennsylvania. Two of the first counsel at that bar, Mr. Lewis and Mr. Dallas, without fee or reward, undertook his defense. I mention their names to show that there could have been no party prejudices that influenced them. When the trial came on the judge behaved in such a manner that Mr. Lewis declared that he would not so far degrade his profession as to plead under the circumstances imposed upon him. Mr. Dallas declared that the rights of the bar were as well established as those of the bench; that he considered the conduct of the judge as a violation of those rights and refused to plead. The facts were these: The judge told the jury and the counsel that the court had made up their minds on what constituted treason; that they had committed their opinion to writing, and that the counsel must therefore confine themselves to the facts in the case before the court. The counsel replied that they did not dispute the facts, but that they were able to show that they did not constitute treason. The end of the affair was that the counsel retired from court, and the man was tried without counsel, convicted, and sentenced to death.

After this the Attorney-General wrote a letter to Messrs. Dallas and Lewis, requesting them to furnish their notes and opinions for the use of the President. They drew up an answer, in which they stated that the acts charged against Fries did not amount to treason, but were only sedition, and that they were so considered in the British courts. This letter was read to me by Mr. Dallas. After receiving the letter the President pardoned the man.

A lengthy debate ensued as to whether or not, upon the facts before it, the House would be justified in agreeing to the resolution. It was objected [2] that the statements of the Member from Pennsylvania, Mr. Smilie, were not entitled to much weight, since they were not what he knew himself, but only what he had received from others. Moreover, he had charged only what amounted at most to an error of judgment on the part of the judge. Some facts, it was argued,[3] ought to be adduced, and so important a step should not be taken hastily. It was stated [4] that the most parliamentary way would be for a gentleman to state in the form of a resolution the grounds of impeachment and then to refer such a resolution to a select committee for investigation. But it would be novel and unprecedented for the House to institute, without facts before it, an inquiry into the character of a high officer of the Government. The voting of an inquiry, so it was declared,[5] would be considered equivalent to the expression of an opinion that the House had evidence of the probable guilt of the judge. It had been urged that

[2] By Mr. Joseph Clay, of Pennsylvania, Annals, p. 810.
[3] By Mr. Roger Griswold, of Connecticut, Annals, p. 813.
[4] By Mr. John Dennis, of Maryland, Annals, p. 814.
[5] By George W. Campbell, of Tennessee, Annals, p. 817.

the House, in this case, had all the powers of a grand jury. But a grand jury had only the right to receive testimony. They might not send for it. If there was evidence in this case they might act on it, even though it be ex parte, although that would be going far. But so far there had been no statement satisfactorily showing probable cause. It was asserted,[6] that the opinion of any one Member, without presentation of facts, should not avail to set in motion this proceeding. The gentleman from Pennsylvania might have misconceived the information given to him. Objection was further made [7] that the proposed form of procedure was not warranted by the precedents. The case of Bolingbroke was not in point, since that impeachment was based on disclosures made during examination of the conduct of the ministry. In the Blount and Pickering cases the Executive had transmitted documents to the House. But in this case it was proposed to appoint a committee to search in the first instance for an accusation and then to look for proofs to justify it. The assertion was made [8] that there were no precedents to justify an assertion that common fame was sufficient ground for impeachment. The precedent of the Earl of Stratford was a gloomy and terrible precedent, unsusceptible of application under a Republican form of government. It was true that a member had risen in his place in the Commons and impeached Warren Hastings, but at the same time he exhibited specific charges of misconduct. The House was the grand inquest of the nation, and its practice ought to be in many respects analogous to that of a grand jury. It should not listen to murmurs and seek for guilt. The resolution before the House did not allege a single fact. It was urged [9] that never, so far as any precedents so far cited had shown, had an inquiry been commenced in Parliament without a statement of the facts to accompany the motion, and it was objected [10] that even if common rumor had once been ground for beginning proceedings in a period of rudeness and violence, the more improved system of modern jurisprudence should discard such a doctrine.

In favor of the resolution it was urged [11] that the purpose of the inquiry was to procure evidence. If the House already had the evidence there would be no need of the inquiry. The statement of a Member in his place, even though hearsay, was sufficient to cause inquiry. It was pointed out [12] that under the rules of the House—such was the respect due to a Member of the House—the statement of a Member that he possessed information proper to be communicated to the House was sufficient to cause the doors to be closed at once; and surely the request of a Member for a committee of inquiry ought to be of equal force. It was further urged [13] that the right to move an inquiry was one of the most important pertaining to the Representative. And it was pointed out [14] that the motion to inquire should not be confounded with the motion to impeach. There was, it was urged,[15] a great difference between the inquiry and the impeachment. The analogy between the function of the House in this matter and that of a grand jury was

[6] By Mr. Thomas Lowndes, of South Carolina, Annals, p. 825.
[7] By Mr. R. Griswold, of Connecticut, Annals, p. 837.
[8] By Mr. James Elliott, of Vermont, Annals, p. 846.
[9] By Mr. Thomas Griffin, of Virginia, Annals, p. 860.
[10] By Mr. Samuel W. Dana, of Connecticut, Annals, p. 870.
[11] By Mr. John Randolph, of Virginia, Annals, p. 811.
[12] By Mr. Smilie, of Pennsylvania, Annals, p. 821.
[13] By Messrs William Findley, of Pennsylvania, and Joseph H. Nicholson, of Maryland. Annals, pp. 826–838.
[14] By Mr. Nicholson, Annals, p. 844.
[15] By Mr. Samuel Thatcher, of Massachusetts, Annals, pp. 861, 862.

correct and forcible. Before a grand jury it was the right of any individual to apply for and demand an inquiry into the conduct of any person within their cognizance, and it was more especially the right of any member of the jury to make such a demand. In addition to Mr. Smilie, another Member, Mr. John W. Eppes, of Virginia, stated [16] his belief that in his State a general opinion prevailed that Judge Chase had acted indecently and tyranically in a case tried there. Mr. Eppes said he was not personally present at the trial; but he related what he believed to be the facts as to the case. It was urged [17] that in England common report was considered sufficient authority for similar inquiries. In this case common report from Maine to Georgia condemned the conduct of the judge, not only in the case of Fries, but in the case of a grand jury in Delaware and in the case of Callender in Virginia. The general sentiment of the country condemned [18] the judge. Moreover, the Representatives of two States lately came forward and opposed his being assigned to circuits which embraced their States. This single fact ought to make an impression on the House. But in this case a Member in his place had impeached the judge, and it was not necessary to rely on common report. As to precedents for the proposed action, the impeachments of Strafford, Bolingbroke, Oxford, and Ormond, Eyres and Hastings were referred to in English history. From American history a case of proceedings against certain judges in North Carolina in 1796 was cited.[19]

In the course of the debate it was agreed by the House that Judge Richard Peters, who was associated in the case with Judge Chase, should be included in an inquiry, should one be made. This amendment was agreed to, yeas 79, nays 37.[20]

On January 7,[21] Mr. John Dennis, of Maryland, proposed an amendment to the resolution, by prefixing the following preamble:

> Whereas information has been given to the House by one of its Members, that, in a certain prosecution for treason on the part of the United States against a certain John Fries, pending in the circuit court of the United States in the State of Pennsylvania, Samuel Chase, one of the Associate Justices of the Supreme Court of the United States, and Richard Peters, district judge for the district of Pennsylvania, by whom the said circuit court was then holden, did inform the counsel for the prisoner, that as the court had formed their opinion upon the point of law, and would direct the jury thereupon, the counsel for the prisoner must confine their argument before the jury to the question of fact only: and whereas it is represented that, in consequence of such determination of the court, the counsel did refuse to address the jury on the question of fact, and the said John Fries was found guilty of treason and sentenced by the court to the punishment in such case by the laws of the United States provided, and was pardoned by the President of the United States.

It was urged in behalf of this preamble that the Journal should show the grounds for the adoption of the resolution.

Mr. Joseph H. Nicholson, of Maryland, moved to amend the proposed preamble by striking out all after the word "whereas," where it first occurred, and inserting:

> Members of this House has stated in their places that they have heard certain acts of official misconduct alleged against Samuel Chase, one of the Associate Justices of the Supreme Court of the United States, and Richard Peters, judge of the district court of the district of Pennsylvania.

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[16] Annals, p. 868.
[17] By Mr. William Findley, Annals, p. 834.
[18] Statement by Mr. Smilie, Annals, p. 823.
[19] By Mr. James Holland, of North Carolina, Annals, p. 848.
[20] House Journal, p. 518.
[21] House Journal, p. 520; Annals, p. 874.

A division of the motion to strike out and insert was made,[22] and on striking out there appeared yeas 79, nays 41. Then the motion to insert was agreed to without division.

Mr. Randolph and others opposed the preamble, urging that it would tend to limit the general inquiry desired.

The question being taken on the preamble as amended, it was disagreed to without a division.

The original resolution, as it had previously been amended, was then agreed to [23] as follows, the yeas being 81, the nays 40:

Resolved, That a committee be appointed to inquire into the official conduct of Samuel Chase, one of the Associate Justices of the Supreme Court of the United States, and of Richard Peters, district judge of the district of Pennsylvania, and to report their opinion whether the said Samuel Chase and Richard Peters, or either of them, have so acted, in their judicial capacity, as to require the interposition of the constitutional powers of this House.

Thereupon the committee was appointed as follows: Messrs. John Randolph, jr., of Virginia; Joseph H. Nicholson, of Maryland; Joseph Clay, of Pennsylvania; Peter Early, of Georgia; Roger Griswold, of Connecticut; Benjamin Huger, of South Carolina, and John Boyle, of Kentucky.[24]

On January 10,[25] the House passed a resolution that the committee "be authorized to send for persons and papers."

On January 30 [26] Mr. J. Randolph, in the name of the committee appointed to inquire into the conduct of Samuel Chase and Richard Peters, stated that documents had been received by them which occupied a considerable bulk, the printing of which would considerably assist their investigation, by rendering them more convenient for perusal. He added that it would probably be necessary to print these papers for the information of the House when the report of the committee was made. He therefore moved the vesting in them authority to cause to be printed such papers as they might conceive proper. It was objected that the printing of a part of the documents might prejudice the case in advance; but on the part of the committee it was replied that it was not necessary that the printed documents be made public until the report should be made. The motion of Mr. Randolph was then agreed to.

2343. Chase's impeachment, continued.

The report recommending the impeachment of Mr. Justice Chase was considered in Committee of the Whole House.

The investigation which resulted in the impeachment of Mr. Justice Chase was entirely ex parte.

The House found that Judge Richard Peters had not so acted as to require impeachment.

The impeachment of Mr. Justice Chase was carried to the Senate by a committee of two.

Form of declaration used by the committee in presenting the impeachment of Mr. Justice Chase in the Senate.

Verbal report made by the committee that had carried the impeachment of Mr. Justice Chase to the Senate.

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[22] The rule at present does not permit such a division.
[23] House Journal, pp. 522, 523; Annals, p. 875.
[24] It is to be observed that two of the seven members of this committee represented the minority, who had opposed the investigation.
[25] House Journal, p. 525
[26] House Journal, p. 558; Annals, p. 959.

Form of the resolution directing the carrying of the Chase impeachment to the Senate.

The committee appointed to prepare articles in the Chase case were all of those who had favored the impeachment.

The article of impeachment in the Chase case were reported just before the close of the first session of the Congress.

On March 6 [27] Mr. Randolph submitted the report of the committee; which was referred to a Committee of the Whole House. On March 8 [28] Mr. Randolph submitted to the House an additional affidavit, which was referred also to the Committee of the Whole House.

On March 12 [29] the report of the committee was taken up in Committee of the Whole House for consideration. This report was as follows:

That in consequence of the evidence collected by them, in virtue of the powers with which they have been invested by the House, and which is hereunto subjoined, they are of opinion—

1. That Samuel Chase, esq., one of the associate justices of the Supreme Court of the United States, be impeached of high crimes and misdemeanors.

2. That Richard Peters, district judge of the district of Pennsylvania, has not so acted in his judiciary capacity as to require the interposition of the constitutional powers of this House.

Accompanying this report was a volume of printed testimony. Two members of the committee, Messrs. Huger and Griswold, did not concur in the report; but as it was not the practice in the House at that time to permit minority views, their dissent appears only from the debate. Mr. Huger declared [30] that the testimony on which it was proposed to proceed was "entirely ex parte." This was not denied. Mr. Huger based his opposition to the report on this ground.

The Committee of the Whole House, after considering the report, recommended the following:

Resolved, That Samuel Chase, esq., one of the associate justices of the Supreme Court of the United States, be impeached of high crimes and misdemeanors.

Resolved, That Richard Peters, district judge of the district of Pennsylvania, hath not so acted, in his judicial capacity, as to require the interposition of the constitutional power of this House.

The House agreed to the first resolution, yeas 73, nays 32. The second resolution was then agreed to without divisions.

Thereupon it was

Ordered, That Mr. John Randolph and Mr. Early be appointed a committee to go to the Senate, and, at the bar thereof, in the name of the House of Representatives and of all the people of the United States, to impeach Samuel Chase, one of the associated justices of the Supreme Court of the United States, of high crimes and misdemeanors; and acquaint the Senate that the House of Representatives will, in due time, exhibit particular articles of impeachment against him, and make good the same.

Ordered, That the committee do demand that the Senate take order for the appearance of the said Samuel Chase to answer to the said impeachment.

On March 13,[31] in the Senate, a message from the House of Representatives, by Messrs. J. Randolph and Early, two of their Members, was received, as follows:

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[27] House Journal, p. 620; Annals, p. 1093.
[28] House Journal, p. 630; Annals, p. 1124.
[29] House Journal, p. 643; Annals, pp. 1171–1181.
[30] Annals, p. 1180.
[31] Senate Journal, p. 374; Annals, p. 271.

Mr. President: We are ordered, in the name of the House of Representatives and of all the people of the United States, to impeach Samuel Chase, one of the associate justices of the Supreme Court of the United States, of high crimes and misdemeanors; and to acquaint the Senate that the House of Representatives will, in due time, exhibit particular articles of impeachment against him, and make good the same.

We are also ordered to demand that the Senate take order for the appearance of the said Samuel Chase to answer to the said impeachment.

On the same day,[32] in the Senate, it was ordered that the message be referred to Messrs. Abraham Baldwin, of Georgia; Joseph Anderson, of Tennessee, and William C. Nicholas, of Virigina, "to consider and report thereon."

On March 13,[33] in the House, Mr. John Randolph, from the committee appointed on the 12th instant, reported—

That, in obedience to the order of the House, the committee had been to the Senate, and in the name of the House of Representatives, and of the people of the United States, had impeached Samuel Chase, one of the associate justices of the Supreme Court of the United States, of high crimes and misdemeanors; and had acquainted the Senate that the House of Representatives will, in due time, exhibit particular articles against him and make good the same.

And further: That the committee had demanded that the Senate take order for the appearance of the said Samuel Chase to answer the said impeachment.

On motion it was—

Resolved, That a committee be appointed to prepare and report articles of impeachment against Samuel Chase, one of the associate justices of the Supreme Court of the United States, who has been impeached by this House, during the present session, of high crimes and misdemeanors; and that the said committee have power to send for persons, papers, and records.

Ordered, That Mr. John Randolph, Mr. Nicholson, Mr. Joseph Clay, Mr. Early, and Mr. Boyle be appointed a committee, pursuant to the said resolution.

All of this committee had favored the report in favor of impeachment.

On March 26[34] Mr. Randolph reported articles of impeachment, which were ordered printed. These articles do not appear in the Journal of the House.

Then, on March 27,[35] the Congress adjourned to the first Monday in November next.

2344. Chase's impeachment continued.

The proceedings in the Chase impeachment were continued after a recess of Congress; but in deference to the practice at that time the articles were recommitted for a new report.

The articles impeaching Mr. Justice Chase were considered article by article in Committee of the Whole.

Practice in considering and amending articles of impeachment in Committee of the Whole.

The House decided to retain in the articles of the Chase impeachment the old reservation of liberty to exhibit further articles.

The articles of impeachment in the Chase case appear in the House Journal in full at the time of their adoption.

Method by which the House amended and voted on the articles of impeachment in the Chase case.

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[32] Senate Journal, p. 375; Annals, p. 374.
[33] House Journal, p. 645; Annals, p. 1182.
[34] House Journal, pp. 689, 690; Annals, pp. 1237–1240.
[35] House Journal, p. 696.

On the second day of the next session, November 6,[36] Mr. Randolph raised a question as to the status of the articles of impeachment, it being then the practice of the House that pending business should begin anew at the first of a session.[37] As a result of this inquiry the report made at the last session was referred to a select committee, composed of the same members as the select committee of the preceding session, except that Mr. John Rhea, of Tennessee, succeeded Mr. Nicholson.

On November 30,[38] Mr. Randolph, from the select committee, reported articles of impeachment, which were nearly the same as those reported at the last session, with the addition of two new articles. The articles were referred to a Committee of the Whole House. An objection was made that the committee reporting in this case had been given no power of investigation, and yet that they had reported new articles not reported by the former committee, which had expired. This objection was not considered by the House.

On December 3,[39] the report was considered in Committee of the Whole House. The articles having been read, a question arose as to procedure, especially as to amendment; and the Chairman[40] gave it as his opinion that the proper method would be to take up the report by articles. This was done accordingly.

The first article being read, a motion was made to strike it out, whereupon the Chairman, with the approval of the committee so far as expressed, decided that, while the motion to strike out the first section of a bill would be in order, yet it seemed to him that in considering independent articles it would be preferable to take the sense of the Committee of the Whole on each article on a motion to concur with the action of the select committee which had reported the articles. This method was thereupon adopted.

Thereupon the Comittee of the Whole House went through the report article by article, amending, and where an article had several paragraphs, reading by paragraphs for amendment. And on each article, after an opportunity for amendment and after reading of testimony relating to it on demand of a Member, the question was put on concurring.[41] The committee decided, ayes 40, noes 50, that the testimony should not be read as a whole on each article, but only as called for by Members.

When the last article was read, Mr. James Mott, of New Jersey, moved[42] to strike out the words, declaring that the House "saved to itself the liberty of exhibiting at any time hereafter any further articles, or other accusation or impeachment against the said Samuel Chase," and further, that part which saved to the House "the right of replying to any such articles of impeachment or accusation which shall be exhibited to them." It seemed to him unfair that the House should reserve such a right to themselves. If there was anything more with which he ought to be charged, it ought to be now brought forward, and the accused should be informed at once how far they meant to go, in order to enable him the better to make his defense.

[36] Second session Eighth Congress, House Journal, p. 6; Annals, p. 680.
[37] The rule in this respect was modified in 1818.
[38] House Journal, p. 29; Annals, pp. 726–731.
[39] Annals, p. 728.
[40] Joseph B. Varnum, of Massachusetts, Chairman.
[41] Annals, pp. 731–746.
[42] Annals, p. 745.

Mr. Randolph argued that these reservations had been made in the articles of the Blount and Pickering impeachments, and he did not wish to see the liberties of the people or the rights of the House abridged. Mr. Mott admitted the practice, which had been followed in his own State.

Mr. Mott's motion was disagreed to.

The last article having been concurred in, the Committee of the Whole House rose and reported the articles with amendments.

On December 4,[43] the articles were considered in the House, the Journal containing them in full as reported originally by the select committee. Each article was considered by itself, and after opportunity to amend the question was taken "that the House do agree" to the article. On the last article a division was demanded, as it contained both a charge against Judge Chase and the protestation whereby the House reserved to themselves the "liberty of exhibiting at any time hereafter any further articles." The first portion of the article was agreed to, and then the question being taken on the second portion, it was agreed to, yeas 78, nays 32. The other votes on agreeing to the several articles had ranged as follows: yeas 70 to 84, nays 34 to 45. All amendments made in Committee of the Whole had been disagreed to, and no new ones were agreed to by the House.

The question having been taken on each article, the House then voted affirmatively on the question—

That the House do concur with the select committee in their agreement to the said articles of impeachment, as originally proposed, and hereinbefore recited.

2345. Chase's impeachment continued.

The House appointed seven managers, by ballot, for the trial of Mr. Justice Chase.

The managers chosen for the trial of Mr. Justice Chase had each voted for a portion, at least, of the articles.

The House overruled the Speaker and decided that a manager of an impeachment should be elected by a majority and not by a plurality.

Forms of resolutions directing the managers to exhibit in the Senate the articles of impeachment against Mr. Justice Chase.

In the Chase impeachment the message notifying the Senate that articles would be exhibited does not appear to have included the names of the managers.

The Senate notified the House of the day and hour when it would receive the managers to exhibit the articles impeaching Mr. Justice Chase.

The Senate as a court adopted a rule prescribing the ceremonies at the presentation of articles impeaching Mr. Justice Chase.

On December 5,[44] it was—

Resolved, That seven managers be appointed by ballot, to conduct the impeachment exhibited against Samuel Chase, one of the Associate Justices of the Supreme Court of the United States.

Thereupon the following were elected: Messrs. John Randolph, jr., of Virginia; Cæsar A. Rodney, of Delaware; Joseph H. Nichol-

[43] House Journal, pp. 31–44; Annals, pp. 747–762.
[44] House Journal, p. 44; Annals, pp. 762, 763.

son, of Maryland; Peter Early, of Georgia; John Boyle, of Kentucky; Roger Nelson, of Maryland, and George W. Campbell, of Tennessee.

Each of these managers had voted for a portion or all of the articles of impeachment.

On the first ballot the six first Members on the list had each a majority of the ballots; but Mr. Campbell had only a plurality.

A question arising, the Speaker,[45] after referring to the rule of the House, "In all other cases of ballot than for committees, a majority of the votes given shall be necessary to an election," held that Mr. Campbell was duly chosen.

A question arose, and after reference to precedents, which did not seem conclusive, Mr. Randolph appealed from the decision. And the question being taken, the decision of the Speaker was overruled, ayes 25, noes 50. Thereupon a second ballot was taken, at which Mr. Campbell received a majority.

Thereupon, on motion of Mr. Nicholson, it was—

Resolved, That the articles agreed to by this House, to be exhibited in the name of themselves and of the people of the United States, against Samuel Chase, in maintenance of their impeachment against him for high crimes and misdemeanors, be carried to the Senate by the managers appointed to conduct the said impeachment.

Ordered, That a message be sent to the Senate to inform them that this House have appointed managers to conduct the impeachment against Samuel Chase, one of the associate justices of the Supreme Court of the United States, and have directed the said managers to carry to the Senate the articles agreed upon by this House to be exhibited in maintenance of their impeachment against the said Samuel Chase; and that the Clerk of this House do go with the said message.

On December 6 [46] in the Senate the Clerk of the House delivered the message as follows:

Mr. President, I am directed to inform the Senate that the House of Representatives have appointed managers to conduct the impeachment against Samuel Chase, one of the associate justices of the Supreme Court of the United States, and have directed the said managers to carry to the Senate the articles agreed upon by the House to be exhibited in maintenance of their impeachment against the said Samuel Chase.

On December 7 [47] Mr. William B. Giles, of Virginia, from a committee appointed on November 30 "to prepare and report proper rules of proceeding to be observed by the Senate in cases of impeachment," made a report, which was read. With Mr. Giles on this committee were Messrs. Abraham Baldwin, of Georgia, John Breckenridge, of Kentucky, David Stone, of North Carolina, and Israel Smith, of Vermont.

Also on December 7 [48] it was—

Resolved, That the Senate will, at 1 o'clock this day, be ready to receive articles of impeachment against Samuel Chase, one of the associate justices of the Supreme Court of the United States, to be presented by the managers appointed by the House of Representatives.

Ordered, That the Secretary notify the House of Representatives accordingly.

Immediately thereafter, in the high court of impeachment,[49] it was—

[45] Nathaniel Macon, of North Carolina, Speaker.
[46] Senate Journal, p. 421.
[47] Senate Journal, p. 422.
[48] Senate Journal, p. 422; Annals, p. 21.
[49] Journal of High Court of Impeachment, Senate Journal, pp. 509, 510.

Resolved, That when the managers of the impeachment shall be introduced to the bar of the Senate and shall have signified that they are ready to exhibit articles of impeachment against Samuel Chase, the President of the Senate shall direct the Sergeant-at-Arms to make proclamation, who shall, after making proclamation, repeat the following words: "All persons are commanded to keep silence, on pain of imprisonment, while the grand inquest of the nation is exhibiting to the Senate of the United States articles of impeachment against Samuel Chase, one of the associate justices of the Supreme Court of the United States." After which the articles shall be exhibited; and then the President of the Senate shall inform the managers that the Senate will take proper order on the subject of the impeachment, of which due notice shall be given to the House of Representatives.[50]

2346. Chase's impeachment continued.

The articles of impeachment of Mr. Justice Chase.

Ceremonies at the presentation of the articles before the high court of impeachment in the Chase case.

In presenting to the court the articles impeaching Mr. Justice Chase, the chairman of the managers read them and then delivered them at the table.

The managers having carried to the Senate the articles impeaching Mr. Justice Chase, reported verbally to the House.

On the same day the message from the Senate announcing its readiness to receive the articles of impeachment was received in the House [51] and the managers repaired at 1 o'clock to the Senate Chamber. They were admitted,[52] and Mr. Randolph, the chairman, announced that they were—

the managers instructed by the House of Representatives to exhibit certain articles of impeachment against Samuel Chase, one of the associate justices of the Supreme Court of the United States.

The managers were requested by the President to take seats assigned them within the bar, and the Sergeant-at-Arms was directed to make proclamation in the words following:

Oyes! Oyes! Oyes!

All persons are commanded to keep silence, etc. [In words as prescribed by the resolution.]

After the proclamation the managers rose, and Mr. Randolph, their chairman, read the articles of impeachment, as follows:

Articles exhibited by the House of Representatives of the United States, in the name of themselves and of all the people of the United States, against Samuel Chase, one of the associate justices of the Supreme Court of the United States, in maintenance and support of their impeachment against him for high crimes and misdemeanors.

ART. 1. That unmindful of the solemn duties of his office, and contrary to the sacred obligation by which he stood bound to discharge them, "faithfully and impartially, and without respect to persons," the said Samuel Chase, on the trial of John Fries, charged with treason, before the circuit court of the United States, held for the district of Pennsylvania, in the city of Philadelphia, during the months of April and May, one thousand eight hundred, whereat the said Samuel Chase presided, did, in his judicial capacity, conduct himself in a manner highly arbitrary, oppressive, and unjust, viz:

1. In delivering an opinion in writing, on the question of law, on the construction of which the defense of the accused materially depended, tending to prejudice the minds of the jury against the case of the said John Fries, the prisoner, before counsel had been heard in his defense;

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[50] This is the exact form of resolution adopted on January 4, 1804, for the presentation of the articles of impeachment against Judge John Pickering. Senate Journal, Eighth Congress, pp. 494, 495.

[51] House Journal, p. 47; Annals, p. 89.

[52] Senate Impeachment Journal, pp. 509, 510.

2. In restricting the counsel for the said Fries from recurring to such English authorities as they believed apposite, or from citing certain statutes of the United States, which they deemed illustrative of the positions upon which they intended to rest the defense of their client;

3. In debarring the prisoner from his constitutional privilege of addressing the jury (through his counsel) on the law, as well as on the fact, which was to determine his guilt or innocence, and at the same time endeavoring to wrest from the jury their indisputable right to hear argument and determine upon the question of law, as well as the question of fact, involved in the verdict which they were required to give.

In consequence of which irregular conduct of the said Samuel Chase, as dangerous to our liberties as it is novel to our laws and usages, the said John Fries was deprived of the right, secured to him by the eighth article amendatory of the Constitution, and was condemned to death without having been heard by counsel, in his defense, to the disgrace of the character of the American bench, in manifest violation of law and justice, and in open contempt of the right of juries, on which ultimately rest the liberty and safety of the American people.

ART. 2. That, prompted by a similar spirit of persecution and injustice, at a circuit court of the United States, held at Richmond, in the month of May, 1800, for the district of Virginia, whereat the said Samuel Chase presided, and before which a certain James Thompson Callender was arraigned for a libel on John Adams, then President of the United States, the said Samuel Chase, with intent to oppress and procure the conviction of the said Callender, did overrule the objection of John Basset, one of the jury, who wished to be excused from serving on the trial, because he had made up his mind as to the publication from which the words, charged to be libelous in the indictment, were extracted: and the said Basset was accordingly sworn, and did serve on the said jury, by whose verdict the prisoner was subsequently convicted.

ART. 3. That with intent to oppress and procure the conviction of the prisoner, the evidence of John Taylor, a material witness on behalf of the aforesaid Callender, was not permitted by the said Samuel Chase to be given in, on pretense that the said witness could not prove the truth of the whole of one of the charges contained in the indictment, although the said charge embraced more than one fact.

ART. 4. That the conduct of the said Samuel Chase was marked, during the whole course of the said trial, by manifest injustice, partiality, and intemperance, viz:

1. In compelling the prisoner's counsel to reduce to writing, and submit to the inspection of the court, for their admission or rejection, all questions which the said counsel meant to propound to the above-named John Taylor, the witness.

2. In refusing to postpone the trial, although an affidavit was regularly filed stating the absence of material witnesses on behalf of the accused; and although it was manifest that, with the utmost diligence, the attendance of such witnesses could not have been procured at that term.

3. In the use of unusual, rude, and contemptuous expressions toward the prisoner's counsel; and in falsely insinuating that they wished to excite the public fears and indignation, and to produce that insubordination to law to which the conduct of the judge did at the same time manifestly tend.

4. In repeated and vexatious interruptions of the said counsel, on the part of the said judge, which at length induced them to abandon their cause and their client, who was thereupon convicted and condemned to fine and imprisonment.

5. In an indecent solicitude, manifested by the said Samuel Chase, for the conviction of the accused, unbecoming even a public prosecutor, but highly disgraceful to the character of a judge, as it was subversive of justice.

ART. 5. And whereas it is provided by the act of Congress passed on the 24th day of September, 1786, entitled "An act to establish the judicial courts of the United States," that for any crime or offense against the United States the offender may be arrested, imprisoned, or bailed, agreeably to the usual mode of process in the State where such offender may be found; and whereas it is provided by the laws of Virginia that upon presentment by any grand jury of an offense not capital the court shall order the clerk to issue a summons against the person or persons offending to appear and answer such presentment at the next court; yet the said Samuel Chase did, at the court aforesaid, award a capias against the body of the said James Thomson Callender, indicted for an offense not capital, whereupon the said Callender was arrested and committed to close custody, contrary to law in that case made and provided.

ART. 6. And whereas it is provided by the thirty-fourth section of the aforesaid act, entitled "An act to establish the judicial courts of the United States," that the laws of the several States, except where the Constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as the rules of decision in trials at common law in the courts of the United States in cases where they apply; and whereas by the laws of Virginia it is provided that in cases not capital the offender shall not be held to answer any presentment of a grand jury until the court next succeeding that during which such presentment shall have been made, yet the said Samuel Chase, with intent to oppress and procure the conviction of the said James Thompson Callender, did, at the court aforesaid, rule and adjudge the said Callender to trial during the term at which he, the said Callender, was presented and indicted, contrary to law in that case made and provided.

ART. 7. That at a circuit court of the United States for the district of Delaware, held at Newcastle, in the month of June, 1800, whereat the said Samuel Chase presided, the said Samuel Chase, disregarding the duties of his office, did descend from the dignity of a judge and stoop to the level of an informer by refusing to discharge the grand jury, although entreated by several of the said jury so to do; and after the said grand jury had regularly declared through their foreman that they had found no bills of indictment, nor had any presentments to make, by observing to the said grand jury that he, the said Samuel Chase, understood "that a highly seditious temper had manifested itself in the State of Delaware among a certain class of people, particularly in Newcastle County, and more especially in the town of Wilmington, where lived a most seditious printer, unrestrained by any principle of virtue, and regardless of social order, that the name of this printer was"—but checking himself, as if sensible of the indecorum which he was committing, added "that it might be assuming too much to mention the name of this person, but it becomes your duty, gentlemen, to inquire diligently into this matter," or words to that effect; and that with intention to procure the prosecution of the printer in question the said Samuel Chase did, moreover, authoritatively enjoin on the district attorney of the United States the necessity of procuring a file of the papers to which he alluded (and which were understood to be those published under the title of "Mirror of the Times and General Advertiser"), and, by a strict examination of them, to find some passage which might furnish the groundwork of a prosecution against the printer of the said paper, thereby degrading his high judicial functions and tending to impair the public confidence in and respect for the tribunals of justice so essential to the general welfare.

ART. 8. And whereas mutual respect and confidence between the Government of the United States and those of the individual States, and between the people and those governments, respectively, are highly conducive to that public harmony without which there can be no public happiness, yet the said Samuel Chase, disregarding the duties and dignity of his judicial character, did, at a circuit court for the district of Maryland, held at Baltimore in the month of May, 1803, pervert his official right and duty to address the grand jury then and there assembled on the matters coming within the province of the said jury, for the purpose of delivering to the said grand jury an intemperate and inflammatory political harangue, with intent to excite the fears and resentment of the said grand jury and of the good people of Maryland against their State government and constitution, a conduct highly censurable in any, but peculiarly indecent and unbecoming in a judge of the Supreme Court of the United States; and, moreover, that the said Samuel Chase then and there, under pretense of exercising his judicial right to address the said grand jury, as aforesaid, did, in a manner highly unwarrantable, endeavor to excite the odium of the said grand jury and of the good people of Maryland against the Government of the United States by delivering opinions which, even if the judicial authority were competent to their expression on a suitable occasion and in a proper manner, were at that time, and as delivered by him, highly indecent, extrajudicial, and tending to prostitute the high judicial character with which he was invested to the low purpose of an electioneering partisan.

And the House of Representatives, by protestation, saving to themselves the liberty of exhibiting, at any time hereafter, any further articles, or other accusation or impeachment against the said Samuel Chase, and also of replying to his answers which he shall make unto the said articles, or any of them, and of offering proof to all and every the aforesaid articles, and to all and every other articles, impeachment, or accusation, which shall be exhibited by them as

the case shall require, do demand that the said Samuel Chase may be put to answer the said crimes and misdemeanors, and that such proceedings, examinations, trials, and judgments may be thereupon had and given as are agreeable to law and justice.

After the reading of the articles [52] the President notified the managers that the Senate would take proper order on the subject of the impeachment, of which due notice should be given to the House of Representatives.

The managers delivered the articles of impeachment at the table and withdrew.

Thereupon the high court of impeachments adjourned.

The managers having returned to the House, Mr. Randolph, their chairman, reported [53] that they did this day carry to the Senate the articles of impeachment agreed to by this House on the 4th instant, and that the said managers were informed by the Senate that their House would take proper measures relative to the said impeachment, of which this House should be duly notified.

2347. Chase's impeachment continued.

Form prescribed for the writ of summons in the Chase impeachment.

Form of precept to be indorsed on the writ of summons in the Chase impeachment.

The Senate having fixed a day for the return of the writ of summons in the Chase impeachment, informed the House thereof.

On December 10 [54] the high court of impeachments considered the report of the committee appointed November 30 to prepare and report proper rules of proceedings, and after consideration agreed to the following:

A summons shall issue, directed to the person impeached, in the form following: "THE UNITED STATES OF AMERICA, *ss.*:

"The Senate of the United States to ———, greeting:

"Whereas, the House of Representatives of the United States of America did, on the ——, ——— day of ———, exhibit to the Senate articles of impeachment against you, the said ———, in the words following, viz: [here recite the articles] and did demand that you, the said ——— ——— should be put to answer the accusations as set forth in said articles; and that such proceedings, examinations, trials, and judgments might be thereupon had as are agreeable to law and justice: You, the said ——— ———, are therefore hereby summoned, to be and appear before the Senate of the United States of America, at their Chamber in the city of Washington, on the —— day of ———, then and there to answer to the said articles of impeachment, and then and there to abide by, obey, and perform such orders and judgments as the Senate of the United States shall make in the premises, according to the Constitution and laws of the United States. Hereof you are not to fail.

"Witness, ——— ———, Vice President of the United States of America and President of the Senate thereof, at the city of Washington, this —— day of ———, in the year our Lord —— and of the Independence of the United States the ———."

Which summons shall be signed by the Secretary of the Senate, and sealed with their seal, and served by the Sergeant-at-Arms to the Senate, or by such other person as the Senate shall specially appoint for that purpose, who shall serve the same, pursuant to the directions given in the form next following:

A precept shall be indorsed on said writ of summons, in the form following, viz:

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[52] The articles are not given in the Senate Journal (p. 510) on the day of their presentation, so the signatures of the Speaker and Clerk do not appear.
[53] House Journal, p. 47.
[54] Senate Impeachment Journal, pp. 510, 511; Annals, pp. 89, 90.

"UNITED STATES OF AMERICA, *ss:*

"The Senate of the United States to ———, ———, greeting:

"You are hereby commanded to deliver to, and leave with ——— ———, if to be found, a true and attested copy of the within writ of summons, together with a like copy of this precept, showing him both; or in case he can not with convenience be found, you are to leave true and attested copies of the said summons and precept at his usual place of residence, and in whichever way you perform the service let it be done at least ——— days before the appearance day mentioned in said writ of summons. Fail not, and make return of this writ of summons and precept, with your proceedings thereon indorsed, on or before the appearance day mentioned in said writ of summons.

"Witness, ——— ———, Vice-President of the United States of American and President of the Senate thereof, at the city of Washington, this —— day of———, in the year of our Lord —— and of the Independence of the United States the ———."

Which precept shall be signed by the Secretary of the Senate and sealed with their seal.

It was then

Resolved, That the secretary be directed to issue a summons to Samuel Chase, one of the Associate Justices of the Supreme Court of the United States, to answer certain articles of impeachment, exhibited against him by the House of Representatives on Friday last; that the said summons be returnable the second of January next and be served at least fifteen days before the return day thereof.

Ordered, That the secretary notify the House of Representatives of this resolution.

On the same day the message was delivered in the House,[55] and on the succeeding day was read, in form as follows:

In Senate of the United States—High Court of Impeachments, Monday, December 10, 1804.

The United States *v.* Samuel Chase.

Resolved, That the Secretary be directed to issue a summons to Samuel Chase, one of the Associate Justices of the Supreme Court of the United States, to answer certain articles of impeachment exhibited against him by the House of Representatives, on Friday last. That the said summons be returnable the second day of Janauary next and be served at least fifteen days before the return day thereof.

Ordered, That the Secretary carry this resolution to the House of Representatives.

Attest:

SAM. A. OTIS, *Secretary.*

Ordered, That the said proceedings of the Senate do lie on the table.

On December 14,[56] in the High Court of Impeachment, "Return was made by the Sergeant-at-Arms on the summons issued."

2348. Chase's impeachment continued.

The rules agreed to by the high court of impeachment to govern the trial of Mr. Justice Chase.

On December 24,[57] the High Court of Impeachments concluded its consideration of the report of the committee and the rules stood as follows:

1. Whensoever the Senate shall receive notice from the House of Representatives that managers are appointed on their part to conduct an impeachment against any person, and are directed to carry such articles to the Senate, the Secretary of the Senate shall immediately inform the House of Representatives that the Senate is ready to receive the managers for the purpose of exhibiting such articles of impeachment, agreeably to the said notice.

2. When the managers of an impeachment shall be introduced to the bar of the Senate, and shall have signified that they are ready to exhibit articles of

[55] House Journal, pp. 49, 50, Annals, p. 701.
[56] Senate Impeachment Journal, p. 511.
[57] Senate Impeachment Journal, pp. 511–513, Annals, pp. 89–92.

impeachment against any person, the President of the Senate shall direct the Sergeant-at-Arms to make proclamation, who shall, after making proclamation, repeat the following words: "All persons are commanded to keep silence, on pain of imprisonment, while the grand inquest of the nation is exhibiting to the Senate of the United States articles of impeachment against ——— ———;" after which the articles shall be exhibited, and then the President of the Senate shall inform the managers that the Senate will take proper order on the subject of the impeachment, of which due notice shall be given to the House of Representatives.

3 and 4. [As adopted on December 10—Forms of summons and precept.]

5. Subpoenas shall be issued by the Secretary of the Senate, upon the application of the managers of the impeachment, or of the party impeached, or his counsel, in the following form, to wit:

"To ——— ———, greeting:

"You, and each of you, are hereby commanded to appear before the Senate of the United States, on the —— day of ——, at the Senate Chamber, in the city of Washington, then and there to testify your knowledge in the cause which is before the Senate, in which the House of Representatives have impeached ——— ———. Fail not.

"Witness, ——— ———, Vice-President of the United States of America and President of the Senate thereof, at the city of Washington, this —— day of ——, in the year of our Lord —— and of the Independence of the United States the ——."

Which shall be signed by the Secretary of the Senate and sealed with their seal.

Which subpoenas shall be directed, in every case, to the marshal of the district where such witnesses respectively reside, to serve and return.

6. The form of direction to the marshal, for the service of the subpoena, shall be as follows:

"*The Senate of the United States of America to the Marshal of the District of* ——.

"You are hereby commanded to serve and return the within subpoena, according to law.

"Dated at Washington, this —— day of ——, in the year of our Lord —— and of the Independence of the United States the ———.

———— ————,

"Secretary of the Senate."

7. That the President of the Senate shall direct all necessary preparations in the Senate Chamber, and all the forms of proceeding, while the Senate are sitting for the purpose of trying an impeachment, and all forms during the trial not otherwise specially provided for by the Senate.

8. He shall also be authorized to direct the employment of the marshal of the District of Columbia, or any other person or persons, during the trial, to discharge such duties as may be prescribed by him.

9. At 12 o'clock of the day appointed for the return of the summons against the person impeached the legislative and executive business of the Senate shall be suspended, and the Secretary of the Senate shall administer an oath to the returning officer, in the form following, viz: "I, ———— ————, do solemnly swear that the return made and subscribed by me, upon the process issued on the —— day of ————, by the Senate of the United States against ——— ————, is truly made, and that I have performed said services as therein described. So help me God." Which oath shall be entered at large on the records.

10. The person impeached shall then be called to appear and answer the articles of impeachment exhibited against him. If he appears, or any person for him, the appearance shall be recorded, stating particularly if by himself or if by agent or attorney, naming the person appearing and the capacity in which he appears.

11. At 12 o'clock of the day appointed for the trial of an impeachment the legislative and executive business of the Senate shall be postponed. The Secretary shall then administer the following oath or affirmation to the President:

"You solemnly swear, or affirm, that in all things appertaining to the trial of the impeachment of ———— ————, you will do impartial justice according to the Constitution and laws of the United States."

12. And the President shall administer the said oath or affirmation to each Senator present.

The Secretary shall then give notice to the House of Representatives that the Senate is ready to proceed upon the impeachment of ———— ————, in the

Senate Chamber, which Chamber is prepared with accommodations for the reception of the House of Representatives.

13. Counsel for the parties shall be admitted to appear, and be heard upon an impeachment.

14. All motions made by the parties or their counsel shall be addressed to the President of the Senate, and if he shall require it, shall be committed to writing, and read at the Secretary's table and all decisions shall be had by yeas and nays, and without debate, which shall be entered on the records.

15. Witnesses shall be sworn in the following form, to wit: "You, ———— ————, do swear (or affirm, as the case may be) that the evidence you shall give in the case now depending between the United States and ———— ————, shall be the truth, the whole truth, and nothing but the truth. So help you God." Which oath shall be administered by the Secretary.

16. Witnesses shall be examined by the party producing them, and then cross-examined in the usual form.

17. If a Senator is called as a witness, he shall be sworn, and give his testimony, standing in his place.

18. If a Senator wishes a question to be put to a witness, it shall be reduced to writing and put by the President.

19. At all times, whilst the Senate is sitting upon the trial of an impeachment the doors of the Senate Chamber shall be kept open.

The nineteenth rule was agreed to on December 31.[58]

2349. Chase's impeachment continued.

Form of return made and oath taken by the Sergeant-at-Arms in the Chase impeachment.

Mr. Justice Chase appeared to answer the articles of impeachment "in his own proper person."

On his appearance to answer articles of impeachment Mr. Justice Chase was furnished with a chair.

Mr. Justice Chase, in appearing, was permitted by the Vice-President, without objection of the Senate, to read a paper giving reasons for delaying his answer.

Mr. Justice Chase, in asking time to prepare his answer to the articles, was called to order by the Vice-President for expressions used.

It was decided that members of the court should be sworn before considering respondent's motion for time to answer in the Chase case.

Mr. Justice Chase's application for a time to answer was accompanied by a sworn statement of reasons.

The Senate having fixed the day for Mr. Justice Chase to file his answer, informed the House that the trial would proceed on that day.

Neither the managers nor the House attended on the appearance of Mr. Justice Chase in answer to the summons.

On January 2, 1805,[59] the high court of impeachment having been opened by proclamation, the return made by the Sergeant-at-Arms was read, as follows:

I, James Mathers, Sergeant-at-Arms to the Senate of the United States, in obedience to the within summons to me directed, did proceed to the residence of the within-named Samuel Chase, on the 12th day of December, 1804, and did then and there leave a true copy of the said writ of summons, together with a true copy of the articles of impeachment annexed, with him, the said Samuel Chase.

JAMES MATHERS.

[58] Senate Impeachment, Journal, pp. 513, 514.
[59] Senate Impeachment, Journal, p. 514.

After which the Secretary administered to him the oath, as follows:

You, James Mathers, Sergeant-at-Arms to the Senate of the United States, do solemnly swear that the return made and subscribed by you upon the process issued on the 10th day of December last, by the Senate of the United States, against Samuel Chase, one of the Associate Justices of the Supreme Court, is truly made, and that you have performed said services as therein described. So help you God.

Samuel Chase was then solemnly called,[60] who appeared "in his own proper person."

The President of the Senate [61] informed him that the Senate was ready to receive any answer that he had to make.[62]

Mr. Chase requested the indulgence of a chair, which was immediately furnished. The report of the trial intimates that in accordance with the parliamentary practice of England no chair was assigned to him previously to his appearance, but that an informal intimation was made to him that, on his request, it would be furnished.

After being seated for a short time Judge Chase rose and commenced reading from a paper which he held in his hand.

After reading far enough to show that the paper was proceeding in general denial of the charges, the President reminded him that this was the day appointed to receive any answer he might make to the articles of impeachment. Thereupon Judge Chase said it was his purpose to request the allowance of further time to put in his answer.

The reading was then proceeding, when the President interrupted and asked if the paper was intended as his answer. If so, it would be put on file. If it was a prelude to a motion he meant to make praying to be allowed further time for putting in his answer, he would confine himself strictly to what had relation to that object.

Judge Chase said it was not his answer that he was reading, but that he was assigning reasons why he could not now answer, in order to show that he was entitled to further time to prepare and put in his answer.

The President replied:

You, who are so conversant in the practice of courts of law, know very well that a motion for time must not be founded on mere suggestions, but must be founded on some facts to prove the propriety of the motion.

Judge Chase said he meant to show the impracticability of his answering at this time, from the articles themselves, and it was for that purpose that he made an allusion to them.

The President said that with the caution he had given he might proceed, provided no objection were made by any gentleman of the Senate.

Judge Chase proceeded in his address.

Later in the reading the following paragraph occurred:

And acrimonious as are the terms in which many of the accusations are conceived; harsh and opprobrious as are the epithets wherewith it has been thought proper to assail my name and character, by those who were "*puling in their nurses' arms*" *whilst I was contributing my utmost aid to lay the*

[60] The form of this call is not given, but in the Blount tria lit was as follows: "Hear ye! Hear ye! Hear ye! William Blount, late a Senator from the State of Tennessee, come forward and answer the articles of impeachment against you by the House of Representatives." Senate Journals, Sixth, Seventh, and Eighth Congresses, p. 486.

[61] Aaron Burr, of New York, Vice-President, and President of the Senate.

[62] Annals, pp. 92–98.

groundwork of American liberty, I yet thank my accusers, whose functions as members of the Government of my country I highly respect, for having at length put their charges into a definitive form, susceptible of refutation; and for having thereby afforded me an opportunity of vindicating my innocence, in the face of this honorable court, of my country, and of the world.

On using the expressions marked in *italics*,

The President interrupted Judge Chase and said that observations of censure or recrimination were not admissible; it would be very improper for him to listen to observations on the statements of the House of Representatives before an answer was filed.

Judge Chase said he had very few words more to add, which would conclude what he had to say at the present time.

With the permission of the President he proceeded.

The address being concluded, the President requested him to reduce to writing any motion which he wished to make.

Thereupon Judge Chase submitted the following:

I solicit this honorable court to allow me until the first day of the next session to put in my answer and prepare for my trial.

The President informed Mr. Chase that the court would take time to consider the motion.

During these proceedings incident to the return on the summons and the appearance of Judge Chase, neither the House of Representatives nor its manageres were present.

After Judge Chase had submitted his motion the Senate withdrew to a private apartment, where debate arose as to whether or not the Senators should take the oath required by the Constitution before they took into consideration the motion of Judge Chase; and at the conclusion of the debate it was

Resolved, That on the meeting of the Senate to-morrow, before they proceed to any business on the articles of impeachment before them, and before the decision of any question, the oath prescribed by the rules shall be administered to the President and Members of the Senate.

On January 3 [63] the high court of impeachments was duly opened with proclamation, and the oath was administered to the President and Senators in the manner prescribed by the rule.

Thereupon the President stated that he had received a letter from the defendant, inclosing an affidavit that further time was necessary for him to prepare for trial; which affidavit [64] was read, as follows:

City of Washington, ss:

Samuel Chase made oath on the Holy Evangels of Almighty God, that it is not in his power to obtain information respecting the facts alleged in the articles of impeachment to have taken place in the city of Philadelphia in the trial of John Fries; or of the facts alleged to have taken place in the city of Richmond in the trial of James T. Callender, in time to prepare and put in his answer, and to proceed to trial, with any probability that the same could be finished on or before the the 5th day of March next. And, further, that it is not in his power to procure information of the names of the witnesses, whom he thinks it may be proper and necessary for him to summon, in time to obtain their attendance, if his answer could be prepared in time sufficient for the finishing of the said trial, before the said 5th day of March next; and the said Samuel Chase further made oath that he believes it will not be in his power to obtain the advice of counsel, to prepare his answer, and to give him their assistance on the trial, which he thinks necessary, if the said trial should take place during the present session of Congress; and that he verily believes, if he had at this time full

[63] Senate impeachment, Journal, pp. 514, 515; Annals, pp. 98–100.
[64] This affidavit does not appear in full in the Journal of the high court of impeachments.

information of facts, and of the witnesses proper for him to summon, and if he had also the assistance of counsel, that he could not prepare the answer he thinks he ought to put in, and be ready for his trial, within the space of four or five weeks from this time. And, further, this his application to the honorable the Senate, for time to obtain the information of facts, in order to prepare his answer, and for time to procure the attendance of necessary witnesses, and to prepare for his defense in the trial, and to obtain the advice and assistance of counsel, is not made for the purpose of delay, but only for the purpose of obtaining a full hearing of the articles of impeachment against him in their real merits.

SAMUEL CHASE.

Sworn to this 3d day of January, 1805, before

SAMUEL HAMILTON.

Whereupon the following motion was made by Mr. Stephen R. Bradley, of Vermont:

Ordered, That Samuel Chase file his answer, with the Secretary of the Senate, to the several articles of impeachment exhibited against him, by the House of Representatives, on or before the —— day ——.

A motion was made by Mr. William B. Giles, of Virginia, to amend the motion and to strike out all that follows the word "*Ordered*," and insert "That ——— next shall be the day for receiving the answer, and proceeding on the trial of the impeachment against Samuel Chase.

The motion to strike out was agreed to, yeas 20, nays 10. And then the motion to insert was also agreed to, yeas 22, nays 8.

The motion to fill the blank with the words "first Monday of December next" was disagreed to, yeas 12, nays 18. Then a motion to insert "the fourth day of February next" was agreed to, yeas 22, nays 8. Then the resolution as amended was agreed to, yeas 21, nays 9.

It was then

Ordered, That the Secretary notify the House of Representatives and the said Samuel Chase thereof.

Thereupon the high court of impeachments adjourned.

On January 4[65] the House was informed by message, which was read in form, as follows:

In Senate of the United States—High court of impeachments, January 3, 1805.

United States *v.* Samuel Chase.

Ordered, That the 4th day of February next shall be the day for receiving the answer, and proceeding on the trial of the impeachment against Samuel Chase, one of the Associate Justices of the Supreme Court of the United States.

Attest: SAM. A. OTIS, *Secretary*.

Ordered, That the said proceedings of the Senate do lie on the table.

2350. Chase's impeachment continued.

A manager of the Chase impeachment being excused, the House chose another by ballot and informed the Senate thereof.

The House determined to attend as a Committee of the Whole the proceedings of the trial of Mr. Justice Chase.

On January 25,[66] in the House—

Resolved, That Mr. Nelson be excused from serving as one of the Managers appointed on the 5th ultimo, on the part of this House, to conduct the impeachment against Samuel Chase, one of the Associate Justices of the Supreme Court of the United States.

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[65] House Journal, p. 76; Annals, p. 872.
[66] House Journal, p. 105; Annals, p. 1011.

On January 28 [67] the House elected by ballot Mr. Christopher Clark, of Virginia, to succeed Mr. Nelson, and informed the Senate thereof by message, delivered as follows by the Clerk:

Mr. President, I am directed to acquaint the Senate that the House of Representatives have elected Mr. Clark a manager to conduct the impeachment against Samuel Chase, one of the associate justices of the Supreme Court of the United States, in the place of Mr. Nelson, who hath been excused that service.

Mr. Clark had voted in favor of all the articles of impeachment save one, which he had voted against.

On February 4,[68] in the House, it was

Resolved, That during the trial of the impeachment now depending before the Senate, this House will attend, at 10 o'clock in the forenoon, and proceed on the legislative business before the House until the hour at which the Senate shall appoint each day to proceed on the trial of the impeachment now pending before that body, and that the House then resolve itself into a Committee of the Whole and attend the said trial.

2351. Chase's impeachment continued.

Attendance of the House in Committee of the Whole at the ceremonies of the beginning of Chase's trial.

Description of the arrangement of the Senate chamber for the Chase trial.

Mr. Justice Chase introduced his counsel at the time he gave in his answer.

The Senate granted the request of Mr. Justice Chase for permission to read his answer by himself and counsel.

The answer of Mr. Justice Chase to the articles of impeachment.

The answer of the respondent in the Chase trial does not appear in the journal of the court.

On request of the managers the Senate directed its Secretary to carry to the House an attested copy of Mr. Justice Chase's answer.

The answer of Mr. Justice Chase being received in the House was referred to the managers.

Form of proceedings when the House attends an impeachment trial as Committee of the Whole.

On the same day,[69] the high court of impeachments was duly opened with proclamation, and it was then—

Ordered, That the Secretary give notice to the House of Representatives that the Senate are in their public Chamber and are ready to proceed on the trial of Samuel Chase; and that seats are provided for the accommodation of the Members.

This message being received in the House,[70] that body resolved itself into a Committee of the Whole House, with Mr. Joseph B. Varnum, of Massachusetts, as Chairman, and proceeded to the Senate Chamber with the managers. Soon after they entered the Chamber and took their seats.

The Senate Chamber was fitted up in a style of appropriate elegance. Benches covered with crimson, on each side, and in a line with the chair of the President, were assigned to the Members of the Senate. On the right and in front of the chair, a box was assigned to the

[67] House Journal, p. 108; Senate Journal, pp. 442, 516.
[68] House Journal, p. 118; Annals, p. 1174.
[69] Senate Impeachment Journal, p. 516; Annals, p. 101.
[70] House Journal, p. 119.

managers, and on the left a similar box to Mr. Chase and his counsel, and chairs allotted to such friends as he might introduce. The residue of the floor was occupied with chairs for the accommodation of the Members of the House of Representatives, and with boxes for the reception of the foreign ministers, and civil and military officers of the United States. On the right and left of the Chair, at the termination of the benches of the members of the court, boxes were assigned to stenographers. The permanent gallery was allotted to the indiscriminate admission of spectators. Below this gallery and above the floor of the House a new gallery was raised and fitted up with peculiar elegance, intended primarily for the exclusive accommodation of ladies. But this feature of the arrangement, made by the Vice-President, was at an early period of the trial abandoned, it having been found impracticable. At the termination of this gallery, on each side, boxes were specially assigned to ladies attached to the families of public personages. The preservation of order was devolved on the marshal of the District of Columbia, who was assisted by a number of deputies.[71]

Samuel Chase being called to make answer to the articles of impeachment exhibited against him by the House of Representatives, appeared and requested that Robert G. Harper, Luther Martin, Philip B. Key, and Joseph Hopkinson, esqs., might be admitted and considered as counsel for him, the said Samuel Chase, and thereupon submitted a motion, which was read at the table as follows:

Samuel Chase moves for permission to read his answer, by himself and his counsel, at the bar of the honorable court.

The President asked him if it was the answer on which he meant to rely? To which he replied in the affirmative.

The question being taken on the motion, it passed in the affirmative.

Then Judge Chase began the reading of his answer, and before its conclusion was assisted by Messrs. Harper and Hopkinson. The answer began as follows: [72]

This respondent, in his proper person, comes into the said court, and protesting that there is no high crime or misdemeanor particularly alleged in the said articles of impeachment to which he is or can be bound by law to make answer, and saving to himself now, and at all times hereafter, all benefit of exception to the insufficiency of the said articles, and each of them, and to the defects therein appearing in point of law or otherwise, and protesting also that he ought not to be injured in any manner, by any words, or by any want of form in this his answer, he submits the following facts and observations by way of answer to the said articles.

The answer then proceeds to answer the charges, article by article.

At the conclusion of the reading, Mr. Randolph, chairman of the managers, moved that they have time to consult the House of Representatives on a replication, and that they be furnished with a copy of the answer.

To this the President replied that the motion would be taken into consideration and the House of Representatives should be notified of the result.

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[71] Annals, p. 100.

[72] Annals, pp. 101–150. The Journal of the Court of Impeachments does not have the answer; and prints the articles only as they are voted on.

Thereupon the high court of impeachments adjourned and the Members of the House of Representatives returned to their Hall, and the Committee of the Whole House rose and their Chairman reported.[73]

On February 5,[74] in the high court of impeachments—

Ordered, That the Secretary carry to the House of Representatives an attested copy of the answer of Samuel Chase, one of the associate justices of the Supreme Court, to articles of impeachment against him by the House of Representatives.

The message being delivered in the House the same day,[75] the copy of the answer was read and ordered to be referred to the managers.

2352. Chase's impeachment continued.

The replication of the House to the answer of Mr. Justice Chase to the articles of impeachment.

In the Chase case the House refused to strike from its replication certain words reflecting on the motives of the respondent.

Forms of resolutions relating to the adoption of the replication in the Chase case and the carrying thereof to the Senate.

The replication in the Chase impeachment was signed by the Speaker and attested by the Clerk.

The replication in the Chase case was read to the Senate by the chairman of the managers.

Counsel for respondent were furnished a copy of the House's replication by direction of the Presiding Officer.

Later, on the same day, Mr. Randolph, chairman of the managers, submitted to the House the following report:

That they have considered the said answer, and do find that the said Samuel Chase has endeavored to cover the crimes and misdemeanors laid to his charge by evasive insinuations and misrepresentation of facts; and that the said answer does give a gloss and coloring, utterly false and untrue, to the various criminal matters contained in the said article; and do submit to the judgment of the House their opinion, that, for avoiding any imputation of delay to the House of Representatives, in a case of so great moment, a replication be forthwith sent to the Senate, maintaining the charge of this House; and that the committee had prepared a replication accordingly, which they herewith report to the House, as follows:

"The House of Representatives of the United States have considered the answer of Samuel Chase, one of the associate justices of the Supreme Court of the United States, to the articles of impeachment against him by them exhibited, in the name of themselves and of all the people of the United States; and observe—

"That the said Samuel Chase has endeavored to cover the high crimes and misdemeanors laid to his charge by evasive insinuations and misrepresentation of facts; that the answer does give a gloss and coloring, utterly false and untrue, to the various criminal matters contained in the said articles; that the said Samuel Chase did, in fact, commit the numerous acts of oppression, persecution, and injustice of which he stands accused; and the House of Representatives, in

[73] The Journal of the House has the following entry, showing the form used while the trial progressed:

"The House then, in pursuance of a resolution agreed to this day, resolved itself into a Committee of the Whole House, and proceeded in that capacity to the Senate Chamber to attend the trial by the Senate of the impeachment against Samuel Chase, one of the associate justices of the Supreme Court of the United States; and, after some time spent therein, the committee returned into the Chamber of the House, and Mr. Speaker having resumed the chair, Mr. Varnum, from the said Committee of the Whole, reported that the committee had, according to order, attended the trial by the Senate of the said impeachment, and that some progress had been made therein." (House Journal, p. 119.)

[74] Senate Impeachment Journal, p. 516.

[75] House Journal, pp. 123, 124; Annals, pp. 1181–1184.

full confidence of the truth and justice of their accusation and of the necessity of bringing the said Samuel Chase to a speedy and exemplary punishment, and not doubting that the Senate will use all becoming diligence to do justice to the proceedings of the House of Representatives, and to vindicate the honor of the nation, do aver their charge against the said Samuel Chase to be true; and that the said Samuel Chase is guilty in such manner as he stands impeached; and that the House of Representatives will be ready to prove their charges against him, at such convenient time and place as shall be appointed for that purpose."

Mr. Roger Griswold, of Connecticut, moved that the report be committed to a Committee of the Whole House, which motion was disagreed to.

Mr. John Dennis, of Maryland, moved to amend the replication by striking out therefrom after the words "and observe," the following words:

That the said Samuel Chase has endeavored to cover the high crimes and misdemeanors laid to his charge by evasive insinuations and misrepresentation of facts: that the said answer does give a gloss and coloring, utterly false and untrue, to the various criminal matters contained in the said articles.

This amendment was disagreed to, yeas 41, nays 70.

Then the question being taken that the House do agree to the said replication, it passed in the affirmative, yeas 77, nays 34.

Thereupon, it was

Resolved, That the replication annexed to the report of the managers be put into the answer and pleas of the aforesaid Samuel Chase, on behalf of this House; and that the managers be instructed to proceed to maintain the said replication at the bar of the Senate, at such time as shall be appointed by the Senate.

Ordered, That a message be sent to the Senate to inform them that this House have agreed to a replication, on their part, to the answer of Samuel Chase, one of the associate justices of the Supreme Court of the United States, to the articles of impeachment exhibited to the Senate against him by this House, and have directed the managers appointed to conduct the said impeachment to carry the said replication to the Senate; and to proceed to maintain the same at the bar of the Senate, at such time as shall be appointed by the Senate.

On February 7, 1805,[76] in the high court of impeachments, the Clerk of the House delivered the message, as above directed.

Then it was

Ordered, That the Secretary inform the House of Representatives that the Senate will be ready to proceed on the trial of the impeachment of Samuel Chase, one of the associate justices of the Supreme Court, at half past 2 o'clock this day.

The high court of impeachments being duly opened at 2 o'clock the managers attended, and the replication was read by Mr. Randolph, in the form given above, with the following attestation:

Signed by order and in behalf of the said House.

NATH. MACON, *Speaker*.

Attest:

JOHN BECKLEY, *Clerk*.

Mr. Hopkinson requested a copy of the replication, which the President replied, would be furnished by the Secretary.

Mr. Breckenridge moved a resolution to the following effect:

That the Secretary be directed to inform the House of Representatives that the Senate will, to-morrow, at 12 o'clock, proceed with the trial of Samuel Chase;

which was agreed to without one dissenting voice, 34 members voting for it.

Whereupon the Senate withdrew to their legislative apartment.

[76] Senate Impeachment Journal, p. 516.

2353. Chase's impeachment continued.

The answer and replication being filed in the Chase impeachment, the court proceeded to hear testimony.

Proclamation made by the Sergeant-at-Arms at the opening of the Chase trial for presentation of evidence.

Witnesses on both sides were called at the opening of the Chase trial.

The managers not being ready to present testimony at the opening of the Chase trial, the court granted their motion to postpone.

On February 8 [77] the high court of impeachments having met, it was

Ordered, That the Secretary notify the House of Representatives that the Senate are ready to proceed further on the trial of the impeachment of Samuel Chase, one of the associate justices of the Supreme Court.

The managers, accompanied by the House of Representatives in Committee of the Whole House, accordingly attended.

Samuel Chase, the respondent, attended with his counsel.

Proclamation was made to keep silence, and also as follows:

Oyes! Oyes! Oyes!

Whereas a charge of high crimes and misdemeanors hath been exhibited by the House of Representatives of the United States, in the name of themselves and of all the people of the United States, against Samuel Chase, one of the associate justices of the Supreme Court, all persons concerned are to take notice that he now stands upon his trial, and they may come forth in order to make good the said charge.

The President informed the managers that they were at liberty to proceed in support of the articles of impeachment exhibited.

On request of Mr. Randolph the witnesses on behalf of the managers were called.

On request of Mr. Hopkinson, counsel for the respondent, his witnesses were called.

Mr. Randolph observed that various considerations, which it was unnecessary to detail, induced him, on behalf of the managers, to move a postponement of the trial till to-morrow, when they hoped to be prepared to proceed with it.

Mr. Harper said that, on behalf of Judge Chase, he would not object to the motion.

The President informed the managers that the Senate acceded to their request, and added, that the Senate would attend to-morrow at 12 o'clock, for the purpose of proceeding with the trial.

The court thereupon adjourned.

2354. Chase's impeachment continued.

During the Chase trial the House attended daily without notice from the court, except on a special occasion, when the hour was changed.

Order of proceeding in the Chase trial during the introduction of evidence.

The journal of an impeachment trial records the names of witnesses, but not their testimony, except when it is subject of objection.

[77] Senate Impeachment Journal, p. 517; Annals, p. 152.

By consent, during the Chase trial, a witness for respondent was examined while the managers were presenting testimony.

In an impeachment trial the discharge of witnesses is determined by the Senate, sometimes in conformity with the consent of the parties.

Mr. Justice Chase, after attending during much of his trial, asked leave to retire, and was informed that the rules did not require his attendance.

Mr. Justice Chase did not, after reading his reply, participate personally in the conduct of his case, beyond waiving objection to one question.

The Presiding Officer of the Senate frequently put questions to witnesses during the Chase trial.

In the Chase impeachment the respondent introduced additional counsel during the trial.

On February 9,[78] and thereafter during the continuation of the trial, the high court met daily at 12 o'clock, and until February 23, near the end of the session, the House of Representatives in Committee of the Whole House attended with the managers without notice from the court. A single exception is noticed, however. On February 13[79] the two Houses met at noon to count the electoral vote. After that duty was concluded, the Secretary of the Senate presented the following message:

> Mr. Speaker: I am directed to inform this House that the Senate will, at half past 2 o'clock on this day, be ready to proceed on the trial of the impeachment against Samuel Chase, one of the associate justices of the Supreme Court of the United States.

Accordingly the managers and the House attended.

The trial proceeded in this order:

On February 9,[80] Mr. Randolph, chairman of the managers, opened the cause. Then witnesses for the managers were sworn, gave testimony, and were cross-examined. The Journal states the name of each witness, but not his testimony, unless any portion was objected to and became the subject of decision by the court. On February 13,[81] while the managers were still presenting their testimony, at the request of Mr. Harper, counsel for the respondent, and with the consent of the managers, John Basset, a witness on the part of Judge Chase, was sworn and examined, in consequence of the peculiar situation of his family requiring his immediate return home.

On February 14,[82] while the managers were putting in their testimony, the respondent requested that Charles Lee, esq., might also be allowed to appear as one of his counsel.

On February 15,[83] the managers having completed their testimony, the respondent was notified that he might proceed to make his defense. Thereupon Mr. Harper, in his defense, addressed the court, and then proceeded to adduce witnesses.

On February 19,[84] on request, and with consent of parties, David Robinson, a witness, was discharged.

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[78] Journal of Impeachments, p. 517; Annals, p. 153.
[79] House Journal, p. 137; Senate Impeachment Journal, p. 518.
[80] Senate Impeachment Journal, p. 517.
[81] Senate Impeachment Journal, p. 519; Annals, p. 222.
[82] Senate Impeachment Journal, p. 519.
[83] Senate Impeachment Journal, p. 522.

Also on February 19,[84] the following occurred:

Mr. HARPER. I am desired by Judge Chase to make of this honorable court the request contained in the following letter, which I will read:

"Mr. President. The state of my health will not permit me to remain any longer at this bar. It is with great regret I depart before I hear the judgment of this honorable court. If permitted to retire, I shall leave this honorable court with an unlimited confidence in its justice; and I beg leave to present my thanks to them for their patience and indulgence in the long and tedious examination of the witnesses. Whatever may be the ultimate decision of this honorable court, I console myself with the reflection that it will be the result of mature deliberation on the legal testimony in the case, and will emanate from those principles which ought to govern the highest tribunal of justice in the United States."

The President observed that the rules of the Senate did not require the personal attendance of the respondent; whereupon Judge Chase bowed in a very respectful manner and withdrew. Until this time the respondent had attended each day. Thereafter he did not attend. While in attendance he had not, after the reading of his reply, participated personally in the conduct of the defense, except in one instance to say that he had no objection to a question which his counsel had challenged.[85]

The President of the Senate frequently put questions to the witnesses as the trial proceeded.

On February 20,[86] at the conclusion of the testimony, a request was made that a certain witness, a Mr. Tilghman, be discharged, and the following took place:

Mr. Harper said the counsel for the respondent would have no objection to discharge all the witnesses, but must object to discharging part of them.

The PRESIDENT. If the gentlemen do not agree upon the discharge of the witnesses, I will take the sense of the Senate upon the point.

Mr. HARPER. The particular situation of Mr. Tilghman's family requires his return to Philadelphia. I must therefore request that his further attendance be dispensed with.

The managers consented, and Mr. Tilghman was discharged.

The question was then taken by the President on the discharge of the witnesses, and lost; there being 16 votes in the affirmative and 17 in the negative.

Mr. Rodney requested the discharge of the witnesses from Delaware; which being consented to by the respondent's counsel, they were discharged.

It may be proper here to notice that, from time to time, during the trial, witnesses were discharged with consent of the parties.

2355. Chase's impeachment, continued.

In the Chase impeachment, by agreement, the managers had the opening and close of the final arguments.

Those making the final arguments of the Chase trial were limited neither as to time nor numbers.

On February 19,[87] the following occurred as to the concluding arguments:

The PRESIDENT. Is the course of the arguments on each side understood?

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[84] Journal, p. 522; Annals, p. 310.
[85] Annals, p. 171.
[86] Annals, p. 312.
[87] Annals, p. 311.

Mr. NICHOLSON. We understand that the managers will open; that reply will be made by the counsel for the respondent, and that the managers will then close.

Mr. KEY. This is the usual course, and we have no objection to it.

The testimony being closed, on February 20,[88] Mr. Early commenced for the managers the argument in support of the articles, and was followed by Mr. Campbell, also in behalf of the managers, and then by Mr. Clark, also a manager.

Then Messrs. Hopkinson, Key, Lee, Martin, and Harper were severally heard for the respondent.

Finally Messrs. Nicholson, Rodney, and Randolph concluded for the managers.

2356. Chase's impeachment continued.

The managers of the Chase impeachment resisted strenuously the argument that impeachment might be invoked only for indictable offenses.

The argument of Mr. Manager Campbell in the Chase trial on the nature of the power of impeachment.

In their arguments the managers and counsel for the respondent considered not only the evidence as tending to substantiate the charges set forth in the articles, but discussed at length the meaning and application of the Constitution in those clauses establishing the remedy of impeachment.

Mr. Campbell, of the managers, said:[89]

The first provision in the Constitution on this subject (art. 1, sec. 3,), declares that the Senate shall have the sole power to try all impeachments. Here we discover the great wisdom of the framers of the Constitution. The highest and most enlightened tribunal in the nation is charged with the protection of the rights and liberties of the citizens against oppression from the officers of Government under the sanction of law; unawed by the power which the officer may possess, or the dignified station he may fill, complete justice may be expected at their hands. The accused is called upon before the same tribunal, and in many instances, before the same men, who sanctioned his official elevation, to answer for abusing the powers with which he had been intrusted. Men who are presumed to have had a favorable opinion of him once are to be his judges; no inferior or coordinate tribunal is to decide on his case, which might from motives of jealousy or interest be prejudiced against him and wish his removal. No, sir; his judges, without the shadow of temptation to influence their conduct, are placed beyond the reach of suspicion.

The next provision in the Constitution declares that judgment in cases of impeachment shall not extend further than to removal from office and disqualification to hold and enjoy any office of honor, trust, or profit under the United States.

Here the Constitution seems to make an evident distinction between such misdemeanors as would authorize a removal from office, and disqualification to hold any office, and such as are criminal, in the ordinary sense of the word, in courts of common law, and punishable by indictment. So far as the offense committed is injurious to society, only in consequence of the power reposed in the officer being abused in the exercise of his official functions, it is inquirable into only by impeachment, and punishable only by removal from office and disqualification to hold any office; but so far as the offense is criminal, independent of the office, it is to be tried by indictment, and is made punishable according to the known rules of law in courts of ordinary jurisdiction. As, if an officer take a bribe to do an act not connected with his office, for this he is indictable in a court of justice only. Impeachment therefore, according to the meaning of the Constitution, may fairly be considered a kind of inquest into the conduct of an officer, merely as it regards his office; the manner in which he performs the duties thereof; and the effects

[88] Senate Impeachment Journal, pp. 522, 523.
[89] Annals, p. 381.

that his conduct therein may have on society. It is more in the nature of a civil investigation than of a criminal prosecution. And though impeachable offenses are termed in the Constitution high crimes and misdemeanors, they must be such only so far as regards the official conduct of the officer; and even treason and bribery can only be inquired into by impeachment, so far as the same may be considered as a violation of the duties of the officer, and of the oath the officer takes to support the Constitution and laws of the United States, and of his oath of office; and not as to the criminality of those offenses independent of the office. This must be inquired into and punished by indictment.

This position is strongly supported by the mode of proceeding adopted by this honorable court in cases of impeachment. You issue a summons to give notice to the accused of the proceeding against him; you do not consider his personal appearance necessary; you issue no compulsory process to enforce his personal attendance; and you pass sentence, or render judgment on him in his absence. But, in all criminal prosecutions, compulsory process must issue at some stage of it to enforce the defendant's appearance; unless outlawry in England be considered an exception, which, it is believed, is not resorted to in this country, and his personal appearance is considered absolutely necessary; and in almost every case he must be present when sentence is pronounced against him. This construction of the Constitutional provision appears to be absolutely necessary, to avoid the absurd consequence that would arise from a different construction; that of punishing a man twice for the same offense, which could not have been intended by the framers of the Constitution. The nature of the judgment which you are bound to render, and not to exceed, appears also conclusive on this head. You can only remove and disqualify an individual from holding any office of honor, trust, or profit. This can not be considered a criminal punishment; it is merely a deprivation of rights; a declaration that the person is not properly qualified to serve his country. Hence I conceive that, in order to support these articles of impeachment, we are not bound to make out such a case as would be punishable by indictment in a court of law. It is sufficient to show that the accused has transgressed the line of his official duty, in violation of the laws of his country; and that this conduct can only be accounted for on the ground of impure and corrupt motives. We need not hunt down the accused as a criminal, who had committed crimes of the deepest die; and this honorable court are not authorized to inflict a punishment adequate to such crimes, if they had been committed and could be established. With this view of the meaning of the Constitutional provision relative to impeachments, I shall proceed to examine the articles now under consideration, and the evidence given to support them. In the course of this examination, we apprehend it will clearly appear that the whole conduct of the judge in the several transactions, for which charges are alleged against him, had its origin in a corrupt partiality and predetermination unjustly to oppress, under the sanction of legal authority, those who became the objects of his resentment in consequence of differing from him in political sentiments; turning the judicial power, with which he was vested, into an engine of political oppression.

2357. Chase's impeachment continued.

The argument of Mr. Manager Nicholson on the nature of the power of impeachment.

Mr. Manager Nicholson said: [90]

But, sir, there is one principle upon which all the counsel for the accused have relied, upon which they have all dwelt with great force, and to the maintenance of which they have directed all their powers, that we can not assent to; we mean to contend against it, because we believe it to be totally untenable, and because it is of the first importance in the decision of the question now under discussion. We do not contend that, to sustain an impeachment, it is not necessary to show that the offenses charged are of such a nature as to subject the party to an indictment, for the learned counsel have said that the person now accused is not guilty, because the misdemeanors charged against him are not of a nature for which he might be indicted in a court of law.

To show how entirely groundless this position is, I need only pursue that course which has been pointed out to us by the respondent himself and his counsel. I might refer to English authorities of the highest respectability, to show that officers of the British Government have been impeached for offenses

[90] Annals, pp. 562–567.

not indictable under any law whatever. But I feel no disposition to resort to foreign precedents. In my judgment, the Constitution of the United States ought to be expounded upon its own principles, and that foreign aid ought never to be called in. Our Constitution was fashioned after none other in the known world, and if we understand the language in which it is written, we require no assistance in giving it a true exposition. As we speak the English language, we may, indeed, refer to English authorities for definitions, as we should refer to English dictionaries for the meaning of English words; but upon this, as upon all occasions, where the principles of our Government are to be developed, I trust that the Constitution of the United States will stand upon its own foundation, unsupported by foreign aid, and that the construction given to it will be, not an English construction, but one purely and entirely American.

The Constitution declares that "the judges both of the supreme and inferior courts shall hold their commissions during good behavior." The plain and correct inference to be drawn from this language is, that a judge is to hold his office so long as he demeans himself well in it; and whenever he shall not demean himself well, he shall be removed. I therefore contend that a judge would be liable to impeachment under the Constitution, even without the insertion of that clause which declares, that "all civil officers of the United States shall be removed for the commission of treason, bribery, and other high crimes and misdemeanors." The nature of the tenure by which a judge holds his office is such that, for any act of misbehavior in office, he is liable to removal. These acts of misbehavior may be of various kinds, some of which may, indeed, be punishable under our laws by indictment; but there may be others which the lawmakers may not have pointed out, involving such a flagrant breach of duty in a judge, either in doing that which he ought not to have done, or in omitting to do that which he ought to have done, that no man of common understanding would hesitate to say he ought to be impeached for it.

The words "good behavior" are borrowed from the English laws, and if I were inclined to rest this case on English authorities, I could easily show that, in England, these words have been construed to mean much more than we contend for. The expression durante se bene gesserit, I believe, first occurs in a statute of Henry VIII, providing for the appointment of a custos rotulorum, and clerk of the peace for the several countries in England. The statute recites, that ignorant and unlearned persons had, by unfair means, procured themselves to be appointed to these offices, to the great injury of the community, and provides that the custos shall hold his office until removed, and the clerk of the peace shall hold his office durante se bene gesserit. The reason for making the tenure to be during good behavior was that the office had been held by incapable persons, who were too ignorant to discharge the duties; and it was certainly the intention of the legislature that such persons should be removed whenever their incapacity was discovered. Under this statute, therefore, I think it clear that the officer holding his office during good behavior might be removed for any improper exercise of his powers, whether arising from ignorance, corruption, passion, or any other cause. To this extent, however, we do not wish to go. We do not charge the judge with incapacity. His learning and his ability are acknowledged on all hands; but we charge him with gross impropriety of conduct in the discharge of his official duties, and as he can not pretend ignorance we insist that his malconduct arose from a worse cause.

If, however, a judge were not made liable to removal, from the very nature of the tenure by which he holds his office, we still insist that every judge conducting himself improperly in office comes under that clause of the Constitution which declares that "The President, Vice-President, and 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."

We do not mean to contend against a position which one of the learned counsel took so much pains to prove, that the word "high" applies as well to misdemeanors as to crimes; nor do we deem it important at this time to inquire whether a civil officer of the United States can be removed for offenses not committed in the discharge of his official duties. It will be time enough to make this inquiry when the case presents itself. At present we aver that the party charged has been guilty of a high misdemeanor in office, and that he ought to be removed for it.

Here, however, we are met by being told, that although his conduct may have been improper, yet that he is not liable to impeachment, unless the offense is of such a nature as that he might be indicted for it in a court of law.

If this be true, as it relates to a judge, the Constitution, to be consistent with itself, must make it universally true; and yet, if the doctrine be admitted, the

Constitution will be found to be at variance with itself. Treason is an offense which may or may not be committed in the discharge of official duty, and no doubt the party committing it may be indicted. Bribery is an offense for which a judge may be indicted in the courts of the United States, because an act of Congress makes provision for it, and declares the punishment; but there is no law by which any other officer of the United States can be indicted for bribery. If, therefore, the President of the United States should accept a bribe, he certainly can not be indicted for it, and yet no man can doubt that he might be impeached. If one of the heads of Departments should undertake to recommend to office for pay, he certainly might be impeached for it, and yet, I would ask, under what law, and in what court could he be indicted?

To this, perhaps, it might be answered, that bribery is one of those offenses for which the Constitution expressly provides that the officer may be impeached. This is true; but let us proceed further, and inquire whether there are not other offenses for which an officer may be impeached, and for which he can not be indicted?

If a judge should order a cause to be tried with eleven jurors only, surely he might be impeached for it, and yet I believe there is no court in which he could be indicted. You, Mr. President, as Vice-President of the United States, together with the Secretary of the Treasury, the Chief Justice, and the Attorney-General, as commissioners of the sinking fund, have annually at your disposal $8,000,000, for the purpose of paying the national debt. If, instead of applying it to this public use, you should divert it to another channel, or convert it to your own private uses, I ask if there is a man in the world who would hesitate to say that you ought to be impeached for this misconduct? And yet there is no court in this country in which you could be indicted for it. Nay, sir, it would amount to nothing more than a breach of trust, and would not be indictable under the favorite common law.

But, sir, this ground, which was so strenuously fought for, will probably be abandoned, and instead of our adversaries maintaining that the offense must be of an indictable nature, they will, like one of the honorable counsel (Mr. Harper), go a step back and say that it must be a breach of some known positive law. Thus they will endeavor to shelter their client by saying that there is no act of Congress declaring it illegal for a judge to deliver his opinion on the law before counsel have been heard, or to make political harangues from the bench.

There are offenses for which an officer may be impeached, and against which there are no known positive laws. It is possible that the day may arrive when a President of the United States, having some great political object in view, may endeavor to influence the legislature by holding out threats or inducements to them. A treaty may be made which the President, with some personal view, may be extremely anxious to have ratified. The hope of office may be held out to a Senator; and I think it can not be doubted that for this the President would be liable to impeachment although there is no positive law forbidding it. Again, sir, a Member of the Senate or of the House of Representatives may have a very dear friend in office, and the President may tell him unless you vote for my measures your friend shall be dismissed. Where is the positive law forbidding this, yet where is the man who would be shameless enough to rise in the face of the country and defend such conduct, or bold enough to contend that the President could not be impeached for it?

It was said by one of the counsel that the offense must be a breach either of the common law, a State law, or a law of the United States, and that no lawyer would speak of a misdemeanor, but as an act violating some one of these laws. This doctrine is surely not warranted, for the Government of the United States have no concern with any but their own laws. In a State court, I would speak of a misdemeanor as an offense against a State law; in the courts of the United States, I would speak of it as an offense against an act of Congress; but, sir, as a member of the House of Representatives, and acting as a manager of an impeachment before the highest court in the nation, appointed to try the highest officers of the Government, when I speak of a misdemeanor, I mean an act of official misconduct, a violation of official duty, whether it be a proceeding against a positive law, or a proceeding unwarranted by law.

If the objection that the offense must be of an indictable nature, or against some positive law, means anything, it must be that the misconduct for which a judge or any other officer may be impeached, is either made punishable by, or is a violation of an act of Congress, for we are not to be regulated either by the common law or a State law. What, then, would be the result? I have pointed out

several instances of gross misconduct in violation of no act of Congress, and yet under this doctrine he is to be permitted to pursue his wicked courses until every possible offense is defined by statute. This too, would teach us that we have done wrong heretofore, for at the last session a judge was impeached and removed from office for drunkenness and profane swearing on the bench, although there is no law of the United States forbidding them. Indeed, I do not know that there is any law punishing either in New Hampshire, where the offense was committed. It was said by one of the counsel that there were indictable offenses. I, however, do not know where, certainly not in England. Drunkenness is punishable there by the ecclesiastical authority, but the temporal magistrate never had any power over it until it was given by a statute of James I, and even then the power was not to be exercised by the courts, but only by a justice of the peace, as is now the case in Maryland, where a small fine may be imposed.

But the attorney-general of Maryland (Mr. Martin) admits that offenses may be of so heinous a nature that their punishment carries infamy with them, and that, though not committed in the discharge of official duty, yet if against a State law, the party may be impeached and removed from office. This, though not very material to the present question, may serve us in showing how inapplicable the doctrine is, that the offense must be against a State law or the common law. I will suppose that in New Hampshire there is no law punishing profane swearing. In Maryland a magistrate is authorized to impose a fine of 33 cents, and if this is not paid instantly the offender may be put in the pillory and receive thirty-nine lashes. The punishment is infamous, and if inflicted on a judge, according to the idea of this gentleman, he is to be impeached and removed from office. If the same offense is committed in New Hampshire, the judge is not to be removed, not because he has been guilty of a lighter offense, but because there is no State law punishing it. If, then, the State law is to be the criterion, a judge in Maryland is to be removed from office for that which he might do with impunity in another State.

To carry this idea a little further: There was once in the State of Connecticut, and may be yet for aught I know, a celebrated code called the Blue Laws. Under the provisions of this code, I believe it is a fact that a captain of a ship was tied up and publicly whipped, because on returning from a long voyage, he met his wife on a Sunday at the front door and kissed her. This was deemed a high offense, and was ignominiously punished. Now, if we are to be governed by the State laws, I trust the Blue Laws of Connecticut will be rejected, and that our grave judges may be allowed to kiss when and where they please, as to their wisdom shall seem meet, without incurring the pains and penalties of an impeachment. This, sir, may be somewhat ludicrous, but I hope it is not, therefore, the less illustrative of the absurdity of the doctrine contended for. It has been said that the offenses for which a judge or other officer is to be impeached ought to be defined by act of Congress. This is impossible. Such is the multiplicity of passions that sway the human heart, such is the variety of human action, that a code of laws never did and never can exist in which all human offenses are defined. The Constitution is sufficiently definite when it declares that a judge shall hold his office during good behavior, and that all civil officers shall be removed for high crimes and misdemeanors. The law of good behavior is the law of truth and justice. It is confined to no soil and to no climate. It is written on the heart of man in indelible characters, by the hand of his Creator, and is known and felt by every human being. He who violates it violates the first principles of law. He abandons the path of rectitude, and by not listening to the warning voice of his conscience, he forsakes man's best and surest guide on this earth. The best and ablest judge will often err in mere matters of law, but as to principles of duty, in discharging acts of common justice to his fellow-men, he can never err so long as he follows conscience as his guide, and suffers justice to be the only object which he has in view.

2358. Chase's impeachment continued.

The argument of Mr. Manager Rodney on the nature of the power of impeachment.

Mr. Manager Rodney, at greater length, discussed this question:[91]

We have been told by that able lawyer, the attorney-general of Maryland, that a judge can not be impeached for any offense which is not indictable; nor, indeed, for an indictable offense, unless it be a high crime or misdemeanor; and not even

[91] Annals, pp. 591–610.

for a high crime or misdemeanor, except such as stamp infamy on the character and brand the soul with corruption. A variety of cases have been put to explain his ideas. The law books and the Constitution have been relied on to support those positions, which it becomes my duty to examine. Without troubling you to remove the lumber of the books, let me call your attention, in the first place, to the Constitution. The Constitution shall be my text. I think I shall be able to demonstrate that, in order to render an offense impeachable, it is not necessary that it should be indictable. But, I will go further and prove that, agreeably to the learned counsel's own principles, Judge Chase has committed indictable offenses. Taking his own explanation of crimes and misdemeanors, and recurring to his authority, I will prove that, within the strictest terms of the definition on which he relies, Judge Chase is guilty, not merely of misdemeanors in the various acts of judicial misbehavior, but of aggravated crimes against the express language of the laws and the positive provisions of the Constitution.

In adverting to the Constitution, when looking at one part, we should take a view of the whole instrument to fix the proper construction. In examining any provision, we should consider the bearing and tendencies of all the rest. By adopting this rule we shall preserve order and harmony throughout the system.

The first place in which the subject of impeachment is mentioned in the Constitution is in the first section of the first article. The language used by those who framed it is, in my humble opinion, too plain to be misconceived, and too clear to be misunderstood: "The House of Representatives shall choose their Speaker and other officers, and shall have the sole power of impeachment."

This section vests the exclusive authority to impeach in the immediate representatives of the people. The power thus delegated is general and comprehensive. It is not limited to any particular acts or transgressions, but is coextensive with every proper object or subject of impeachment. The House of Representatives is thus constituted, most emphatically, the grand jury of the nation: A high and responsible authority, which, I trust, will always be exercised with prudence and discretion, directed with impartiality and justice. But I do confidently hope that there will ever be found sufficient spirit and firmness to arraign the guilty delinquent, however elevated his station, when the Constitution or laws have been infringed, the tenure of office broken, or its duties violated.

The next passage in order which touches this topic and to which I shall refer is the third section of the same article: "The Senate shall have the sole power to try all impeachments. When sitting for that purpose they shall be on oath or affirmation. When the President of the United States is tried, the Chief Justice shall preside. And no person shall be convicted without the concurrence of two-thirds of the Members present."

This clause establishes a tribunal for the trial of impeachments. To the Senate this important trust is wisely confided. It prescribes the manner in which the jurisdiction shall be exercised, directs that the Members shall be under oath or affirmation, and fixes the number necessary to convict. Let us proceed a step further in the path: "Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust, or profit under the United States; but the party convicted shall, nevertheless, be liable and subject to indictment, trial, judgment, and punishment, according to law."

The part I have just read contains two very salutary provisions. The first limits the extent of the punishment to be inflicted by the Senate. The second, as a necessary consequence of the former, reserves to the ordinary tribunals of law the right to proceed by indictment. This last provision has been a fruitful source of argument to the learned counsel. They have very ingeniously played upon these terms, and, in the zeal of their imaginations, have fancied that they proved to a demonstration the position, that an offense must be indictable or it is not impeachable. There may be magic in their argument, but I do not perceive there is any logic. The superstructure which they have erected on this basis is easily demolished. From the language of this clause they draw the inference that the framers of the Constitution intended that no person should be impeached for any offense for which he was not liable to be indicted. Is this the fair import of the expressions? The text of this instrument is remarkably free from ambiguity. Clearness, correctness, and precision are its leading characteristics. With a very few exceptions it speaks a language intelligible by all. Had it been the design and wish of the authors of the Constitution that no offenses should be impeachable which were not indictable, they would have declared so in express and positive terms, and left nothing for inference or conjecture. This they have not done, and we may reasonably presume they did not intend to do. They prudently

looked into the volume of history, where they saw the shocking purposes to which, in evil times, the power of impeachments had been basely and inhumanly prostituted. They read in those instructive pages the dear-bought lessons of experience, and wisely ordained limits which the authority to punish should not exceed. They fixed a ne plus ultra for the tribunal that they established which their severest judgments should not pass. They knew, at the same time, that crimes might be perpetrated and offenses committed which would demand additional chastisement. The loss of office, and disqualification to hold any in future, the maximum of punishment which they had prescribed, would be very inadequate and bear little proportion to the atrocious guilt which might be incurred. Under the influence of these impressions they reserved to the tribunals established by law the right to inflict the just penalties annexed to this class of cases. Without any intention whatever, when any acts had been committed which manifested an unfitness for office, or when there had been a breach of the tenure by which it was held, by malconduct or misbehavior, to prevent the proceedings by impeachment, although the case might not be such as to warrant any additional punishment at law. This, I apprehend, is the object they had in view, and this is the fair, easy, natural, and obvious sense of the words they have used.

Those conversant with the judicial history of England, or who have studied her political annals, must be sensible of the deplorable situation to which that country has been reduced, at different periods, by the abuse of the power of impeachment. The revengeful exercise of this authority has too often deluged the scaffold with blood. In that country the proceeding by impeachment for any offense supersedes all other modes. The person accused, whether he be acquitted or condemned, can not afterwards be indicted for the same offense, or called to an account before the ordinary tribunals. The former course is a complete bar to the latter. To prevent those consequences flowing from a proceeding by impeachment under the Constitution, those who formed that instrument, at the same time that they limited the punishment, have expressly declared it shall have no effect to bar a trial before the ordinary courts, but that the party shall be liable to indictment and punishment according to law. Without this positive provision, as we are almost as much in the habit of drawing on the Bank of England for law as our merchants are for cash or credit, we might have incorporated a principle into our code totally repugnant to the system. The Constitution has drawn the true line on this subject. From a mere reprimand or temporary suspension, the court may ascend in the scale of punishment to removal and disqualification. But thus far can they go and no farther. They can not pass the Rubicon. If the crime deserves a more exemplary sentence recourse must be had to the ordinary mode of proceeding, and then their judgment is not pleadable in bar to an indictment. By this means adequate punishment may in all cases be inflicted.

In England every person, in a public or private capacity, either as an officer or an individual, is liable to be proceeded against by impeachment. In this country the sphere of impeachment is properly limited. The attorney-general of Maryland has taken a long, tedious, and circuitous march to arrive at this point, which I would readily have yielded without an argument. I do not recollect that any of my colleagues contended for the position that every man in this country, in his individual capacity, might be an object of impeachment. For myself I utterly disclaim the idea. Admitting, as I do, in its fullest extent, this wide distinction between the power delegated by the Constitution and that exercised in England, which embraces every subject of that kingdom, how does it bear on the case or affect the argument? After laboring for a considerable time, and employing all his talents, and that fund of legal knowledge which is inexhaustible, to prove that the House of Representatives can not impeach every citizen indiscriminately, the learned attorney-general has not favored us with any application of his principle to the present cause. It proves certainly one among many other broad lines of difference which exist between the British doctrines on the subject of impeachment and the constitutional provisions of this country. In this respect it adds to the weight of our scale. It shows how cautious we should be in bowing down to British precedents which can not be perfectly applicable. I hope I have satisfied the court that the gentlemen are mistaken in their argument on this part of the Constitution. In the general wreck of their defense I conceive this sinking plank, to which they have clung, can not afford them the most distant prospect of safety. We will now proceed a little further in the broad and plain road of the Constitution, carefully examining the ground on which we move.

By the fourth section of the second article of the Constitution it is provided that "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."

The learned counsel have placed great reliance on this passage to prove that an officer must be guilty, not merely of an indictable offense (as they concede every crime or misdemeanor to be), but must have committed a high crime or high misdemeanor to justify an impeachment. One of the learned gentlemen, to fix the true construction of the terms "or other high crimes and misdemeanors," commented at great length on the expressions. To illustrate the subject his fancy readily formed an objection which with logical accuracy he removed. He demonstrated that, agreeably to the strictest grammatical construction and the nicest propriety of speech, the epithet high was to be considered as prefixed to misdemeanors as well as to crimes. In this manner the phantom which his own imagination raised was laid not by a spell, but by the exertion of his argumentative powers. We would willingly have conceded the point and spared him his labor and his breath. We mean not to cavil about trifles or dispute for straws.

Taking it for granted that he has given the proper construction to a part, let us examine what is the just sense of the whole of this passage. In plain English it commands upon the conviction by impeachment of certain atrocious offenses that the guilty officer shall be removed at all events. Depriving the court thus far of the discretion which they would otherwise have possessed as to the judgment they might pass. Having previously limited, in general cases, the punishment which they might inflict, according to their discretion, by establishing a maximum which they should not exceed in this particular grade of flagrant offenses, they have fixed the sentence which they shall pass. The language of the Constitution is peremptory and imperative. Those convicted of such daring enormities of those high crimes or high misdemeanors must be removed from office, which they have justly forfeited. This is the minimum of punishment to be inflicted. Perhaps those who penned the great charter of the Union apprehended that in evil times some high officer of the United States clothed with power and armed with influence might be proved to have committed the base and detestable crime of bribery, or some other equally great, by evidence too strong and too powerful to be resisted, and in an unfortunate hour, awed by fear or seduced by favor, the constitutional judges would not hurl him at once from the seat which he was unworthy to occupy, but permit him to remain in his station, to the disgrace of the country and to the injury of the people. Hence they were induced to make this wholesome provision which left nothing to the discretion of the judges. But is there a word in the whole sentence which expresses an idea or from which any fair inference can be drawn that no person shall be impeached but for "treason, bribery, or other high crimes and misdemeanors?" It does not pretend to specify the various acts of an officer which may subject him to an impeachment; its whole object is to define and fix the punishment which he shall incur on the commission of particular offenses, which is removal from office. This is the least penalty they can inflict in such cases, and God knows it would be much too little had they not in the former part provided that after stripping the traitorous imposter of the insignia of office and power the ordinary tribunals may add to the constitutional sentence of the Senate the fines of forfeitures imposed by law.

From the most cursory and transient view of this passage I submit with due deference that it must appear very manifest that there are other cases than those here specified for which an impeachment will lay and is the proper remedy. In these particular cases the punishment is ascertained, to wit, removal from office; but in a clause to which I have sometime since adverted it is discretionary. Where was the necessity or use of that, if this defined all the impeachable offenses and specified the punishment? We must, if possible, give effect to every sentence of this instrument. We must not suppose that its authors made nugatory provisions. The sense and meaning which I have given to their language and the constructions which I have maintained will give force and effect to every word.

The system of impeachment thus understood, and I humbly submit rationally explained, is perhaps as little liable to exception as any branch of the Constitution. It is stripped of those terrible instruments of death and destruction which have made such dreadful havoc and carnage in the ages that have preceded us. We have been benefited by the sanguinary precedents of barbarous times. We have been taught wisdom ourselves by the folly of others. We have improved

the advantages we possessed, and thus, according to his own inscrutable ways, has the benevolent Author of our existence brought good out of evil.

In guarding effectually against the cruel and vindictive punishments which the extraordinary tribunal of impeachment might inflict, in the exacerbations of party violence and personal animosity, the fathers of the Constitution took care to provide that a certain grade of offenses should deprive the guilty incumbent of his office, thereby rendering him a harmless object to the community when dispossessed of his abused authority. Nay, they went further. Their wisdom and prudence led them to make a specific declaration that, after being deprived of his power, he should be subject to the legal consequences of his guilt upon trial and conviction before the ordinary tribunals at law. Thus rendering the system perfect and complete.

There is an important provision contained in the Constitution, intimately connected with this subject, to which I now beg leave to refer. It will be found in the first section of the third article:

"The judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior."

With this particular part of the Constitution the learned judge must have been more especially acquainted when he accepted of his present office, and must then have expressly accepted it on the terms specified. No man can seriously say that for a judge to continue in the exercise of his authority and the receipt of his salary after any acts of misbehavior is not a violation of this essential provision of the Constitution. He holds his office explicitly and expressly during good behavior. The instant he behaves bad he commits a breach of the tenure by which he holds the possession, and the office becomes forfeited. The people have leased out the authority upon certain specified terms. So long as he complies with them, and not a moment longer, is he entitled to exercise the power which was not intended for his individual advantage, but for their benefit. But, sir, who is to take notice of these acts of misbehavior? How are they to be ascertained, and what shall be considered as such? Are the people in their individual capacity, ipso facto, on the commission of the act to declare the office forfeited, and is a judge then to cease from his labors? Or must it not be officially, or rather judicially, ascertained? This, I conceive, would be the proper mode of procedure. Has the Constitution provided no tribunal for this purpose? I answer it has, most indubitably. By the Constitution the Senate, as the court, and jury, too, in cases of impeachment, has the sole power of removing from offices those who hold them by the tenure of good behavior. If a judge misbehave, he ought to be removed, because agreeably to the plainest provision he has forfeited his right to hold the office. The Constitution having established this single mode of removal, and having declared that a judge shall hold his office only during good behavior, it becomes the duty of the representatives of the people, as the grand inquest of the nation, vested with the general power of impeachment, when they know, of their own knowledge or from the information of their constituents, that acts of misbehavior have been committed, to present the delinquent to this high tribunal, whose powers are competent to inquire into the case and apply the remedy; whose authority is coextensive with the complaint, commensurate with the object, and adequate to the redress of the evil. Shall it be said that it is true the Constitution has declared that a judge shall hold his office no longer than he behaves himself well, and that though he behaves never so ill it has provided no means to turn him out of office if he has the hardihood to remain in his seat? If such a doctrine be contended for, it is too preposterous to receive the sanction of this court. It would render this provision nugatory indeed. It would do more. It would be establishing the principle that whether they behave well or ill they must continue in office, because there was no mode fixed for removing them. This would be the strongest construction that plain language, obvious to the common sense of the most unlettered man, ever received in a court of justice. The method I have pointed out solves all difficulties at once and releases us from every embarrassment on this subject. It makes the Constitution consistent with itself and preserves uniformity throughout all the parts.

The learned counsel were compelled to make a show in maintenance of unsound doctrines to give appearance of support to positions equally untenable.

I flatter myself that every member of this court is by this time convinced that if a judge misbehave, he should be deprived of his office, because guilty of a breach of the tenure by which it is held; that any acts of misbehavior must

be judicially inquired into and ascertained; that the Constitution, having delegated to the House of Representatives exclusively the general power to impeach, acts of misbehavior are proper subjects of impeachment, upon conviction of which the Senate has the authority to remove an officer, and is bound to exercise it. Shall we be told, then, that no matter how gross the acts of judicial misbehavior, or how flagrant the misconduct of a judge, he can not be removed from office, nay, he can not be impeached, unless guilty of treason or bribery or some crime equally great? Sir, it is impossible that the intelligent understandings and the mature judgments of this court could countenance for a moment such an idea.

The terms "during good behavior" appear to have been considered as very vague and indefinite by the learned counsel for the defendant, from the manner in which they have argued the case. When, in the strong, nervous language of my honorable friend, the conduct of the accused has been described in the most appropriate terms in the articles of impeachment, they have treated them with levity, as if they did not understand their import, because they admitted of no serious refutation. The clear explanation of the expression "during good behavior," and the lucid exposition of this passage contained in the charges themselves, they seem unwilling to comprehend. The commentary is as unintelligible as the text. When to such conduct as was never before witnessed in a court of justice is applied the epithet of novel, we have been told by one counsel that the term is too uncertain to be comprehended—no precise idea can be affixed to it, nor is the language sufficiently technical to constitute a criminal charge. When behavior the most rude and contumelious, disgraceful on any occasion, but truly degrading on the bench and unquestionably criminal, because calculated to bring the judiciary into the the lowest contempt and to excite universal indignation against the tribunals of the country, is portrayed in the impressive style of truth, the age of captious sophistry or technical bigotry is resorted to for proving there is no sense or meaning in the charge. Upon what an ocean of uncertainty have we embarked when the plainest language is not understood! If sound, solid common sense were to be confounded by technical jargon, the tower of Babel would not present a greater confusion of tongues. Sir, when the gentleman can not but feel the force of these charges, with what admirable ingenuity do they attempt to evade them! Is this tribunal, say they, to erect itself into a court of honor, or assume the chair of chivalry, and form a scale by which decorum and good manners may be nicely graduated? Is every slight deviation from the line of politeness at an assembly or drawing-room to be marked with accuracy and chastised with severity? The testimony furnishes apt and ready answers to those questions. The learned judge is not arraigned because he does not possess the polished manners of an accomplished gentleman, but for outraging all the rules of decency and decorum by conduct at which the plain sense of every honest man would revolt.

I beg this court seriously to consider whether a judge may not be guilty of acts of misbehavior inferior in criminality to treason or bribery for which he ought to be impeached, though no indictment would lay for the same. When gentlemen talk of an indictment being a necessary substratum of an impeachment I should be glad to be informed in what court it must be supported. In the courts of the United States or in the State courts? If in the State courts, then in which of them? Or, provided it can be supported in any of them, will the act warrant an impeachment? If an indictment must lay in the courts of the United States, in the long catalogue of crimes there are very few which an officer might not commit with impunity. He might be guilty of treason against an individual State, of murder, arson, forgery, and perjury, in various forms, without being amenable to the Federal jurisdiction, and unless he could be indicted before them he could not be impeached. Are we then to resort to the erring data of the different States? In New Hampshire drunkenness may be an indictable offense, but not in another State. Shall a United States judge be impeached and removed for getting intoxicated in New Hampshire, when he may drink as he pleases in another State with impunity? In some States witchcraft is a heinous offense, which subjects the unfortunate person to indictment and punishment; in several other States it is unknown as a crime. A greater variety of cases might be put to expose the fallacy of the principle and to prove how improper it would be for this court to be governed by the practice of the different States. The variation of such a compass is too great for it to be relied on. This honorable body must have a standard of their own, which will admit of no change or deviation. The test by which they will try an impeachment can not be that of indictment. Even in England, to whose practice and whose precedents such constant recourse has

been had, the learned counsel have not adduced a single case where a judge of one of their superior courts has been indicted for any malconduct in office. Nay, I believe I may defy them to show an example of the kind. The best authorities tell us they are not subject to indictment, but may be proceeded against by impeachment. They have been impeached, convicted, and punished for giving opinions which they knew to be contrary to law, and for a variety of misdeeds, but never in a solitary instance that I know of have they been indicted. I think I can put so many striking cases of misconduct in a judge for which it must be admitted that an impeachment will lay, though no indictment could be maintained, that the learned counsel themselves must be compelled at length to surrender this post at discretion, without any terms of capitulation. I will not state the case of a judge willfully and designedly neglecting to hold a court on the day prescribed by law, for I am aware of the answer gentlemen would give, that it is an offense against a particular provision. But let use suppose Judge Chase, to comply with the forms of the law at the time appointed, should appear and open the court, and notwithstanding there was pressing business to be done he should proceed knowingly and willfully to adjourn it until the next stated period. He would be guilty of no violation of any positive law for which he might be punished by indictment; but ought he not to be impeached? Suppose he proceeded in the dispatch of business, and from prejudice against one party or favor to his antagonist he ordered on the trial of a cause, though legal grounds are exhibited for postponement. Is this not a proper subject of impeachment? And yet there is no express law infringed. If when the jury return to the bar to give the verdict, he should knowingly receive the verdict of a majority, is there any positive provision by which a jury shall be composed of twelve men and that their decision shall be unanimous? I believe even the learning of that profound lawyer (Mr. Martin), from the reading of laborious years and the indefatigable researches of a life devoted to the pursuit of his profession, could not show any positive provision in the Constitution of the United States or any statute of Congress on the subject. So far from it being originally necessary in civil cases that a jury should be unanimous, the late Judge Wilson (a great and venerable authority), magnum et memorabile nomen, asserts that a majority always decided agreeably to the primary principles of that valuable institution.

Again, there is no man so ignorant as to be insensible to manifest violations of the sanctuary of a court. It was never intended as a stage for the exhibition of pantomimes or plays. Were a judge to entertain the suitors with a farce or a comedy, instead of hearing their causes, and turn a jester or buffoon on the bench, I presume he would subject himself to an impeachment; and yet there is no positive law preventing a court from being converted into a theater or of preferring the buskin to the sock. If he should exhibit a tragic scene, in which an unfortunate fellow-citizen might find himself really no actor in the part which he bore, I presume his conduct would claim the attention of the House of Representatives, as the grand inquest of the nation. It must be unnecessary to multiply examples of misconduct in a judge against the known law of his duty, so manifest at first blush that the most callous conscience can not be insensible to them, not minutely specified and described (for that would be impossible) by particular provision in any legislative act, but all embraced and comprehended in the solemn oath which he takes to perform his duty faithfully and impartially as a judge. As a judge he is bound to execute the laws. Every opinion which he gives and every sentence which he passes must be in conformity to law and be authorized by it. It ought to be the judgment of the law and not his own individual opinion. If he willfully make a decree not sanctioned by law, he is guilty of misbehavior as a judge, for it is a glaring violation of the fundamental principles of his office. I shall have occasion in the course of my argument to advert to judicial opinions delivered by the accused which there was no legislative act to warrant, no precedent to authorize, no principle to sanction, and which the utmost latitude of legal discretion would not justify. In such a case, if this court be satisfied that he acted innocently wrong, that it was an honest error of judgment which led him astray, he will no doubt stand acquitted. But if, from a concurrence of circumstances, they are convinced that he erred through design, from prejudiced and partial motives, though he may not have been corrupted by a bribe, they will consider him as a proper subject of their jurisdiction, and a proper object for the exercise of their authority.

The doctrines of the learned counsel for the defendant would lead to a conclusion which they may not have contemplated, but which the country would feel. Time would fail me to enumerate the different offenses of various grades

which a judge might commit, and for which he ought most assuredly to be impeached, though no indictment could be maintained in any of the Federal courts. If their positions were correct, a judge might violate all the Ten Commandments without subjecting himself to impeachment and removal; for I know of no method of removal but through the medium of impeachment. There is no law of the United States prohibiting drunkenness on the bench, or indeed punishing this vice at all, unless we look into the laws of a naval or military court-martial, and yet a judge ought certainly to be removed from office if guilty of habitual intoxication. The use of profane or obscene language by a judge is not expressly proscribed by any act of Congress with which I am acquainted, though if it were forbidden in general terms gentlemen might say with as much propriety as they have done in other cases, in the course of their argument, that every term, considered as such, ought to be enumerated, and yet, I believe, should a judge, in his place, be guilty of taking the name of his God in vain, of cursing and swearing on the bench, or using the obscene language of Billingsgate or St. Giles, he ought to be impeached and removed. The sanctity of a court should be preserved unsullied, and the officer displaced who was capable of exhibiting so shocking an example, calculated to destroy all respect for, and confidence in, the judicial establishment of the country, and to corrupt the morals of the nation. But, sir, why need I enlarge on this subject? The counsel for the defendant have appeared at one stage of their argument to possess great respect and deference for precedent. To consider cases solemnly argued or deliberately adjudged as fixing the law so perfectly as to justify a court in absolutely preventing any counsel even though concerned for a criminal, and that, too, in a capital case, from questioning principles thus established. If precedent will furnish us with a clue to the intricate labyrinth in which they have attempted to involve us, we are in possession of one equal to that of Ariadne.

Suffer me again to refer them to the precedent which I cited a few days since. I allude to the case of Judge Addison, in Pennsylvania. One of the counsel (Mr. Martin), for whose legal erudition I feel the greatest respect, has endeavored to impeach the authority of the highest tribunal in that State, and has asked if that decision is to be a precedent for this court? I was the more surprised at this, because his colleague (Mr. Lee) had cited, in the course of his argument, a case from Kirby's Connecticut Reports, decided by Chief Justice Ellsworth and his associates. I ask, sir, in reply, whether, when a case determined in one of the ordinary courts of Connecticut has been produced by the opposite counsel as entitled to consideration, the decision of the senate of Pennsylvania, the highest court of criminal judicature in that Commonwealth, ought not to be respected. Permit me to add that, in my humble opinion, there is as much propriety in referring to such examples as in recurring to British precedents. I have said, and with increasing confidence I repeat it, that this case, under the constitution of Pennsylvania, is emphatically stronger than the present, under the Constitution of the United States, on the much-litigated question whether a judge can be impeached for any act for which he can not be indicted. In the constitution of Pennsylvania, article 5 and section 2, there is a provision not to be found in the Constitution of the United States, by which a judge, for any reasonable cause, which shall not be sufficient ground for impeachment, may be removed by the governor, on the address of two-thirds of each branch of the legislature. This provision would seem to be intended to meet the distinction which the learned counsel have labored to establish. In this light Judge Addison himself on his trial considered it, and pressed the point most forcibly on the senate of Pennsylvania. He had the strongest interest in so doing. If this course had been pursued, he would have merely lost his office, but upon conviction by impeachment he dreaded the disqualification to hold any office which the senate might annex to the judgment of removal. But, sir, this is not the only reason, cogent as it is, for considering the case of Judge Addison particularly applicable to the present. It so happens that we have a decision of the supreme court of Pennsylvania on the very objection which the gentlemen now take, when the conduct of Judge Addison was brought before them previous to his being impeached. If the learned counsel will not give full faith and credit to the determination of the senate of Pennsylvania, perhaps they will admit the authority of her supreme court. I hope this tribunal, at least, will give it equal weight with that of the supreme court of Connecticut. A very correct account of the case will be found in the statement of the attorney-general on the trial of Judge Addison, taken in connection with a printed report of the case, which was produced by Mr. Dallas on that occasion. I will not detain this honorable court with reading all which is there recorded on this subject, but will

refer to pages 51, 52, 64, and 69 of Addison's trial, and endeavor to present them an accurate view of the case.

On the ground of an application filed by J. B. C. Lucas, then an associate judge of the same court in which Judge Addison presided, stating that Judge Addison, on a particular occasion, after having delivered a charge to the grand jury himself, had prevented Judge Lucas from addressing them, by ordering a constable to be sworn and the jury to be taken from the box, the attorney-general moved for leave to file an information against Mr. Addison.

The attorney-general made two points: First, that Judge Lucas had an equal right with the presiding judge to deliver a charge to the grand jury, on principle and authority. The chief justice, Shippen, immediately observed that it was unnecessary to speak to that point or to read authorities, "speak to the second point—Is this conduct the subject of an information?"

After the argument was closed, the opinion of the court (Judge Breckenridge taking no part) was delivered by the chief justice, who stated that the proceeding was arbitrary, unbecoming, unhandsome, ungentlemanly, unmannerly and improper, but "but that it was not indictable, nor the subject of an information," and that there was another remedy, referring no doubt to an impeachment; for the attorney-general states, in page 52, "That from what fell from the judges of the supreme court, when the case was before them, it might be easily inferred that impeachment was the proper mode to correct the evil complained of."

Thus we have the solemn adjudication of the supreme court that conduct in a judge may be impeachable, though no indictment can be maintained for it. We could not have formed for ourselves a precedent more apposite.

An impeachment was accordingly presented against Judge Addison by the constitutional authority to the senate of Pennsylvania. Pardon me for trespassing so much on your time as to read distinctly the articles, in order to put this court in possession of the whole case:

"ARTICLE 1. That the said Alexander Addison, being duly appointed and commissioned president of the several courts of common pleas, in the circuit consisting of the said counties of Westmoreland, Fayette, Washington, and Allegheny, within the territory of the said Commonwealth, while acting as president of the said court of common please of the said county of Allegheny, on Saturday, the 28th day of March, in the year of our Lord 1801, in open court of common pleas, then and there holden in and for the county last aforesaid, did, after John Lucas, otherwise John B. C. Lucas, also duly appointed and commissioned one of the judges of the court of common pleas of the county last aforesaid, had, in his official character and capacity of judge as aforesaid, and as of right he might do, addressed a petit jury, then and there duly impaneled, and sworn or affirmed, respectively, as jurors, in a cause then pending, then and there, openly declare and say to the said jury, 'that the address delivered to them by the said John Lucas, otherwise John B. C. Lucas, had nothing to do with the question before them, and that they ought not to pay any attention to it;' thereby degrading or endeavoring to degrade and vilify the said John Lucas, otherwise John B. C. Lucas, and his character and office as aforesaid, to the obstruction of the free, impartial, and due administration of justice, and contrary to the public rights and interests of this Commonwealth.

"ART. 2. That the said Alexander Addison, being duly appointed and commissioned president as aforesaid, did, at a court of quarter sessions of the peace and court of common pleas, holden in and for the county of Allegheny aforesaid, on Monday, the 22d day of June, in the year of our Lord, 1801, under the pretense of discharging and performing his official duties as president aforesaid, unjustly, illegally, and unconstitutionally claim, usurp, and exercise authority not given or delegated to him by the constitution and laws of this Commonwealth, inasmuch as he, the said Alexander Addison, president as aforesaid, did, under pretense as aforesaid of discharging and performing his official duties, then and there, in time of open court, unjustly illegally and unconstitutionally stop, threaten, and prevent the said John Lucas, otherwise John B. C. Lucas, also duly appointed and commissioned one of the judges of the said courts, from addressing, as of right he might do, a grand jury of the said county of Allegheny, then and there assembled and impaneled, and sworn or affirmed, respectively, concerning their rights and duties as grand jurymen, thereby abusing and attempting to degrade the high offices of president and judge as aforesaid, to the denial and prevention of public right, and of the due administration of justice, and to the evil example of all others in the like case offending."

You have now a clear and comprehensive view of the grounds on which

the impeachment was supported. The first charge accuses Judge Addison of speaking, in terms very unjustifiable for a president of a court, of an address delivered to a petit jury by his associate, Judge Lucas. The language which he used, and the manner in which it was proved to have been delivered, are equally exceptionable. His conduct was rude, ungentlemanly, and utterly inconsistent with that decorum and respect which should be inculcated and practiced on the bench, to preserve the credit and the character of a court of justice. Its object and tendency was to deter Mr. Lucas from exercising his judgment and expressing his opinion from the bench, and to reduce him to a perfect cipher.

The other charge was for preventing Judge Lucas from addressing a grand jury. This was effected in the same rude, and insolent manner, as will appear from the testimony of Judge Lucas himself, in pages 33 and 37 of the printed trial.

To support the first article, I believe it would not be possible to find any positive act or special provision prescribing what particular language a president of a court may use, and what he shall not, in reference to the opinion which an associate justice may have delivered. There is no legal barometer for weighing words, nor any particular law embracing all the variety of cases of lighter and darker shades which may occur. The learned counsel who supported the prosecution did not cite a single precedent, even, of the kind. There may have been a law to be found in the breast of every man of common sense and common manners, with which Judge Addison was not unacquainted, and upon which the Senate considered themselves perfectly justified in convicting him. This was the general, but clear and comprehensive law which marked his rights and duties as a judge—the law of his office, prescribed by his oath.

The second article, for preventing an associate judge from delivering a charge to the grand jury after they had received one from the president of the court, could not have been maintained on the ground of any express statute or legal usage. It is the first time I ever heard of such a case. The uniform practice in the courts to which I have been accustomed is for the chief justice or president to deliver the charge. This was more especially the case in the court in which Judge Addison presided, for it appears they had adopted a positive rule on the subject. The practice of a court of justice is generally considered as the law of that court. But the senate, believing on principle (and believing correctly) that the power of all the judges of the court was equal, pronounced a sentence of condemnation.

With these plausible circumstances to countenance him, Judge Addison, a gentleman of considerable celebrity both in the legal and political world, and of unquestionable talents, conducted his own defense. His principal reliance was on the very objection which the learned counsel for the present defendant now make. He contended that he had committed no act for which he was liable to indictment, and that he was, therefore, not subject to impeachment. In the position that his conduct was not indictable, he was supported by the opinion of the supreme court, who had, nevertheless, considered it a fit subject for impeachment. His argument was able and ingenious; but, sir, his objection was anticipated or answered in such a mastery manner, by a chain of reasoning so irresistible, that it produced complete conviction on the minds of the senate of Pennsylvania. This honorable court know the result. He has been not only removed, but disqualified to hold the office of judge in any court of law in that State. We have, then, the deliberate opinion of the senate of Pennsylvania, upon solemn argument, confirming the decision made by her supreme court. If these cases do not furnish us with lessons of instruction, I know not where such lessons are to be read.

I will remark, sir, further, in relation to this case, that had it not been for the extreme anxiety of Judge Addison to propagate his political dogmas from the bench, he would never have been reduced to this serious dilemma. Like the defendant, he converted the sacred edifice of justice into a theater for the dissemination of doctrines to which I hope I shall never subscribe. If I have a desire relative to the administration of justice, paramount to all others, it is that party and party spirit should be banished from every court. My sincere and fervent prayer is that the laws, like the providence of God, may shed their protecting influence equally over all, without respect to persons or opinions.

I have been requested by the attorney-general of Maryland to state another and a recent case which has happened in Pennsylvania. For his satisfaction I will briefly inform this honorable court of all that took place on that occasion, in the least degree applicable to the present trial. Three of the judges of their

supreme court were accused of fining and imprisoning, without the intervention of a jury, a fellow-citizen, for publishing a paper which they considered as a contempt of court. The judges were defended by two most able and eloquent counsel, who contended that the constitution, the laws, and the practice of Pennsylvania, by adopting the common law doctrines on the subject, justified the proceeding; and that if there was no law to justify it, their conduct flowed from an honest error in judgment, for which they were not liable to impeachment. But, sir, they did not attempt to maintain the position contended for on this occasion, that to support an impeachment the conduct of a judge must be such as to subject him to an indictment. Nor could they, with any consistency, have supported such a doctrine, for their clients had before in the case of Mr. Addison decided that his conduct was not a proper subject of impeachment though it might be of indictment.

This precedent, then, fortifies the former decisions on this point, and adds another authority to those which previously existed, and to which I have adverted.

The judges were acquitted, I acknowledge, and were I to hazard an opinion, I would say because some of the members of the senate of Pennsylvania thought their conduct proceeded from an honest error of judgment. If this court shall be of the same opinion with respect to the conduct of Judge Chase, I trust they will follow the precedent and acquit him, and I shall cheerfully acquiesce in the decision.

I fear I shall fatigue this honorable court by noticing the various cases on this subject, but I can not omit pressing on their attention a decision of the most authoritative and binding nature, because it is one of their own. The case to which I allude and its attending circumstances must be fresh in the recollection of every Member of the Senate. The district judge of New Hampshire was impeached for habitual drunkenness on the bench, and for using profane and indecent language. It was not in evidence to the court that drunkenness or profane and indecent language were indictable by any law of that State. There is no law of the United States, unless we recur to the naval or military code, punishing these vices as offenses. Of course, sir, it was not pretended by the managers on that occasion, of whom I had the honor to be one, that any indictment could be maintained against Judge Pickering in any civil court of the United States, or of the individual State of which he was a citizen. I appeal to your recollection, sir, for the accuracy of this statement; and, let me ask, what was the result? A constitutional majority of the senate pronounced a verdict of guilty and passed a judgment of removal.

One of the counsel (Mr. Harper), of whose argument I may be permitted to observe, without disparagement to the talents and learning of his colleagues, that it contained an able and masterly defense of the conduct of the accused, sunk beneath the weight of this stubborn and conclusive precedent. It was a stumbling block which he could not remove out of his way, and he seemed compelled, reluctantly, to yield the principle to the decisive authority and pointed application of the case.

We have, then, the whole weight of American authority in our scale, whilst the learned counsel have not been able to adduce a single precedent, foreign or domestic, against us. When I speak of precedents, I do not allude to the obscure dicta which may be found by turning over the dark lantern of tradition in remote ages of antiquity, or to the interpolations which may be scattered through the marginal references to the abridgments, by unknown editors; but to some authoritative case which has occurred since the regular date of parliamentary impeachments. The fines which Edward I imposed on some of his judges, in what manner is not certainly known, to replenish, as many have supposed, an exhausted treasury, are familiar to every student. But from the period of impeachment to the present time, I believe no instance of an indictment can be shown against a judge of the Common Pleas, Exchequer, or King's Bench in England, nor against a Lord Keeper or Lord Chancellor, who hold their offices to this day, let it be remembered, during pleasure. The civil business of the Court of Chancery is more important than that of all the other courts, and the decisions of that tribunal have been as impartial I believe as any, notwithstanding the high sounding doctrines of judicial independence. There have been many impeachments, the judges have sometimes been complained of by information in the execrable Star Chamber, but there have been no indictments at law. The Star Chamber has been long since abolished, and the sole method of proceeding against judges of the superior court now is by impeachment. The best writers

agree, "that judges of record are freed from all presentations whatever, except in Parliament, where they may be punished for anything done by them in such courts as judges." Numerous authorities might be cited on this subject, but I shall content myself with barely referring to them.—1 Hawk., 192, chap. 73, sec. 6; 1 Salk., 396; Woodeson, 596; Jacob's Law Dictionary, title Judges, 12 Co., 25, 26.

Were I to rest the point here, I confidently believe we should be perfectly safe; but I will proceed further, agreeably to my engagement in the commencement of my argument, and demonstrate that, according to their own principles and authorities, Judge Chase has been guilty of crimes and misdemeanors, in the strictest technical sense of the terms, for which he ought to be punished in an exemplary manner.

In contesting the principles that no act is impeachable unless it also be indictable, I have not contended for the position attributed to me by the learned attorney-general of Maryland, that a judge may be impeached for conduct which is not criminal. On the contrary, we rely on supporting this as a criminal proceeding, and the gentlemen are entitled to every advantage which they can reap from this declaration.

I have had occasion to state that I considered every act of misbehavior in a judge as a misdemeanor, and the attorney-general of Maryland has expressed in strong terms his perfect agreement in the opinion that misbehavior is synonymous with misdemeanor. He appeared to imagine that he gained a great advantage by making this concession, and I am content to give him the full benefit to be derived from it. I shall not shrink from the position, but meet the gentleman with pleasure and confidence on this ground. I love to break a lance in the open field of discussion, and disdain every kind of ambush in argument.

As we agree in one point, that misbehavior and misdemeanor are convertible terms, Jacob's Law Dictionary, which quotes the language of Judge Blackstone in his Commentaries, has been recurred to for a definition of a misdemeanor. Let us try the conduct Judge Chase by his text. "A crime or misdemeanor (says Judge Blackstone) is an act committed or omitted, in violation of a public law either forbidding or commanding it." "This general definition comprehends both crimes and misdemeanors, which properly speaking are mere synonymous terms."

There is a public law that prescribes the following oath which Judge Chase took on his entrance into office (1 vol., p. 53): "I do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and the rich, and that I will faithfully and impartially perform all the duties incumbent on me as a judge of the Supreme Court according to the best of my abilities and understanding, agreeably to the Constitution and laws of the United States."

Who that reads this solemn and impressive provision, and looks at the plenary evidence we have before us, can hesitate to pronounce the respondent guilty of violating a public law, which he was bound by the most sacred of all human obligation to execute with fidelity? His oath informed him that the law, like the gospel, was no respecter of persons, and yet what have we beheld in his conduct, when a poor unfortunate Fries or a wretched Callender was before him, upon a criminal charge? I appeal to the testimony which I shall by and by comment upon, whether his acts do not prove that he marked them out as victims to be sacrificed on the altar of party? Sir, I can not believe that gentlemen will seriously contend that the expressions "faithfully and impartially to perform his duties," have no definite meaning; that conduct grossly prejudiced, and the most shameless partiality shall be considered as no violations of his solemn oath. If they did, I have too exalted an opinion of the good sense and discernment of the court to believe they would countenance such an idea. Their import is certainly plain and obvious without recurring to the black-lettered lore for explanation. What then was the conduct of the respondent to Fries, if testimony not only unimpeached but unimpeachable is to be believed? Was he not prejudiced both against the unhappy prisoner and his case, which he had from a superabundance of zeal completely prejudged? Or, sir, when he declared Callender ought to be hung and set off with his miserable pamphlet in his pocket, ready scored for his purpose, and proceeded in the most arbitrary manner with his trial, was he impartial, or was he not guilty of the most manifest and daring partiality? Shall he be guilty of all these outrages against the plain language of a public statute, which combines the obligation of an oath with the sanction of a law, and yet be innocent of any crime or misdemeanor? If gentlemen will hold up the acts of Congress in one hand, and the acts of Judge Chase, proved by the testimony, in the other, they will see and be satisfied, that within the strictest

legal definition he has been guilty of repeated and aggravated violations of public law, and therefore unquestionably of crimes and misdemeanors.

The Constitution, however, is declared to be emphatically the supreme law of the land. This sacred instrument he was bound by a twofold oath to preserve inviolate. All executive and judicial officers of the United States, independent of their oaths of office, are bound by oath to support the Constitution. (Art. 6, sec. 3.)

By the seventh article of the amendments of the Constitution, which have been duly ratified and therefore now form part of that instrument, it is declared, that "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law; and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense."

This article secures to every accused individual the right of a trial by an impartial jury. Without their unanimous consent, no matter how eager the Government are for conviction, no person can be punished. Where any man is charged in due form with the commission of a crime, and pleads he is not guilty, the jury are to decide on the whole case whether he be innocent or not. Their verdict must be commensurate with the issue joined, which involves both fact and law, which they have indubitably the right to decide, agreeably to the express and positive provision of the Constitution. This right, therefore, is an original right, flowing from the highest authority. It is beyond doubt a principle and not an incidental right. It is not a right incidental to the trial, but it constitutes the trial itself; for there can be no other trial in the case but by jury.

This same amendment guarantees to the accused the assistance of counsel. How important is this privilege, when it is recollected that veterans of the bar are generally selected to prosecute. The situation, too, of an innocent man, charged with the commission of a crime, is delicate and embarrassing. It excites frequently apprehensions which unfit him for making a defense. I feel myself compelled to declare, upon the authority of the testimony in this case, that the respondent has been proved guilty of violating the supreme law of the land in those great essential provisions. He has deprived accused individuals of a trial by jury, for he would not suffer the jury to decide, or even to hear argument on the subject of the law, and he has deprived them of the benefit of counsel by conduct which drove counsel from the bar. This has happened in more than one instance, and above all, an injured fellow-citizen has been stripped of his invaluable privileges in a capital case. Is this imagination or is it reality? Let the recorded testimony determine. If, however, I am correct, must I not have satisfied this honorable court, agreeably to my promise that taking the learned counsel's own definition, and relying upon his authorities, I have demonstrated that the accused has been guilty of crimes and misdemeanors? But have I not gone further, and shown that he has been guilty of high crimes and misdemeanors, and such as disqualify him for a seat on the bench, so as to come fully within the rule which he has laid down?

God forbid that it should be said, when a judge is guilty of grossly violating not merely a public law, but the supreme law of the land, nay, a law which he was bound by two solemn oaths to support, he is not guilty of any crime or misdemeanor; or that when he violated this supreme law which he is thus obligated to respect, for the purpose of depriving a fellow-citizen, accused of a capital crime, of the benefit of counsel, and the inestimable right of trial by jury, he shall not be declared guilty of high crimes and misdemeanors, which evince a want of integrity, and mark a depravity of heart that completely disqualify him for a judicial office.

I have now finished by observations in reply to the preliminary objections which have been made to this mode of proceeding, and have been reluctantly compelled to discuss them at much greater length than I at first contemplated, from the zeal and pertinacity with which they have been urged and insisted on by the learned counsel opposed to us. Under the impression that I have been successful in this undertaking, I shall hasten to the investigation of the articles themselves.

2359. Chase's impeachment continued.

The argument of Mr. Manager Randolph on the nature of the power of impeachment.

And Mr. Manager Randolph said: [92]

It has been contended that an offense, to be impeachable must be indictable. For what then, I pray you, was it that this provision of impeachment found its way into the Constitution? Could it not have said, at once, that any civil officer of the United States, convicted on an indictment, should (ipso facto) be removed from office? This would be coming at the thing by a short and obvious way. If the Constitution did not contemplate a distinction between an impeachable and an indictable offense, whence this cumbrous and expensive process, which has cost us so much labor, and so much anxiety to the nation? Whence this idle parade, this wanton waste of time and treasure, when the ready intervention of a court and jury alone was wanting to rectify the evil? In addition to the instances adduced by my right worthy friend (Mr. Nicholson) who first addressed the court yesterday, permit me to cite a few others by way of illustration. The President of the United States has a qualified negative on all bills passed by the two Houses of Congress, that he may arrest the passage of a law framed in a moment of legislative delirium. Let us suppose it exercised, indiscriminately, on every act presented for his acceptance. This surely would be an abuse of his constitutional power, richly deserving impeachment; and yet no man will pretend to say it is an indictable offense. The President is authorized by the Constitution to retain any bill presented for his approbation, not exceeding ten days, Sundays excepted, within which period he may return it to the House wherein it originated, stating his reasons for disapproving it. Now let us suppose that, at a session like the present, which must necessarily terminate on the third of March (and that day falls this year on a Sunday) the President should keep back until the last hour of an expiring Congress every bill offered to him for signature during the ten preceding days (and these are always the greater part of the laws passed at any session of the Legislature), and should then return them, stating his objections, whether good or bad is altogether immaterial. It is true that a vote of two-thirds of each branch may enact a law in despite of Executive opposition; but, in the case I have stated, it would be physically impossible for Congress to exercise its constitutional power. Indeed, over the bills presented to the President within nine days preceding its dissolution, the Legislature might be deprived of even the shadow of control, since the Executive is not bound to make any return of them whatever. Now, I ask whether such misconduct in the President be an indictable offense? And yet is there a man who hears me who will deny that it would be a flagrant abuse, under pretense of exercise of his constitutional authority, for which he ought to be impeached, removed, and disqualified? Sir, this doctrine, that impeachable and indictable are convertible terms, is almost too absurd for argument. Nothing but the high authority by which it is urged, and the dignified theater where it is advanced, could induce me to treat it seriously. Strip it of technical jargon, and what is it but a monstrous pretension that the officers of Government, so long as they steer clear of your penal statutes—so long as they keep without the letter of the law—may, to the whole length of the tether of the Constitution, abuse that power, which they are bound to exercise with a sound discretion and under a high responsibility for the general good? The counsel who closed the defense (Mr. Harper) felt that this ground trembled beneath his feet; and, fearing to be swallowed up in the yawning ruin, he precipitately abandoned it. He shifts from the position taken by his associates, and lays down this principle "that an offense, to be impeachable, need not be indictable, yet it must have been committed against some known law." Well, take the question in this point of view, and there is no longer matter of dispute between us; it is reduced to a miserable quibble. For what do we contend?—that the respondent has contravened the known law of the land and of his duty, which required him "to dispense justice faithful and impartially, and without respect to persons." He stands charged with having sinned against this law and against his sacred oath, by acting in his judicial capacity unfaithfully, partially, and with respect to persons. These are our points. We do charge him with misdemeanor in office. We aver that he hath demeaned himself amiss—partially, unfaithfully, unjustly, corruptly. This is the sum and substance of our accusation, and this we have established by undeniable proof. I will waste no more time in attempting to dislodge our opponents from a position which they have abandoned in the face of day.

[92] Annals, pp. 642, 643.

2360. Chase's impeachment continued.

The counsel of Mr. Justice Chase argued elaborately that the power of impeachment applied only to indictable offenses.

Argument of Mr. Joseph Hopkinson, counsel for Mr. Justice Chase, on the nature of the power of impeachment.

On the other hand the counsel for the respondent argued at length that the power should be considered narrower.

Mr. Hopkinson said: [93]

In England the impeachment of a judge is a rare occurrence. I recollect but two in half a century. But, in our country, boasting of its superior purity and virtue, and declaiming ever against the vice, venality, and corruption of the Old World, seven judges have been prosecuted criminally in about two years. A melancholy proof either of extreme and unequaled corruption in our judiciary, or of strange and persecuting times among us.

The first proper object of our inquiries in this case is, to ascertain with proper precision what acts or offenses of a public officer are the objects of impeachment? This question meets us at the very threshold of the case. If it shall appear that the charges exhibited in these articles of impeachment are not, even if true, the constitutional subjects of impeachment; if it shall turn out on the investigation that the judge has really fallen into error, mistake, or indiscretion, yet if he stands acquitted in proof of any such acts as by the law of the land are impeachable offenses, he stands entitled to discharge on his trial. This proceeding by impeachment is a mode of trial created and defined by the Constitution of our country; and by this the court is exclusively bound. To the Constitution, then, we must exclusively look to discover what is or is not impeachable. We shall there find the whole proceeding distinctly marked out; and everything designated and properly distributed necessary in the construction of a court of criminal jurisdiction. We shall find (1) who shall originate or present an impeachment; (2) who shall try it; (3) for what offenses it may be used; (4) what is the punishment on conviction. The first of these points is provided for in the second section of the first article of the Constitution where it is declared that "the House of Representatives shall have the sole power of impeachment." This power corresponds with that of a grand jury to find a presentment or indictment. In the third section of the same article the court is provided before whom the impeachment thus originated shall be tried: "The Senate shall have the sole power to try all impeachments." And the fourth section of the second article points out and describes the offenses intended to be impeachable, and the punishment which is to follow conviction, subject to a limitation in the third section of the first article.

Have any facts, then, been given in evidence against the respondent which makes him liable to be proceeded against by this high process of impeachment? What are the offenses? What is the constitutional description of those official acts for which a public officer may be arraigned before this high court? In the fourth section of the second article of the Constitution it is declared that "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." Treason or bribery is not alleged against us on this occasion. Our offenses, then, must come under the general description of "high crimes and misdemeanors," or we are not impeachable by the Constitution of the United States. I offer it as a position I shall rely upon in my argument, that no judge can be impeached and removed from office for any act or offense for which he could not be indicted. It must be by law an indictable offense. One of the gentlemen, indeed, who conduct this prosecution (Mr. Campbell), contends for the reverse of this proposition, and holds that for such official acts as are the subject of impeachment no indictment will lie or can be maintained. For, says he, it would involve us in this monstrous oppression and absurdity, that a man might be twice punished for the same offense, once by impeachment and then by indictment. And so most surely he may; and the limitation of the punishment on impeachment takes away the injustice and oppression the gentleman dreads. A slight attention to the subject will show the fallacy of this gentleman's doctrine. If the absurdity and oppression he fears will really ensue on indicting a man for the same offense for which he has already been impeached, they must be charged to the Constitution itself, which, in the third section of the first article,

[93] Annals, pp. 356–364.

after limiting the extent of the judgment in cases of impeachment, goes on to declare that "the party convicted shall, nevertheless, be liable and subject to indictment, trial, judgment, and punishment according to law." The idea of the honorable manager is that for acts done in the course of official duty a judge must be proceeded against exclusively by impeachment; and that no indictment will lie in such case. The incorrectness of this notion appears not only from a reference to the Constitution, but to the known law of England also. I will remind you of a case, stated, I believe, in the elementary books of the law, in which it is said that if a judge undertakes, of his own authority, to change the mode of punishment prescribed by law for any crime, he is indictable; for instance, should he sentence a man to be beheaded when the law directed him to be hanged, the judge is guilty of murder, and may be accordingly indicted. When, sir, I contend, that, in order to sustain an impeachment, an offense must be proved upon the respondent which would support an indictment, I do not mean to be understood as admitting that the converse of the proposition is true—that is, that every act or offense which is impeachable is indictable. Far from it. A man may be indictable for many violations of positive law which evince no mala mens, no corrupt heart or intention, but which would not be the ground of an impeachment. I will instance the case of an assault, which is an indictable offense, but will not surely be pretended to be an impeachable offense, for which a judge may be removed from office. It is true that the second section of the first article, which gives the House of Representatives the sole power of impeachment, does not in terms limit the exercise of that power. But its obvious meaning is not, in that place, to describe the kind of acts which are to be subjects of impeachment, but merely to declare in what branch of Government it shall commence. The House of Representatives has the power of impeachment; but for what they are to impeach, in what cases they may exercise this delegated power, depends on other parts of the Constitution, and not on their opinion, whim, or caprice. The whole system of impeachment must be taken together, and not in detached parts: and if one part of the Constitution declaring who shall commence an impeachment, we find other parts declaring who shall try it, and what acts and what persons are Constitutional subjects of this mode of trial. The power of impeachment is with the House of Representatives—but only for impeachable offenses. They are to proceed against the offense in this way when it is committed, but not to create the offense, and make any act criminal and impeachable at their will and pleasure. What is an offense, is a question to be decided by the Constitution and the law, not by the opinion of a single branch of the legislature; and when the offense thus described by the Constitution or the law has been committed, then, and not until then, has the House of Representatives power to impeach the offender. So a grand jury posseses the sole power to indict; but in the exercise of this power they are bound by positive law, and do not assume under this general power to make anything indictable which they might disapprove. If it were so, we should indeed have a strange, unsettled, and dangerous penal code. No man could walk in safety, but would be at the mercy of the caprice of every grand jury that might be summoned, and that would be crime to-morrow which is innocent to-day.

What part of the Constitution then declares any of the acts charged and proved upon Judge Chase, even in the worst aspect, to be impeachable? He has not been guilty of bribery or corruption: he is not charged with them. Has he then been guilty of "other high crimes and misdemeanors?" In an instrument so sacred as the Constitution, I presume every word must have its full and fair meaning. It is not then only for crimes and misdemeanors that a judge is impeachable, but it must be for high crimes and misdemeanors. Although this qualifying adjective "high" immediately precedes and is directly attached to the word "crimes," yet, from the evident intention of the Constitution and upon a just grammatical construction, it must be also applied to "misdemeanors." The repetition of this adjective would have injured the harmony of the sentence without adding anything to its perspicuity. How would this be in common parlance? Suppose it should be said that at this trial there are attending many ladies and gentlemen. Would it be doubted that the adjective many applies to gentlemen as well as ladies, although not repeated? Or, if there is anything peculiar in this respect in this word "high," I will suppose it were said among the auditors there are men of high rank and station. Would it not be as well understood as if it were said that men of high rank and station are here? There is surely no difference. So in the Constitution, it is said, that "a regular statement of the receipts and expenditures of all public money shall be published from time to time." Is not the account to be regular as wel as the statement?

I should have deemed it unnecessary to have spent a word on so plain a point, had I not understood that a difficulty would probably be made upon it. If my construction of this part of the Constitution be not admitted, and the adjective "high" be given exclusively to "crimes" and denied to "misdemeanors," this strange absurdity must ensue—that when an officer of the Government is impeached for a crime, he can not be convicted unless it proves to be a high crime; but he may nevertheless be convicted of a misdemeanor of the most petty grade. Observe, sir, the crimes with which these "other high crimes" are classed in the Constitution, and we may learn something of their character. They stand in connection with "bribery and corruption;" tried in the same manner and subject to the same penalties. But if we are to lose the force and meaning of the word "high" in relation to misdemeanors, and this description of offenses must be governed by the mere meaning of the term "misdemeanors," without deriving any grade from the objective, still my position remains unimpaired, that the offense, whatever it is, which is the ground of impeachment, must be such a one as would support an indictment. "Misdemeanor" is a legal and technical term, well understood and defined in law; and in the construction of a legal instrument we must give to words their legal significance. A misdemeanor or a crime—for in their just and proper acceptation they are synonymous terms—is an act committed or omitted, in violation of a public law either forbidding or commanding it. By this test, let the conduct of the respondent be tried, and, by it, let him stand justified or condemned.

Does not, sir, the court, provided by the Constitution for the trial of an impeachment gives us some idea of the grade of offenses intended for its jurisdiction? Look around you, sir, upon this awful tribunal of justice—is it not high and dignified, collecting within itself the justice and majesty of the American people? Was such a court created—does such a court sit—to scan and punish paltry errors and indiscretions, too insignificant to have a name in the penal code, too paltry for the notice of a court of quarter sessions? This is indeed employing an elephant to remove an atom too minute for the grasp of an insect. Is the Senate of the United States solemnly convened and held together in the presence of the nation to fix a standard of politeness in a judge and mark the precincts of judicial decorum? The honorable gentleman who opened the prosecution (Mr. Randolph) has contended for a contrary doctrine, and held that many things are impeachable that are not indictable. To illustrate his position, he stated the cases of habitual drunkenness and profane swearing on the bench, which he held to be objects of impeachment and not of indictment. I do not desire to impose my opinions on this court as of any value. But surely I could not hesitate to say that both of the cases put by the gentleman would be indictable. Is there not known to us a class of offenses, not provided for indeed by the letter of any statute, but which come under the general protection which the law gives to virtue, decency, and morals in society? Any act which is contrabonos mores is indictable as such. And it is so, not by act of Congress, but by the pure and wholesome mandates of that common law which some men would madly drive from our jurisprudence, but which I most sincerely pray may live forever.

If I am correct in my position that nothing is impeachable that is not also indictable, for what acts then may a man be indicted? May it be on the mere caprice or opinion of any ten, twenty, or one hundred men in the community; or must it not be on some known law of the society in which he resides? It must unquestionably be for some offense, either of omission or commission, against some statute of the United States—or some statute of a particular State, or against the provision of the common law. Against which of these has the respondent offended? What law of any of the descriptions I have mentioned has he violated? By what is he to be judged, by what is he to be justified or condemned, if not by some known law of the country; and if no such law is brought upon his case—if no such violation rises on this day of trial in judgment against him—why stands he here at this bar as a criminal? When has he offended? The House of Representatives—and he is impeached for this?

I maintain as a most important and indispensable principle, that no man should be criminally accused, no man can be criminally condemned, but for the violation of some known law by which he was bound to govern himself. Nothing is so necessary to justice and to safety as that the criminal code should be certain and known. Let the judge, as well as the citizen, precisely know the path he is to walk in, and what he may or may not do. Let not the sword tremble over his unconscious head, or the ground be spread with quicksands and destruction which

appear fair and harmless to the eye of the traveler. Can it be pretended there is one rule of justice for a judge and another for a private citizen; and that while the latter is protected from surprise, from the malice or caprice of any man or body of men, and can be brought into legal jeopardy only by the violation of laws before made known to him, the latter is to be exposed to punishment without knowing his offense, and the criminality or innocence of his conduct is to depend not upon the laws existing at the time, but upon the opinions of a body of men to be collected four or five years after the transaction? A judge may thus be impeached and removed from office for an act strictly legal, when done, if any House of Representatives for any indefinite time after, shall for any reason they may act upon, choose to consider such act improper and impeachable. The Constitution, sir, never intended to lay the Judiciary thus prostrate at the feet of the House of Representatives, the slaves of their will, the victims of their caprice. The Judiciary must be protected from prejudice and varying opinion, or it is not worth a farthing. Suppose a grand jury should make a presentment against a man, stating that most truly he had violated no law or committed any known offense; but he had violated their notions of common sense—for this was the standard of impeachment the gentleman who opened gave us—he had shocked their nerves or wounded their sensibility. Would such a presentment be received or listened to for a moment? No, sir; and on the same principle, no judge should be put in jeopardy because the common sense of one hundred and fifty men might approve what is thus condemned, and the rule of right, the objects of punishment or praise, would thus shift about from day to day. Are we to depend upon the House of Representatives for the innocence or criminality of our conduct? Can they create offenses at their will and pleasure, and declare that to be a crime in 1804 which was an indiscretion or pardonable error, or perhaps an approved proceeding, in 1800? If this gigantic House of Representatives, by the usual vote and the usual forms of legislation, were to direct that any act heretofore not forbidden by law should hereafter become penal, this declaration of their will would be a mere nullity; would have no force and effect, unless duly sanctioned by the Senate and the approbation of the President. Will they then be allowed, in the exercise of their power of impeachment, to create crimes and inflict the most serious penalties on actions never before suspected to be criminal when they could not have swelled the same act into an offense in the form of a law? If this be truly the case, if this power of impeachment may be thus extended without limit or control, then indeed is every valuable liberty prostrated at the foot of this omnipotent House of Representatives; and may God preserve us! The President may approve and sign a law, or may make an appointment which to him may seem prudent and beneficial, and it may be the general, nay the universal, sentiment that it is so; and it is undeniable that no law is violated by the act. But some four or five years hence there comes a House of Representatives whose common sense is constructed on a new model, and who either are or affect to be greatly shocked at the atrocity of this act. The President is impeached. In vain he pleads the purity of his intention, the legality of his conduct, in vain he avers that he has violated no law and been guilty of no crime. He will be told, as Judge Chase now is, that the common sense of the House is the standard of guilt, and their opinion of the error of the act conclusive evidence of corruption. We have read, sir, in our younger days and read with honor, of the Roman Emperor who placed his edicts so high in the air that the keenest eyes could not decipher them, and yet severely punished any breach of them. But the power claimed by the House of Representatives to make anything criminal at their pleasure, at any period after its occurrence, is ten thousand times more dangerous, more tyrannical, more subversive of all liberty and safety. Shall I be called to heavy judgment now for an act which, when done, was forbidden by no law, and received no reproach, because in a course of years there is found a set of men whose common sense condemns the deed? The gentlemen have referred us to this standard, and, being under the necessity to acknowledge that the respondent has violated no law of the community, they would on this vague and dangerous ground accuse, try, and condemn him. The code of the Roman tyrant was fixed on the height of a column, where it might be understood with some extraordinary pains; but here, to be safe, we must be able to look into years to come, and to foresee what will be the changing opinions of men or points of decorum for years to come. The rule of our conduct, by which we are to be judged and condemned, lies buried in the bosom of futurity, and in the minds and opinions of men unknown, perhaps unborn.

The pure and upright administration of justice, sir, is of the utmost importance to any people; the other movements of Government are not of such universal concern. Who shall be President, or what treaties or general statutes shall be made, occupies the attention of a few busy politicians; but these things touch not, or but seldom, the private interests and happiness of the great mass of the community. But the settlement of private controversies, the administration of law between man and man, the distribution of justice and right to the citizen in his private business and concern, comes to every man's door, and is essential to every man's prosperity and happiness. Hence I consider the judiciary of our country most important among the branches of Government, and its purity and independence of the most interesting consequence to every man. Whilst it is honorably and fully protected from the influence of favor or fear, from any quarter, the situation of a people can never be very uncomfortable or unsafe. But if a judge is forever to be exposed or prosecutions and impeachments for his official conduct, on the mere suggestions of caprice, and to be condemned by the mere voice of prejudice, under the specious name of common sense, can he hold that firm and steady hand his high functions required? No! if his nerves are of iron they must tremble in so perilous a situation.

In England the complete independence of the judiciary has been considered, and has been found the best and surest safeguard of true liberty, securing a government of known and uniform laws, acting alike upon every man. It has, however, been suggested by some of our newspaper politicians, perhaps from a higher source, that although this independent judiciary is very necessary in a monarchy to protect the people from the oppression of a court, yet that, in our republican institution, the same reasons for it do not exist; that it is indeed inconsistent with the nature of our Government that any part or branch of it should be independent of the people from whom the power is derived. And as the House of Representatives come most frequently from this great source of power, they claim the best right of knowing and expressing its will; and of course the right of a controlling influence over the other branches. My doctrine is precisely the reverse of this. If I were called upon to declare whether the independence of judges were more essentially important in a monarchy or a republic, I should certainly say, in the latter. All governments require, in order to give them firmness, stability, and character, some permanent principle, some settled establishment. The want of this is the great deficiency in republican institutions. Nothing can be relied upon; no faith can be given either at home or abroad to a people whose systems and operations and policy are constantly changing with popular opinion. If, however, the judiciary is stable and independent; if the rule of justice between men rests upon known and permanent principles, it gives a security and character to a country which is absolutely necessary in its intercourse with the world and in its own internal concerns. This independence is further requisite as a security from oppression. All history demonstrates, from page to page, that tyranny and oppression have not been confined to despotisms, but have been freely exercised in republics, both ancient and modern—with this difference, that in the latter, the oppression has sprung from the impulse of some sudden gust of passion or prejudice, while in the former it is systematically planned and pursued as an ingredient and principle of the government. The people destroy not deliberately, and will return to reflection and justice, if passion is not kept alive and excited by artful intrigue, but, while the fit is on, their devastation and cruelty are more terrible and unbounded than the most monstrous tyrant. It is for their own benefit and to protect them from the violence of their own passions that is essential to have some firm, unshaken, independent branch of government, able and willing to resist their frenzy. If we have read of the death of a Seneca under the ferocity of a Nero, we have read too of the murder of a Socrates under the delusion of a republic. An independent and firm judiciary, protected and protecting by the laws, would have snatched the one from the fury of a despot and preserved the other from the madness of a people.

I have considered these observations on the necessary independence of the judiciary applicable and important to the case before this honorable court, to repel the wild idea that a judge may be impeached and removed from office although he has violated no law of the country, but merely on the vague and changing opinions of right and wrong—propriety and impropriety of demeanor. For if this is to be the tenure on which a judge holds his office and character; if by such a standard his judicial conduct is to be adjudged criminal or innocent, there is an end to the independence of our judiciary. In opposition to this reasoning I have heard (not from the honorable managers) a sort of jargon about the sovereignty of the people, and that nothing in a republic should be inde-

pendent of them. No phrase in our language is more abused or more misunderstood. The just and legitimate sovereignty of a people is truly an awful object, full of power and commanding respect. It consists in a full acknowledgment that all power originally emanates in some way from them, and that all responsibility is finally in some way due to them; and whether this is acknowledged or not, they have, if driven to the last resort, a physical force, to make it so. But, sir, this sovereignty does not consist in a right to control or interfere with the regular and legal operations and functions of the different branches of the Government at the will and pleasure of the people. Having delegated their power; having distributed it for various purposes into various channels, and directed its course by certain limits, they have no right to impede it while it flows in its intended directions. Otherwise we have no Government. In like manner the officers of Government are responsible in certain modes, and at certain periods, for the exercise of their duties and powers; but the people have no right to make them accountable in any other manner, or at any other period than that prescribed by the great compact of Government or Constitution. Having parted with their power under certain regulations and restrictions, they are done with it. They are bound by their own act, and having retained and declared the manner in which they will correct abuses in office, they have no right to claim any other sort of responsibility. If this be not the case, what government have we? What rule of conduct? What system of association? None; but we are truly in a state of savage anarchy and ruthless confusion, with all the vices incident to civilization without the restraints to control them.

2361. Chase's impeachment continued.

Argument of Mr. Luther Martin, counsel for Mr. Justice Chase, on the nature of the power of impeachment.

Mr. Martin, counsel for the respondent, said:[94]

We have been told by an honorable manager (Mr. Campbell) that the power of trying impeachments was lodged in the Senate with the most perfect propriety; for two reasons—the one, that the person impeached would be tried before those who had given their approbation to his appointment to office. This certainly was not the reason by which the framers of the Constitution were influenced when they gave this power to the Senate. Who are the officers liable to impeachment? The President, the Vice-President, and all civil officers of Government. In the election of the two first the Senate have no control, either as to nomination or approbation. As to other civil officers who hold their appointments during good behavior, it is extremely probable that, though they were approved by one Senate, yet from lapse of time and the fluctuations of that body an officer may be impeached before a Senate not one of whom had sanctioned his appointment, not one of whom, perhaps, had he been nominated after their election would have given him their sanction.

This, then, could not have been one of the reasons for thus placing the power over these officers. But as a second reason he assigned that, if any other inferior tribunal had been intrusted with the trial of impeachments, the members might have an interest in the conviction of an officer, thereby to have him removed in order to obtain his place; but that no Senator could have such inducement. I, sir, disclaim—I hold in contempt the idea—that the members of any tribunal would be influenced in their decision by so unworthy, so base a motive; but what is there to prevent this Senate more than any other court from being influenced? Is there anything to prevent any Member of this Senate or any of their friends from being appointed to the office of any person removed by their conviction?

I speak not from any apprehension I have of this honorable Court. In their integrity I have the greatest confidence. I have the greatest confidence they will discharge their duty to my honorable client with uprightness and impartiality. I have only made these observations to show that the reasons assigned by the honorable manager for vesting the trials of impeachment in the Senate are fallacious.

I see two honorable Members of this court [Messrs. Dayton and Baldwin] who were with me in convention, in 1787, who as well as myself perfectly know why this power was invested in the Senate. It was because, among all our speculative systems, it was thought this power could nowhere be more properly placed or where it would be less likely to be abused. A sentiment, sir, in which I perfectly

[94] Annals, pp. 429–437.

concurred, and I have no doubt but the event of this trial will show that we could not have better disposed of that power.

Let us now, sir, examine the Constitution on the subject of impeachments, and from thence learn in what cases, and in what only, impeachments will lie. To have correct sentiments on this subject is of infinite importance. An error here would be like what is called an error in the first concoction, and would pervade the whole system.

By the Constitution it is declared that "the House of Representatives shall have the sole power of impeachment." That section, however, does not declare in what cases the power shall be exercised. This is designated in a subsequent part of the Constitution, and I shall contend that the power of impeachment is confined to the persons mentioned in the Constitution, namely, "the President, Vice-President, and all other civil officers."

Will it be pretended, for I have heard such a suggestion, that the House of Representatives have a right to impeach every citizen indiscriminately? For what shall they impeach them? For any criminal act? Is the House of Representatives, then, to constitute a grand jury to receive information of a criminal nature against all our citizens and thereby to deprive them of a trial by jury? This was never intended by the Constitution?

The President, Vice-President, and other civil officers can only be impeached. They only in that case are deprived of a trial by jury; they, when they accept their offices, accept them on those terms, and, as far as relates to the tenure of their offices, relinquish that privilege; they, therefore, can not complain. Here, it appears to me, the framers of the Constitution have so expressed themselves as to leave not a single doubt on this subject.

In the first article, section the third, of the Constitution it is declared that judgment in all cases of impeachment shall not extend further than removal from office and disqualification to hold any office of honor, trust, or profit under the United States. This clearly evinces that no persons but those who hold offices are liable to impeachment. They are to lose their offices; and, having misbehaved themselves in such manner as to lose their offices, are with propriety to be rendered ineligible thereafter.

The next question of importance is in what cases the House of Representatives have a right to impeach the President, the Vice-President, and the other civil officers.

It has been said that a judge can not be indicted for the same crime for which he may be impeached, "for," says the honorable manager (Mr. Campbell), "it would introduce the absurdity that a person might be punished twice for the same crime."

This honorable Court will observe that the two punishments which may here be inflicted on impeachment and subsequent indictment amount to no more than in England takes place on a single prosecution; for there on a single conviction a judge may be removed from office and also fined, imprisoned, or otherwise punished according to the nature of his offense. But the whole of this power the United States have not vested in the same body. To the Senate they have confined the punishment of removal from office, and disqualification of the person from holding offices in future; but can there be a single doubt that a person by impeachment removed from office can not afterward, according to the nature of his crime, be punished by indictment? Can gentlemen suppose a removal from office was intended to wash away all crimes the officer should have committed? What are the crimes for which an officer can be impeached? "Treason, bribery, and other high crimes and misdemeanors."

Suppose a judge removed from office by impeachment for treason. Would that wash away his guilt? Would he not afterwards be liable to be indicted, tried, and punished as a traitor. Undoubtedly he would; so in the case of bribery. Yet, if the gentleman's idea is correct, a removal from office on impeachment for either of those crimes would free the officer from any other punishment. Consider the monstrous consequences which would result from the principle suggested by the managers, that a judge is only removable from office on account of crimes committed by him as a judge, and not for those for which he would be punishable as a private individual! A judge, then, might break open his neighbor's house and steal his goods; he might be a common receiver of stolen goods; for these crimes he might be indicted, convicted, and punished in a court of law; but yet he could not be removed from office because the offense was not committed by him in his judicial capacity, and because he could not be punished twice for the same offense.

The truth is, the framers of the Constitution, for many reasons which influenced them, did not think proper to place the officers of Government in the

power of the two branches of the Legislature further than the tenure of their office. Nor did they choose to permit the tenure of their offices to depend upon the passions or prejudices of jurors. The very clause in the Constitution of itself shows that it was intended the persons impeached and removed from office might still be indicted and punished for the same offense, else the provision would have been not only nugatory, but a reflection on the enlightened body who framed the Constitution; since no person ever could have dreamed that a conviction on impeachment and a removal from office, in consequence, for one offense, could prevent the same person from being indicted and punished for another and different offense.

I shall now proceed in the inquiry, For what can the President, Vice-President, or other civil officers, and, consequently, for what can a judge, be impeached? And I shall contend that it must be for an indictable offense. The words of the Constitution are, "that they shall be liable to impeachment for treason, bribery, or other high crimes and misdemeanors."

There can be no doubt but that treason and bribery are indictable offenses. We have only to inquire, then, what is meant by high crimes and misdemeanors? What is the true meaning of the word "crime?" It is the breach of some law which renders the person who violates it liable to punishment. There can be no crime committed where no such law is violated. The honorable gentleman to whom I before alluded has cited the new edition of Jacob's Law Dictionary; let us, then, look into that authority for the true meaning of the word "misdemeanor." He tells us—

"Misdemesnor, or misdemeanor, a crime less than felony. The term 'misdemeanor' is generally used in contradistinction to felony, and comprehend all indictable offenses which do not amount to felony, as perjury, libels, conspiracies, assaults," etc. (See 4 Comm. c. 1, p. 5.)

"A crime or misdemeanor, says Blackstone, is an act committed or omitted in violation of a public law either forbidding or commanding it. This general definition comprehends both crimes and misdemeanors which, properly speaking, are more synonymous terms, though in common usage the word 'crimes' is made use of to denote such offenses as are of a deeper and more atrocious dye; while smaller faults and omissions of less consequences are comprised under the gentle name of misdemeanors only.

"In making the distinction between public wrongs and private, between crimes and misdemeanors, and civil injuries, the same author observes that public wrongs or crimes and misdemeanors are a breach and violation of the public rights and duties due to the whole community, considered as a community in its social aggregate capacity." (4 Comm., 5.)

Thus it appears crimes and misdemeanors are the violation of a law exposing the person to punishment, and are used in contradistinction to those breaches of law which are mere private injuries, and only entitle the injured to a civil remedy.

Blackstone's Commentaries, volume 4, page 5, is cited by Jacob, and is as there stated. I shall not turn to it. Hale, in his Please of the Crown, volume 1, in his Promium, which is not paged, speaking of the division of crimes, says:

"Temporal crimes, which are offenses against the laws of this realm, whether the common law or acts of Parliament, are divided into two general ranks or distributions in respect to the punishments that are by law appointed for them, or in respect to their nature or degree; and thus they may be divided into capital offenses, or offenses only criminal, or rather, and more properly, into felonies and misdemeanors. And the same distribution is to be made touching misdemeanors, namely, they are, such as are so by the common law, or such as are specially made punishable, as misdemeanors, by acts of Parliament."

Thus, then, it appears that crimes and misdemeanors are generally used as synonymous expressions, except that "crimes" is a word frequently used for higher offenses. But while I contend that a judge can not be impeached except for a crime or misdemeanor, I also contend that there are many crimes and misdemeanors for which a judge ought not to be impeached unless immediately relating to his judicial conduct. Let us suppose a judge provoked by insolence should strike a person; this certainly would be an indictable but not an impeachable offense. The offense for which a judge is liable to impeachment must not only be a crime or misdemeanor, but a high crime or misdemeanor. The word "crime," as distinguished from "misdemeanor," is applied to offenses of a more aggravated nature; the word "high," therefore, must certainly equally apply to misdemeanors as to crimes. Nay, sir, I am ready to go further and say there may

be instances of very high crimes and misdemeanors for which an officer ought not to be impeached and removed from office; the crimes ought to be such as relate to his office, or which tend to cover the person who committed them with turpitude and infamy; such as show there can be no dependence on that integrity and honor which will secure the performance of his official duties.

But we have been told, and the authority of the State of Pennsylvania has been cited by one honorable manager (Mr. Rodney) in support of the position, that a judge may be impeached, convicted, and removed from office, for that which is not indictable, for that which is not a violation of any law.

What, sir! Can a judge be impeached and deprived of office when he has done nothing which the laws of his country prohibited? Is not deprivation of office a punishment? Can there be punishment inflicted where there is no crime? Suppose the House of Representatives to impeach for conduct not criminal; the Senate to convict, does that change the law? No, the law can only be changed by a bill brought forward by one House in a certain manner, assented to by the other, and approved by the President. Impeachment and conviction can not change the law and make that punishable which was not before criminal.

It is true it often happens that the good of the community requires that the laws should be passed making criminal and exposing to punishment conduct, which, antecedently, was not punishable; but even in those cases Government has no power to punish acts antecedently done; it can only punish those acts done after the enaction of the law. The Constitution has declared "no ex post facto law shall be passed."

Should such a principal be once admitted or adopted, could the officers of Government ever know how to proceed? Admit that the House of Representatives have a right to impeach for acts which are not contrary to law, and that thereon the Senate may convict and the officer be removed, you leave your judges and all your other officers at the mercy of the prevailing party. You will place them much in the unhappy situation as were the people of England during the contest between the white and red roses, while the doctrine of constructive treasons prevailed. They must be the tools or the victims of the victorious party.

I speak not, sir, with a view to censure the principles or the conduct of any party which has prevailed in the United States since our Revolution, but I wish to bring home to your feelings what may happen at a future time. In republican governments there ever have been, there ever will be a conflict of parties. Must an officer, for instance a judge, ever be in favor of the ruling party whether wrong or right? Or, looking forward to the triumph of the minority, must he however improper their views act with them? Neither the one conduct nor the other is to be supposed but from a total dereliction of principle. Shall, then, a judge by honestly performing his duty and very possibly thereby offending both parties be made the victim of the one or the other, or perhaps of each, as they have power? No, sir; I conceive that a judge should always consider himself safe while he violates no law, while he conscientiously discharges his duty, whomever he may displease thereby.

But an honorable manager (Mr. Campbell) has read to us an authority to prove that a judge can not in England be proceeded against by indictment for violation of his official duties, but only in Parliament or by impeachment; his authority was the new edition of Jacob's Law Dictionary. Let me be indulged with reading to this honorable Court the case from 12 Coke, the case of Floyd and Barker to which Jacob refers, and it will be found that the reasons there assigned, however correct they might be as to judges in England, can have no possible application to the judges of the United States.

[Here Mr. Martin read the following part of the third resolution, to wit:]

"It was resolved that the said Barker who was judge of assize, and gave judgment on the verdict upon the said W. P., and the sheriff who did execute him according to the said judgment, nor the justices of peace who did examine the offender, and the witnesses for proof of the murder before the judgment were not to be drawn in question, in the Star Chamber, for any conspiracy; nor any witness, nor any other person ought to be charged with conspiracy in the Star Chamber, or elsewhere, when the party indicted is convicted or attaint of murder or felony, and although the offender upon the indictment was acquitted, yet the judge, be he judge of assize, or a justice of peace, or any other judge, by commission and of record and sworn to do justice, cannot be charged for conspiracy for that which he did openly in court as judge or justice of peace; and the law will not admit any proof against this vehement and violent presumption of law, that a justice sworn to do justice will do injustice, but if he hath conspired before

out of court, this is extrajudicial, but due examination of causes out of the court, and inquiring by testimony and similar is not any conspiracy, for this he ought to do; but subornation of witnesses, and false and malicious prosecutors, out of court, to such whom he knows will be indictors, to find any guilty, etc., amounts to an unlawful conspiracy.

"And as a judge shall not be drawn in question in the cases aforesaid at the suit of the parties, no more shall he be charged in the said cases before any other judge at the suit of the King.

"And the reason and cause why a judge, for anything done by him as a judge, by the authority which the King (concerning his justice) shall not be drawn in question before any other judge, for any surmise of corruption, except before the King himself, is for this; the King himself is de jure to deliver justice to all his subjects; and for this, that he himself can not do it to all persons, he delegates his power to his judges, who have the custody and guard of the King's oath.

"And forasmuch as this concerns the honor and conscience of the King, there is great reason that the King himself shall take account of it, and no other."

But even in England it has been solemnly determined that judges may be proceeded against by indictment for the violation of the laws in their official conduct, for which I refer this honorable Court to Viner's abridgment, 14th volume, page 579 (F), pl. 3, and in notes, where he says:

"A justice can not rase a record, nor imbecile it, nor file an indictment which is not found, nor give judgment of death where the law does not give it, but if he doth this it is misprison, and he shall lose his office and shall make fine for misprison." (In the note "Brooke, Corone pl. 173 cites 2 R. 3, 9, 10, S. C. and P. and that he shall be indicted and arraigned.")

And that to Hawkin's Pleas of the Crown, volume 1, chapter 69, section 6, where that author tells us:

"It is said that at common law bribery in a judge, in relation to a cause depending before him, was looked upon as an offense of so heinous a nature that it was sometimes punished as high treason, before the 25th Edward III, and at this day it certainly is a very high offense and punishable not only with the forfeiture of the offender's office of justice, but also with fine and imprisonment," etc.

Mr. President, the principle I have endeavored to establish is that no judge or other officer can, under the Constitution of the United States, be removed from office but by impeachment, and for the violation of some law, which violation must be not simply a crime or misdemeanor, but a high crime or misdemeanor.

But an honorable manager (Mr. Rodney), who has this morning referred to some authorities as to other parts of the case has also contested the correctness of the foregoing principle, and has introduced the constitution of the State of Pennsylvania, by which he has told us a judge may, by the governor, be removed from office without the commission of any offense upon the vote of two-thirds of the two houses for his removal notwithstanding that constitution has a similar provision for removal by impeachment as has the Constitution of the United States. To this I answer as we have no such provision in the Constitution of the United States the reverse is to be inferred, to wit, that the people of the United States from whom the Constitution emanated did not intend their judges should be removed, however obnoxious they might be to any part or to the whole of the Legislature, unless they were guilty of some high crime or misdemeanor, and then only by impeachment. It is also well known that the governor of Pennsylvania has not considered those words in the constitution of that State, "that he may remove the judges on such address," as being imperative. For, in a recent instance, where he did receive such address, instead of admitting the construction to be as was contended, "you must," he determined it to be "I will not," and I have had the pleasure of seeing that judge some time since that transaction on the bench with his brethren dispensing justice. I again repeat that as the framers of the Constitution of the United States did not insert in their Consitution such a clause as is inserted in the constitution of Pennsylvania, it is the strongest proof that they did not mean a judge or other officer should be displaced by an address of any portion of the legislature, but only according to the constitutional provisions.

The same gentleman (Mr. Rodney) has told us that the tenure by which a judge holds his office is good behavior, therefore that he is removable for misbehavior; and, further, that misbehavior and misdemeanor are synonymous and coextensive. Here I perfectly agree with the honorable gentleman and join issue with him. Misbehavior and misdemeanor are words equally extensive and correlative; to misbehave or to misdemean is precisely the same; and as I have

shown that to misdemean, or, in other words, to be guilty of a misdemeanor, is a violation of some law punishable, so, of course, misbehavior must be the violation of a similar law.

The same honorable gentleman has mentioned the impeachment and conviction of Judge Addison, and has told us that he was not impeached for the breach of any law, but only for rude or unpolite conduct to his brother judge; that this objection was made with much energy on his defense, but that the Senate were convinced by the great talents and eloquence of Mr. Dallas and some other gentlemen that the objection was groundless; they, therefore, convicted and removed him. I have not here the proceedings against Judge Addison and, therefore, it is possible that the senate of Pennsylvania erected themselves into a court of honor to punish what they might consider breaches of politeness; but does this honorable Court sit here to take its precedents from the State of Pennsylvania or any other State, however respectable? I should rather hope that this honorable Court should furnish precedents which might be respected and adopted by the different States. I would also ask, When was that precedent established? Was it not at a time when there is too much reason to believe that the warmth and violence of party had more influence in it than justice; and that the senate of Pennsylvania overleaped their constitutional limits? But if we are to go to Pennsylvania for a precedent, why should we not be guided by that which the same State has so recently given us in a trial in which that gentleman bore so conspicuous a part? a precedent of acquittal; a precedent which we are perfectly willing should be adopted, and which we trust will be adopted on the present occasion.

My observations thus far have been principally with a view to establish the true construction of our Constitution, as relates to the doctrine of impeachment.

2362. Chase's impeachment, continued.

Argument of Mr. Robert G. Harper, counsel for Mr. Justice Chase, on the nature of the power of impeachment.

And finally, on behalf of the respondent, Mr. Harper said: [95]

The honorable managers, indeed, are as much at war with themselves on this point as with the Constitution and the laws. For when they have told us in one breath that this is merely a question of policy and expediency, they resort in the next to legal authorities, both English and American, for the purpose of explaining the doctrine of impeachment, and of proving that the acts alleged against the respondent amount to impeachable offenses; thus paying an involuntary homage to truth and furnishing an instance of the irresistible power with which she forces herself on the mind, even when most obstinately determined to resist her. Let us also, Mr. President, be permitted to adduce the authority of an elementary writer, of very high authority, on the laws of England in support of the principle for which we contend. Woodeson, in his Lectures, volume 2, page 611, treating on the law of impeachment, speaks thus: "As to the trial itself, it must of course vary in external ceremony, but differs not in essentials from criminal prosecutions before inferior courts. The same rules of evidence, the same legal notions of crimes and punishments, prevail. For impeachments are not formed to alter the law, but to carry it into more effectual execution, where it might be obstructed by the influence of too powerful delinquents, or not easily discerned in the ordinary course of jurisdiction, by reason of the peculiar quality of alleged crimes. The judgment therefore is to be such as is warranted by legal principles or precedents. In capital cases the mere stated sentence is to be specifically pronounced." Thus far this learned professor and commentator of the laws of England: and he cites as authorities for this doctrine Selden and the State Trials; the latter of which, this honorable court need not be informed, is a collection of adjudged cases in the highest courts of England; and the former, a writer of great learning and very high authority, peculiarly tenacious of every principle tending to the security of public liberty, and not likely to mistake on a point so essential as the law of impeachment.

Thus we find that even in England, where the power of impeachment is subject to no express constitutional restrictions and where abuses of that power, for the purpose of party persecution and State policy, have sometimes been committed, and more frequently attempted, an impeachment has never been considered as a mere inquest of office, but always as a criminal prosecution, differing

[95] Annals, pp. 505–514.

not in essentials from those which are carried on before the ordinary tribunals of justice and subject to the same rules of evidence, and the same legal maxims concerning crimes and punishments, as a proceeding contrived not to alter the law, but to carry it into more effectual execution. These authorities, sanctioned by the practice of one hundred and fifty years, prove the principle for which we contend. Instances may, no doubt, be found in the history of that country where these salutary principles have been disregarded and impeachments have been converted into engines of oppression. But this abuse does not destroy or impair the principle. That remains as eternal as the laws of reason and justice on which it is founded, while the abuse passes into oblivion with the temporary interests and fleeting projects which it was made to subserve, or remains in our recollection as a sad monument of the excesses into which frail man is hurried by his passions.

And has not this great principle of English jurisprudence, which in that country has weathered so many storms of faction, revolution, and civil war, received the sanction also of this honorable court? Has not testimony been rejected because it was judged illegal according to the ordinary rules of evidence? And how could those rules apply to this case unless it were considered as a criminal prosecution?

The Constitution of the United States will as little bear out the managers in their positions as the laws of England. That Constitution gives the power of impeachment to the House of Representatives and to the Senate the power of trying impeachments. Had the authors of that instrument and those who adopted it intended to leave this power at large or to erect it into a general inquest for inquiring into the qualifications of judges and the expediency of removing them, nothing more would have been done than merely to give the power. But it will be found that various restrictions are imposed in the subsequent parts of the instrument, which prove that no person can be impeached except for an offense.

Thus, for instance, in speaking of the power of pardoning, the Constitution provides (art. 2, sec. 2) that "the President may grant reprieves and pardons for offenses against the United States, except in cases of impeachment." Is not this the same thing as saying that cases of impeachment are cases of offenses? What, Mr. President, are offenses in the language of the Constitution and the laws? For a definition of the term "offense," in a constitutional sense, we must consult our law books and not the caprice or the varying opinions of popular leaders or popular assemblies. Those books tell us that the word "offense" means some violation of law. Whence it evidently follows that no officer of Government can be impeached unless he has committed some violation of the law, either statute or common. It is not necessary for me to contend that this offense must be an indictable offense. I might safely admit the contrary, though I do not admit it, and there are reasons which appear to be unanswerable in favor of the opinion that no offense is impeachable unless it be also the proper subject of an indictment. But it is not necessary to go so far, and I can suppose cases where a judge ought to be impeached for acts which I am not prepared to declare indictable. Suppose, for instance, that a judge should constantly omit to hold court, or should habitually attend so short a time each day as to render it impossible to dispatch the business. It might be doubted whether an indictment would lie for those acts of omission, although I am inclined to think that it would. But I have no hesitation in saying that a judge in such a case ought to be impeached. And this comes within the principle for which I contend, for these acts of culpable omission are a plain and direct violation of the law which commands him to hold courts a reasonable time for the dispatch of business, and of his oath which binds him to discharge faithfully and diligently the duties of his office.

The honorable gentlemen who opened the case on the part of the prosecution cited the case of habitual drunkenness and profane swearing on the part of a judge as an instance of an offense not indictable and yet punishable by impeachment. But I deny his position. Habitual drunkenness in a judge and profane swearing in any person are indictable offenses. And if they were not, still they are violations of the law. I do not mean to say that there is a statute against drunkenness and profane swearing. But they are offenses against good morals, and as such are forbidden by the common law. They are offenses in the sight of God and man, definitive in their nature, capable of precise proof and of a clear defense.

The honorable managers have cited a case decided in this court as an authority to prove that a man may be convicted on impeachment without having committed an offense. I mean the case of Judge Pickering. But that case does not support the position. The defendant there was charged with habitual drunkenness and gross misbehavior in court arising from this drunkenness. The defense set up

was that the defendant was insane, and that the instances adducted of intoxication and improper behavior proceeded from his insanity. On this point there was a contrariety of evidence. It is not for me to inquire on which side the truth lay. But the court, by finding the defendant guilty, gave their sanction to the charge that his insanity proceeded from habitual drunkenness. This case therefore proves nothing further than that habitual drunkenness is an impeachable offense.

As little aid can the honorable gentlemen derive from the case of Judge Addison, on which also they have relied. The articles of impeachment will show that Judge Addison was not impeached, as the honorable gentlemen suppose, for rude and ungentleman-like behavior in court to one of his colleagues; but for a supposed usurpation of power in preventing his colleague, by an exertion of authority, from exercising the right which he was supposed to possess to charge a grand jury, and in exerting his official influence and power to prevent the jury from paying attention to the legal opinions expressed by his colleague in a civil case. The report of that trial, now in my hand, will attest the correctness of this statement and will show also that Judge Addison was so far from being charged with rude and ungentleman-like behavior to his colleague that the honorable gentleman himself towards whom that behavior is supposed to have been used and who gave evidence on the trial, bore testimony to the mildness and politeness of Judge Addison's manner on the occasions which furnished the grounds of impeachment. Whether the acts done by that learned and distinguished judge did amount to an usurpation of unconstitutional power, or whether his colleague did possess those rights in the exercise of which he was supposed to have been improperly restricted, are questions foreign from the present inquiry. But I am free to declare that if Judge Addison's colleague did possess those rights and if he did arbitrarily prevent and impede the exercise of them by an unconstitutional exertion of the powers of his office he was guilty of an offense for which he might properly be impeached, because he must in that case have acted in express violation of the Constitution and laws.

The great principle for which we contend, and which is so strongly supported by the clause of the Constitution already cited, that an impeachment is a criminal prosecution and can not be maintained without the proof of some offense against the laws, pervades all the other provisions of the Constitution on the subject of impeachment. The fourth section of the second article declares "that 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." This provision, I know has been considered by some as a mere direction of what shall be done in those specified cases, and not as a prohibition confining impeachment to those cases. But it must be recollected, Mr. President, that the Constitution is a limited grant of power, and that it is of the essence of such a grant to be construed strictly and to leave in the grantors all the powers not expressly or by necessary implication granted away. In this manner has the Constitution always been construed and understood: and although an amendment was made for the purpose of expressly declaring and asserting this principle, yet that amendment was always understood by those who adopted it and was represented by the eminent character who brought it forward as as a mere declaration of a principle inherent in the Constitution which it was proper to make for the purpose of removing doubts and quieting apprehensions. When, therefore, the Constitution declares for what acts an officer shall be impeached, it gives power to impeach him for those acts and all power to impeach him for any other cause is withheld. The enumeration in the affirmative grant implies clearly a negative restriction as to all cases not enumerated. This provision of the Constitution, therefore, must be considered upon every sound principle of construction as a declaration that no impeachment shall lie except for a crime or misdemeanor; in other words, for a criminal violation of some law.

The same idea is found in the second section of the third article, third clause, where it is declared that "the trial of all crimes, except in cases of impeachment, shall be by jury;" plainly implying that cases of impeachment are cases of "trials for crimes."

It is material, also, Mr. President, to advert to the peculiar force of the term "conviction," which is employed in several parts of the Constitution, in application to cases of impeachment. The third section of the first article, sixth clause, speaking of the trial of impeachments, says: "And no person shall be convicted without the concurrence of two-thirds of the members present." The seventh

clause of the same section, treating on the extent and operation of a judgment in impeachment, says: "But the party convicted shall nevertheless be liable and subject," etc. And the fourth section of the second article declares that certain officers "shall be removed from office on impeachment for, and conviction of, treason, bribery," etc. This term "conviction" has in our law a fixed and appropriate meaning. There is indeed no word in our legal vocabulary of more technical force. It always imports the decision of a competent tribunal pronouncing a person guilty of some specific offense for which he has been legally brought to trial. In an instrument so remarkable as the Constitution of the United States for technical accuracy in the use of terms the frequent and indeed constant use of this word is decisive to prove that in the intention of the framers of that instrument no man could be impeached except for some offense against law of which he might in legal language be said to be "convicted."

In fixing the construction of this instrument no safer guide can be followed than contemporaneous expositions furnished by those who made or ratified it; and among those expositions the most authoritative are to be found in the constitutions of the several States, formed about the same time, and drawn up in many instances by the same persons. Whenever it appears clearly from the context of these constitutions that they affix a certain meaning to particular terms we may safely infer that those or similar terms in the Constitution of the United States were intended to have the same meaning. And we shall find by inspecting the constitutions of the several States that impeachment has been considered by all of them as a criminal prosecution for the punishment of defined offenses against the laws.

Let us begin with that of Pennsylvania. In treating of impeachments, article the fourth, it speaks of conviction on impeachment, and declares that all civil officers shall be liable to impeachment for any misdemeanor in office. The term "misdemeanor" is of as accurate meaning and of as much technical force as any term in the law. It describes a class of offenses against law, as well defined as any in the criminal code. A still stronger argument is furnished by the second section of the fifth article, which provides that for any reasonable cause which shall not be sufficient ground of impeachment the governor may remove any of the judges on the address of two-thirds of each branch of the legislature. It is most manifest that this provision would have been wholly unnecessary had the people of Pennsylvania, in framing their constitution, considered impeachments, like the honorable managers, merely as inquests of office by which a judge might be removed for any cause which two-thirds of each branch might think reasonable. And the arguments derived from the constitution of Pennsylvania have more force, inasmuch as the terms "misdemeanor in office," used by it for describing impeachable acts, are much less strong than "treason, bribery and other high crimes and misdemeanors," employed by the Constitution of the United States for the same purpose.

The constitution of Delaware, section 22, directs that impeachments shall lie against all persons "offending against the State, either by maladministration, corruption, or other means by which the safety of the State may be endangered." This is a very broad description of impeachable offenses against the laws, liable to punishment in the regular course of justice. It is declared that all impeachments shall be commenced "within eighteen months after the offense committed" and shall be prosecuted by the attorney-general or such other persons as the house of assembly shall appoint, according to the laws of the land. Persons found guilty on impeachment are to be disqualified, or removed, "or subjected to such pains and penalties as the laws shall direct." And the term "conviction," whose peculiar technical force has been already remarked, is applied by this constitution to cases of impeachment.

The people of Maryland did not think fit to invest the legislature with the power of impeachment, but have directed by their bill of rights, section 30, and by their constitution, section 40, that misbehavior in office shall be proceeded against by indictment in a court of law only, and that removal, and, in some cases, disqualification, shall be the consequence of conviction. It will not be denied that "misdemeanor" and "misbehavior in office" are convertible terms. If there be any difference, the latter is the less strong; and yet the people of Maryland have declared that the term "misbehavior in office" means an indictable offense, of which a person may be convicted in a court of law.

The Constitution of Virginia provides that persons offending against the State by maladministration, corruption, or other means by which the safety of the State may be endangered, "shall be impeachable by the house of delegates" in the general court, according to the laws of the land; "and that if all or any of the

judges of the general court should, on grounds (to be judged by the house of delegates), be accused of any of the crimes or offenses above mentioned, such house of delegates may, in like manner, impeach the judge or judges so accused, to be tried in the court of appeals." Hence it appears most clearly that these general words "offending against the State by maladministration, corruption, or other means by which the safety of the State may be endangered," words far more general and indefinite in themselves than those employed by the Federal Constitution, were considered by the people of Virginia as meaning specific crimes or offenses, which might be proceeded against in a court of law according to the usual course of criminal justice. The words "any other means by which the safety of the State may be endangered" are certainly broad enough to embrace those reasons of political expediency and State policy for which the honorable managers contend that a judge may be removed by impeachment; but we find that the people of Virginia had no idea of giving them a construction so contrary to the notions entertained in this country respecting legal rights, personal safety, and constitutional liberty.

The provisions made on this subject by the constitution of North Carolina breathe the same spirit. That instrument declares, section 23, "that the governor and other officers offending against the State by violating any part of this constitution, maladministration, or corruption, may be prosecuted on the impeachment of the general assembly or presentment of the grand jury of any court of supreme jurisdiction in this State." This plainly implies that impeachable acts, though described in terms the most indefinite were neither more nor less than offenses indictable in the ordinary course of law.

In the constitution of South Carolina, article 5, we find the same idea necessarily implied. The words "misdemeanor in office" are used as the description of impeachable offenses; the term "conviction" is applied to impeachments, and it is provided that persons so convicted "shall, nevertheless, be liable to indictment, trial, judgment, and punishment, according to law." It is plain, therefore, that the words "misdemeanor in office," were understood and intended by the people of South Carolina to mean offenses against the laws for which the offender might be indicted and "convicted."

The constitution of Georgia contains no words which can operate in any manner to define or describe impeachable offenses. It merely directs who shall have the power of impeaching, who shall try impeachments, and what description of persons may be impeached. But in that of Vermont there is a provision on this subject, which, though very concise, is very strong to our present purpose. Among the powers given by it, section 9, to the House of Representatives is that to "impeach State criminals." This term "criminals," which in our laws is never applied except to persons charged with offenses of the highest nature, sufficiently declares that the people of Vermont considered impeachments as applicable to cases of crimes only, and not to removals for reasons of State expediency; not even to cases of smaller offenses, much less of indiscretion or impropriety of behavior, such as is alleged against the respondent in this case. For surely it would be an abuse of language to apply the term "criminal" to improper interruptions of the counsel, to rude, hasty or intemperate expressions; to ridicule employed by a judge against counsel who, in his opinion, conducted themselves incorrectly, or to the precipitate and ill-timed expression of a correct legal opinion. No, sir. This word imports the intentional violation of some known law, the perpetration of some specific defined crime, which may admit of precise proof, which every citizen may be able to avoid, against which, when accused of it, he may know how to make his defense.

Such, Mr. President, is the solemn exposition of impeachable offenses given by the United States through the medium of their constitutions. Though not accustomed to talk about the will of the people, there is no man that bows with more reverence to that will when constitutionally declared. And shall we, Mr. President, let go this sheet-anchor of personal rights and political privileges to commit ourselves to the storms of party rage, personal animosity, and popular caprice? Shall we throw down this great landmark, fixed by the wisdom and patriotism of our fellow-citizens and fathers? Instead of having our best and dearest rights secured by fixed and known principles of law, shall we leave them to be governed and disposed by the ever varying whims and passion of the moment? No, sir, I trust not. When I look at these benches and recollect how deep a stake the members of this honorable court have in those rights which form the palladium of our safety and are now intrusted to their care and keeping, I can not but confidently expect that they will feel the whole importance of the

great trust reposed in them by their country; that they will regard themselves as acting for future generations, as well as for the present age; and will elevate themselves above the sphere of little view momentary feelings. They will recollect, sir, that unjust principles, adopted to answer particular purposes, are two-edged swords, which often rebound on the head of him who strikes with them, and that justice, though it may be an inconvenient restraint on our power while we are strong, is the only rampart behind which we can find protection when we become weak. They will remember that power which depends on popular favor is of all sublunary things the most fleeting and transient; that it must, from time to time, change hands; and that when the change which sooner or later must arrive shall have taken place, when those who now direct the thunder of impeachment shall be placed, as ere long they must be, in a situation to be smitten by its bolts, they will be glad to invoke, and unless they now set a great example of correct decision, will invoke in vain those constitutional privileges to which we now cry for safety.

Need I, Mr. President, urge the necessity of adhering to those principles, as it respects the independence of the judiciary department? Need I enlarge on the essential importance that independence to the security of personal rights and to the well-being, nay, to the existence of a free government? These considerations of themselves strike the mind with a force not to be increased by any efforts of mine. It is sufficient merely to bring them into the view of this honorable court.

But it is not to the party accused, to the nation, to posterity, and to the interests of free governments that the observance of settled constitutional principles in cases of impeachment is alone important. It is equally so to the character and feelings of those appointed to judge. Is there any member of this honorable court who would wish, nay, who would consent, in deciding this cause, to be set free from the restraints of the law, or, more properly speaking, to be deprived of its guidance and left to the influence of his own passions, feelings, or prepossessions? Were causes like this to be determined on expediency, and not on fixed principles of law, to what suspicions might not the judges be liable, of having sought the indulgence of some animosity, or the attainment of some selfish end, instead of consulting for the public good? But when they are known to be governed by the settled rules of law, and are considered as merely its organs, their motives will be more respected, and their conduct less liable to suspicion or reproach. Is any member of this honorable body prepared to relinquished the high and venerable station of the organ and expounder of the law, in order to assume the doubtful and dangerous character of a judge, subject to no rule but his own arbitrary will?

To a judge, too, it is the sweetest consolation in the discharge of his painful duties that when he has doomed a fellow-citizen to dishonor and misery, he has merely pronounced the decision of the law, and not the dictates of his own will; that he is not the author of the sentence by which so much calamity is brought on others, but merely its official organ. This reflection soothes his mind under the anguish which is must feel from another's woe. And is there any member of this honorable court who would consent to relinquish this consolation? I boldly say, no. I feel that every heart will respond to the assertion. And if any who hear me be capable of entertaining a contrary opinion, or would wish, in the same situation, to hold a different conduct, I envy not their feelings, however highly I might estimate their intellectual powers.

In every light, therefore, in which this great principle can be viewed, whether as a well-established doctrine of the Constitution; as the bulwark of personal safety and judicial independence; as a shield for the characters of those whose lot it may be to sit under the trial of impeachments; or as a solace to them under the necessity of pronouncing a fellow-citizen guilty; it will equally claim, and I can not doubt that it will receive the sanction of this honorable court, by whose decision it will, I trust, be established so as never hereafter to be brought into question, that an impeachment is not a mere inquiry, in the nature of an inquest of office, whether an officer be qualified for his place, or whether some reason of policy or expediency may not demand his removal, but a criminal prosecution, for the support of which the proof of some willful violation of a known law of the land is known to be indispensably required.

2363. Chase's impeachment, continued.

At the conclusion of the final arguments in the Chase trial, the court set a day and hour for giving final judgment.

It does not appear surely that the House attended on the final judgment in the Chase impeachment.

In the Chase trial the court modified its former rule as to form of final question.

Two-thirds not having voted guilty on any article, the Presiding Officer declared Mr. Justice Chase acquitted.

As soon as the arguments were concluded, on February 27,[96] it was, on motion of Mr. James Jackson, of Georgia, a Senator—

Resolved, That the court will on Friday next, at 12 o'clock, pronounce judgment in the case of Samuel Chase, one of the associate justices of the Supreme Court of the United States.

On Friday, March 1,[97] the court being opened by proclamation, the managers, accompanied by the House of Representatives, attended.[98]

The counsel for the respondent also attended.

The consideration of the motion, made yesterday for an alteration of one of the rules in cases of impeachments, was resumed; whereupon,

Resolved, That in taking the judgment of the Senate upon the articles of impeachment now depending against Samuel Chase, esq., the President of the Senate shall call on each Member by his name, and upon each article, propose the following question, in the manner following: "Mr. ————, how say you; is the respondent, Samuel Chase, guilty or not guilty of a high crime or misdemeanor, as charged in the ——— article of impeachment?"

Whereupon, each Member shall rise in his place, and answer guilty or not guilty.

The President rose, and addressing himself to the members of the court, said:

Gentlemen: You have heard the evidence and arguments adduced on the trial of Samuel Chase, impeached for high crimes and misdemeanors. You will now proceed to pronounce distinctly your judgment on each article.

The Secretary then read the first article of impeachment.

The article having been read, the President took the opinion of the members of the court respectively, in the form following:

Mr. ————, how say you; is the respondent, Samuel Chase, guilty or not guilty of a high crime or misdemeanor, as charged in the first article of impeachment?

And thus, after the reading of each article, the opinion of the court was taken.

At the conclusion, the President rose and said: On the first article, sixteen gentlemen have pronounced guilty and eighteen not guilty; on the second article, ten have said guilty and twenty-four not guilty; on the third article, eighteen have said guilty and sixteen not guilty; on the fourth article, eighteen have said guilty and sixteen not guilty; on the fifth article, there is an unanimous vote of not guilty; on the sixth article, four have said guilty and thirty not guilty; on the seventh article, ten have said guilty and twenty-four not guilty; and on the eighth article, nineteen have said guilty and fifteen not guilty.

Hence, it appears that there is not a constitutional majority of votes finding Samuel Chase, esq., guilty on any one article. It, therefore, becomes my duty to declare that Samual Chase, esq., stands acquitted

[96] Senate Impeachment Journal p. 523; Annals, p. 664.
[97] Journal, pp. 523–527; Annals, pp. 664–669.
[98] The House Journal raises a doubt as to whether or not the House as a Committee of the Whole attended. No mention of such attendance is made, after February 23 (Journal, pp. 149–162). It is probable that in the pressure of business, attendance as an organized body was omitted.

of all the articles exhibited by the House of Representatives against him.

Whereupon, the court adjourned without delay.

It does not appear, from the House Journal,[99] that the decision was communicated to the House; and there is no record in the House Journal that the House attended either as Committee of the Whole or otherwise.

[99] House Journal pp. 157-162.

Impeachment and Trial of James H. Peck*

2364. The impeachment and trial of James H. Peck, United States judge for the district of Missouri.

The impeachment proceedings in the case of Judge Peck were set in motion by a memorial.

The investigation into the conduct of Judge Peck were revived by referring to a committee a memorial presented in a former Congress.

Form of memorial praying for an investigation into the conduct of Judge Peck.

The House decided formally to investigate the conduct of Judge Peck only after the Judiciary Committee had examined the memorial.

On December 8, 1826,[1] Mr. John Scott, of Missouri, presented a memorial of Luke Edward Lawless, for an inquiry into the official conduct of James H. Peck, district judge of the United States for the district of Missouri, in relation to certain proceedings on an attachment for contempt had by said judge against said Lawless. This memorial was referred to the Committee on the Judiciary. On February 15, 1827,[2] the House ordered the committee discharged from the consideration of the memorial, and gave leave to the memorialist to withdraw the same.

On December 29, 1828,[3] on motion of Mr. George McDuffie, of South Carolina, it was

Ordered, That the memorial of Luke Edward Lawless, presented on the 8th December, 1826, be referred to the Committee on the Judiciary.

No report was made at this session.

*Hinds' Precedents, vol. 3, p. 772 (1907).
[1] Second session Nineteenth Congress, House Journal, p. 32.
[2] Journal, p. 300.
[3] Second session Twentieth Congress, House Journal, p. 101.

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On December 15, 1829,[4] on motion of Mr. McDuffie, it was

Ordered, That the memorial of Luke Edward Lawless, presented on the 8th December, 1826, praying for impeachment of John H. Peck, judge of the United States court in the State of Missouri, be referred to the Committee on the Judiciary.

This memorial[5] was addressed as follows:

To the honorable the House of Representatives of the United States:

The petition of Luke Edward Lawless, a citizen of the State of Missouri, and of the United States, respectfully showeth:

That, on the 30th day of March, in the present year, 1826, there appeared in the Republican, a newspaper printed in the city of St. Louis, State of Missouri, an article purporting to be the final decree or opinion of the judge of the district court of the United States for the district of Missouri, in the cause in which the widow and heirs of Antoine Soulard were plaintiffs, and the United States defendant, etc.

The memorial goes on to set forth that an appeal had already been taken to the Supreme Court of the United States when this final decree was published; that the petitioner wrote a letter, which was published in a St. Louis newspaper, setting forth in courteous and decorous language the errors of fact and law which he conceived to exist in the decree. This publication, as petitioner conceived, was meritorious rather than censurable, since the land titles of a large district were affected adversely by the decree, and speculators were taking advantage of this fact. The petition goes on to set forth that he was, for this publication, punished by Judge Peck for contempt. In conclusion the memoralist says:

Having thus submitted to your honorable body the facts of his case, and the evidence in support thereof, your petitioner begs leave to observe that it appears from those facts:

First. That the said James H. Peck has, in his capacity of judge of a district of the United States, been guilty of usurping a power which the laws of the land did not give him.

Second. That said James H. Peck has exercised his power, be the same usurped or legitimate, in the case of your petitioner, in a manner cruel, vindictive, and unjust.

Wherefore, and inasmuch as the said James H. Peck has not only outraged and oppressed your petitioner as an individual citizen, but, in your petitioner's person, has violated the most sacred and undoubted rights of the inhabitants of these United States, namely, the liberty of speech and of the press, and the right of trial by jury, your petitioner prays that the conduct and proceedings in this behalf, of said Judge Peck, may be inquired into by your honorable body, and such decision made therein as to your wisdom and justice shall seem proper.

And your petitioner, as in duty bound, will pray.

LUKE EDWARD LAWLESS.

ST. LOUIS, MO., *September 22, 1826.*

Various documents accompanied this memorial, in substantiation of those charges which he offered to prove.

On January 7, 1830,[6] Mr. James Buchanan, of Pennsylvania, from the Committee on the Judiciary, reported the following resolution, which was agreed to by the House:

Resolved, That the Committee on the Judiciary be authorized to send for persons and papers in the case of the charge of official misconduct against James H. Peck, judge of the district court of Missouri.

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[4] First session Twenty-first Congress, House Journal, p. 39.

[5] For copy of this memorial in full see "Report of the trial of James H. Peck," published in Boston, in 1833, by Hilliard Gray & Co. This publication has the proceedings of the trial in full. The Debates of Congress give them in a very fragmentary form.

[6] House Journal, p. 138.

2365. Peck's impeachment, continued.

In reporting in favor of impeaching Judge Peck the committee submitted transcripts of testimony.

Following the Chase precedent, the committee refrained from giving their reasons for concluding that Judge Peck should be impeached.

In the investigation of Judge Peck, the respondent cross-examined witnesses, and addressed the committee.

The House declined to print with the evidence in the Peck investigation the memorial or the address of respondent.

The report favoring the impeachment of Judge Peck was committed to the Committee of the Whole House on the state of the Union.

On March 23 [7] Mr. Buchanan submitted from that committee the following report:

That, in consequence of the evidence collected by them, in virtue of the powers with which they have been invested by the House, and which is hereunto subjoined, they are of opinion that James H. Peck, judge of the district court of the United States for the district of Missouri, be impeached of high misdemeanors in office.

In presenting the report Mr. Buchanan stated that the committee [8] deemed it fairest toward the party accused not to report to the House their reasons at length for arriving at the conclusion that he ought to be impeached. In this respect they thought it advisable to follow the precedent which had been established in the case of the impeachment of Judge Chase.

The report contains, however, an abstract of the case of heirs of Antoine Soulard *v.* United States, the opinion of Judge Peck therein, the letter of Mr. Lawless criticizing the opinion, and the court records showing the arrest and punishment of the latter. The journal of the committee also accompanies the report. It gives the testimony of Mr. Lawless and others before the committee, and shows that Judge Peck was present in the committee room in person, and cross-examined the witnesses.

Mr. Buchanan moved that the report, with the document as described and the transcripts of the testimony, be printed. Thereupon Mr. Clement C. Clay, of Alabama, moved to add to the matter to be printed "the memorial of Luke E. Lawless and the address of the judge to the committee." This amendment was disagreed to, and then the original motion of Mr. Buchanan was agreed to.

The report was committed to the Committee of the Whole House on the state of the Union.

2366. Peck's impeachment, continued.

Judge Peck, threatened with impeachment, was permitted to make to the House a written or oral argument.

Judge Peck, threatened with impeachment, transmitted to the House a written argument, which was ordered to be read.

In Judge Peck's case the committee proceeded on the theory of an ex parte inquiry.

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[7] House Journal, p. 454; Debates, p. 637; House Report No. 325.

[8] This committee consisted of Messrs. Buchanan, Charles A. Wickliffe, of Kentucky; Henry R. Storrs, of New York; Warren R. Davis, of South Carolina; Thomas T. Bouldin, of Virginia; William W. Ellsworth, of Connecticut, and Edward D. White, of Louisiana.

Judge Peck was not permitted to bring witnesses before the House committee, but cross-examined and filed a statement.

In the Peck case the House, with a view to English precedents, discussed the nature of the inquiry preliminary to impeachment.

Form of memorial in which Judge Peck asked leave to state his case to the House.

On April 5 [9] the Speaker laid before the House a memorial:

To the honorable the Speaker and Members of the House of Representatives of the United States:

The memorial of James H. Peck, judge of the district court of the United States for the district of Missouri, respectfully represents:

That, by a report of the Committee on the Judiciary, made to your honorable body on the 23d March, 1830, on the petition of Luke E. Lawless, it is proposed that your memorialist be impeached of high misdemeanors in office.

The memorialist goes on to describe the status of the case, and says that in view of the gravity of the proceeding he—

presumes that it will not be displeasing to your honorable body to have a full view of the whole ground of this accusation before you proceed to decide finally on the report of the committee. In England, from which we borrow the process of impeachment, the House of Commons has been willing to receive such information from the party accused before they will vote the impeachment.

The memorialist then cites in support of this assertion the case of Warren Hastings.

The memorialist further asks that he may be permitted to adduce against the prima facie impression to his disadvantage arising from the report of the committee the fact that Mr. Lawless's petition had been presented in former Congresses, and that the able men to whom it was referred found no grounds for proceeding.

The petitioner suggests that any method which may be taken to enable him to present "a full exposition of all the facts" will be satisfactory to him, whether by direct address to the House or before a committee.

When the memorial of Mr. Lawless had been referred to the Judiciary Committee, they had notified the present memorialist, Judge Peck, that they would receive "any explanation" which he might think proper to make in reference to the charge. In the brief time allowed he had made such a statement as was possible, although it was inadequate. But when it was handed in, the chairman of the committee did not read it, but proceeded immediately to examine the witnesses.

It is true, also,

continues the memorial—

that your memorialist was permitted to cross-examine, to a certain extent, the witnesses who had been summoned and examined in support of the charge, but this cross-examination was much restricted by frequent objections, and by the strong desire evinced by the committee to get through the examination at least within the two remaining days of the week; and your memorialist having been more than once admonished that he was there ex gratia, felt himself checked and restrained from extending the cross-examination to points which seemed to him to belong to the inquiry, so that his having been permitted to be present under such circumstances is rather a disadvantage to him than a benefit, because it gives to the transaction all the semblance of a free and full investigation of the whole case, without the reality. Your memorialist does not make this remark in censure of the honorable committee; on the contrary, considering the pro-

[9] House Journal, p. 490; Debate, p. 736; House Report No. 345.

ceeding, as they manifestly seemed to do, as being analogous to an inquiry by a grand jury and to be governed by the same rules, your memorialist is sincerely satisfied that it was their purpose to treat him, as, in this view of the subject, they did in fact treat him, with great liberality and indulgence.

But your memorialist submits, with great respect, that the proceeding of the House of Representatives, in inquiring whether they will, or will not, institute an impeachment, is not to be governed by those strict rules which confine a grand jury to ex parte evidence. It was not the course pursued by the House of Commons of Great Britain, in the case of Warren Hastings, to which he has referred, and in which the House, before they voted the impeachment, heard not only the defense, but the testimony of his witnesses.

And the memorialist concludes:

Your memorialist, therefore, respectfully prays that your honorable body will receive from him a written exposition of the whole case, embracing both the facts and the law, and give him, also, process to call his witnesses from Missouri in support of his statements, before any discussion or vote shall be taken on the evidence as it is now presented with the report of the committee. * * *

If this prayer can not be granted, his hope and prayer is that your honorable body will, if it meet your own approbation, vote the impeachment at once, without any discussion on that partial evidence which presents a garbled view of the subject, greatly to the prejudice of your memorialist, and that he may have as speedy an opportunity as the nature of the case will allow to exhibit before the tribunal of the Senate and before his country the entire transaction, in all its parts, as it really occurred, being conscious and confident that to insure his acquittal from all censure in the minds of all honorable men accustomed to discussions of this kind, the case requires only to be fully understood.

And in the strong hope that the one or the other of these prayers will be granted, your memorialist, as in duty bound, will ever pray.

JAMES H. PECK.

WASHINGTON CITY, *April 5, 1830.*

Mr. Henry R. Storrs, of New York, at once moved that the memorial be referred to the Committee of the Whole House on the state of the Union, to which the report of the Judiciary Committee had already been referred.

A debate [10] at once arose as to the propriety of granting the prayer of the petitioner. Mr. Clement C. Clay, of Alabama, said:

As to precedents, there was no uniformity in them on this subject. One high case had been referred to, that of Warren Hastings, and also that of Judge Chase. But the practice in the several States differed from that which had been pursued by the General Government. In his own State (and he hoped he should not be considered as presumptuous in referring to the practice of a State which had so recently been admitted to the Union) the course pursued in cases of impeachment was different and he thought there were many inducements for the House to pursue the practice there adopted. He could not unite in the opinion that the House should proceed precisely as did a grand jury in ordinary cases of indictment. The present case was totally different. A great officer had been accused of a great offense. Did gentlemen suppose, could they think, that when a high officer of the Government was accused by a private individual he must, on the mere ex parte testimony of that accuser, be at once impeached? Mr. Clay said he should hesitate much before he could subscribe to such an opinion. He thought the House ought to proceed with very great caution. Merely to accuse was not all that was necessary in order to have a judge impeached. Some gentlemen seemed to conceive that the memorial of this petitioner asked that witnesses might be examined at the bar of that House; but it made no such request directly. It only asked this as one alternative—that his witnesses might be heard here, if not elsewhere.

Mr. Buchanan said:

Judge Peck, in that memorial, suggests that the Committee on the Judiciary sent for such witnesses only as had been selected by Mr. Lawless. That is far from being the fact. The committee acted upon higher principles. They were sen-

[10] Annals, pp. 737, 738.

sible of the high responsibility which they owed, both to this House and to the country, for the correctness of their proceedings; and had, therefore, inquired and ascertained, from the best sources in their power, the names of such witnesses as would be most likely to give an impartial and intelligent statement of the transaction. They had sent for and examined seven witnesses; and he owed it to them to say that, although he had long been in the habit of examining witnesses in courts of justice, he had never observed, on any occasion, more candor or more impartiality than these seven gentlemen had exhibited upon their examination before the committee.

It is true, as the memorial suggests, that, in the case of Warren Hastings, the House of Commons did hear the accused, and did permit him to produce testimony, before they voted an impeachment against him. But this was only a single instance. That course might have been adopted, because Mr. Burke, merely as an individual Member of the House, had risen in his place, and moved the impeachment. Whether he was correct in this conjecture or not, it was certain there had been no case of an impeachment by this House, in which so much indulgence was granted, as had been allowed to the accused upon the present occasion. He was permitted to furnish the committee with a written explanation of his conduct, and his request that he might cross-examine the witnesses was promptly granted.

Mr. Ralph I. Ingersoll, of Connecticut, confessed that this was, in a great measure, a new case to him. The only one that he had ever before witnessed was that in which charges, through a newspaper of this district, had been brought against the Vice-President about three years ago. That officer had presented these charges to the House, as the grand inquest of the nation, and requested an inquiry. A committee had been appointed to investigate them; and, before that committee, a friend of the Vice-President had been permitted to appear and represent him throughout the whole investigation. Witnesses, also, had been examined on the part of the accused. How it had been in the case of Judge Chase, or of Judge Pickering, from New Hampshire, he did not recollect; but he well recollected that witnesses in favor of the Vice-President had been examined, as well as against him, and that his representative had been allowed to be present before the committee through every stage of that examination. The committee at that time took some pains to ascertain what was the proper mode of proceeding, and they became satisfied that the party accused had, in these preliminary proceedings, a right to be thus heard.

Mr. Spencer Pettis, of Missouri, said that the practice in cases of impeachment, so far as regarded the proceedings of this House, was now to be settled; for it was obvious that it had not yet been settled by precedent. Gentlemen had, indeed, spoken of the case of Judge Chase; but that case had no application to the present one as it now stands. Judge Chase did not ask to make his defense before this House, nor did he ask either to cross-examine witnesses on the part of the Government, or to have an examination of his own witnesses. As the present question was not then raised, that case can form no precedent to govern in this instance.

Mr. Pettis also went on to cite the investigations of the conduct of Mr. John C. Calhoun, as Secretary of War, and of Secretary of the Treasury William H. Crawford. In both investigations the accused had been permitted to have witnesses examined before the committees. Both these gentlemen were charged with high misdemeanors, and the charges had been preferred in times of great political excitement.

Mr. James Strong, of New York, said that, from the little examination he had been able to give to this subject, he had come to the conclusion that the present proceedings should be strictly ex parte, rigidly

so. It had been said by the gentleman from Massachusetts [Mr. Everett] that the committee had departed somewhat from this line. It was true that they had deviated from it in a slight degree, but the departure was not such as to warrant the House in taking the other step which was now requested. There was a very material difference between hearing the party accused and hearing his witnesses. The Members of the House were not judges to try or to condemn the accused. It was true that the matters in this testimony might not be such as to mix themselves up with party politics; but suppose that it were proposed to impeach a political man of high standing, and that the witnesses were brought to the bar of the House, he put it to every man to say whether the safety of the country did not require that in such cases politics should be thoroughly excluded from that tribunal. And how could this be done but by keeping the proceedings strictly ex parte? Compaints had been made that the committee had not reported articles of impeachment; the case had been referred to them for no such purpose; their duty had been simply to ascertain facts. The House did not want even their opinions; it wanted the facts only, and on one side. What the House had to decide was, whether the testimony did or did not contain matter to warrant an impeachment. If it did, then the House would say the party should be impeached, and the next step would be to appoint a committee to frame the articles. These would be reported to the House, and, if they were agreed upon, then managers would be appointed to conduct the trial before the Senate. It struck him that the safest course would be to keep the proceedings as near ex parte as possible.

Finally the memorial was ordered to be laid on the table for printing, and was not referred to the Committee of the Whole.

On April 7,[11] Mr. Pettis proposed a resolution which, after modifications, read as follows:

Resolved, That James H. Peck, judge of the district court of the United States for the district of Missouri, be permitted, at any time, until Wednesday next at 12 o'clock, to make to this House any written or oral argument on the law or matters of fact, now in evidence before the House, he may think proper in answer to the charges preferred against him by Luke E. Lawless, esq., which charges have been reported on by the Committee on the Judiciary.

Mr. William Drayton, of South Carolina, moved to strike out the words "or oral." He said that in making the motion he had no intention of preventing the individual concerned from availing himself of the full benefit of what the resolution proposed to grant to him, but had been influenced by the consideration that, if his exposition should be made in writing all the Members of the House would have an opportunity of examining it; but if made orally it would be impossible that all the Members should distinctly hear it, and, if they did, they would probably not retain the substance of it distinctly in their memories. This was one reason which actuated him. Another was that, in his opinion, ill consequences would be likely to arise from the personal appearance of the memorialist before the House. He might aver that a material fact could be established by testimony incorrectly or imperfectly referred to in the report of the committee, and ask leave to introduce it fully. Should his application be rejected, he might regard

[11] House Journal, p. 513; Debates, p. 746–753.

the permission to be heard as illusory. Should his application be acceded to, they would be drawn into a trial of the cause.

The amendment was disagreed to by the House.

On behalf of the resolution, Mr. Pettis said that he had examined the precedents since 1640 and had found none against the proposed action.

Mr. Buchanan said that he had examined the British precedents, and found that in several cases the party had been admitted to the floor of the House of Commons simply to make an argument on the testimony which had been previously given to the House. This was the utmost extent of the privilege so far as he had examined, except in a single instance—that of Warren Hastings. He should make no objection to a mere permission to make an exposition of the law and an argument upon the facts as they appeared in the testimony already taken.

Mr. William Drayton, of South Carolina, drew a distinction between this House and the House of Commons. This House had no other inquisitorial authority than was expressly delegated to it by the Constitution. The House of Commons, on the other hand, was the "grand inquest" of the nation. It may even supersede the courts in cases of individual misdemeanors, as in the case of Alice Pierce, Sir John Fenwick, etc. British precedents were more likely to mislead than assist. The Constitution simply gives this House power to decide whether the case shall be tried before another body. The House could not itself try the case. Unless it should confine itself to what was termed ex parte evidence there would be no bounds to the inquiry.

Mr. Buchanan said his desire was that the House might establish such a precedent as should protect the interests of the accused in all future time. The Judiciary Committee had Judge Chase's trial before them. The mode of proceeding in that trial they considered as strictly proper and delicate. The committee in that case were directed to report their opinion on the charges against Judge Chase, which had been made on the floor of the House. For the purpose of enabling them to do so they procured all the testimony in their power. This they reported to the House, together with a simple statement of their own opinion upon it—nothing else. And why? He presumed that, as it was a judicial proceeding, they wished to leave every gentleman to decide for himself on the naked testimony. They considered one Member as competent to decide as another. Their report was referred to the Committee of the Whole House on the State of the Union, and there it was discussed. If in this case the Committee of the Whole should concur with the Judiciary Committee in their view of the case, then the House would appoint a committee to draft articles of impeachment. These articles would be considered and adopted by the House. Until after this second decision the accused would not be called upon to answer. As to the course pursued by the Pennsylvania house in a similar case, it had never met his approval.

The House agreed to the resolution proposed by Mr. Pettis without division.

Judge Peck did not avail himself of the permission to come before the House and make an oral statement; but on April 14 [12] the Speaker laid before the House a letter from Judge Peck transmitting his "ex-

[12] House Journal, p. 532; Debates, p. 789; House Report, No. 359.

planation in answer to the charges," with documents referred to in the answer.

The House decided that the explanation should be read, but after a time the reading was suspended and the statement alone having been ordered printed, it was, with the documents, referred to the Committee of the Whole House on the state of the Union.

2367. Peck's impeachment, continued.

After consideration in Committee of the Whole, the House concurred in the proposition to impeach Judge Peck.

The impeachment of Judge Peck was only for "high misdemeanors in office."

Forms and ceremonies of carrying the impeachment of Judge Peck to the Senate.

The impeachment of Judge Peck was carried to the Senate by a committee of two.

After discussing precedents the Senate appointed a committee to consider the message impeaching Judge Peck.

The Blount precedent for requiring bonds of the respondent was discussed adversely in the Peck case.

Mr. Senator Benton was excused from voting on a preliminary question in the Peck impeachment.

On April 21, 22, 23, and 24 [13] the Committee of the Whole House on the state of the Union considered the question of impeachment, the debate being on a resolution proposed, as follows, by Mr. Buchanan:

Resolved, That James H. Peck, judge of the district court of the United States for the district of Missouri, be impeached of high misdemeanors in office.

Mr. Edward Everett, of Massachusetts, moved to amend the resolution by striking all out after the word "*Resolved*" and inserting as follows:

That though, on the evidence now before it, this House does not approve of the conduct of James H. Peck, judge of the district court of the United States for the district of Missouri, in his proceeding by attachment against Luke E. Lawless for alleged contempt of the said court, yet there is not sufficient evidence of evil intent to authorize the House to impeach the said judge of high misdemeanors in office.

This amendment was disagreed to.

The resolution was then agreed to, ayes 113, negative not taken.

The Committee of the Whole then rose and reported the resolution to the House, whereupon the question was put:

Will the House concur with the Committee of the Whole House [on the state of the Union] in the adoption of the said resolution?

and there were ayes 123, nays 49.[14]

So the resolution was agreed to.

It was then [15]—

Ordered, That Mr. Buchanan and Mr. Henry R. Storrs, of New York, be appointed a committee to go to the Senate and, at the bar thereof, in the name of the House of Representatives and of all the people of the United States, to impeach James H. Peck, judge of the district court of the United States for

[13] House Journal, pp. 558, 560, 564, 564; Debates, pp. 810, 814, 818.

[14] It was stated later by Mr. Manager Spencer, in his argument to the high court, that this decision was not at all on party lines. (See Report of the trial of James H. Peck, p. 289.)

[15] House Journal, pp. 566, 567; Debates, p. 819.

the district of Missouri, of high misdemeanors in office, and acquaint the Senate that the House of Representatives will in due time exhibit particular articles of impeachment against him and make good the same.

Ordered, That the committee do demand that the Senate take order for the appearance of the said James H. Peck to answer to said impeachment.

On motion of Mr. Henry R. Storrs, of New York—

Resolved, That a committee be appointed to prepare and report to this House articles of impeachment against James H. Peck, district judge of the United States for the district of Missouri, for high misdemeanors in his said office.

And Mr. Buchanan, Mr. Storrs, of New York; Mr. George McDuffie, of South Carolina; Mr. Ambrose Spencer, of New York, and Mr. Charles A. Wickliffe, of Kentucky, were appointed the said committee.

All of this committee were from among those who had voted in favor of the impeachment.

On April 26 [16]—

Ordered, That James H. Peck have leave to withdraw his memorials and the documents which accompanied the same.

On April 26,[17] in the Senate Messrs. Buchanan and Storrs, Members of the House of Representatives, with a message from that House, were announced, and, having taken the seats assigned them,

The President [18] informed them that the Senate was ready to receive any communication they might have to make.

Mr. Buchanan then rose and said:

We are commanded, in the name of the House of Representatives and of all the people of the United States, to impeach James H. Peck, judge of the district court of Missouri, of high misdemeanors in office, and to acquaint the Senate that the House of Representatives will, in due time, exhibit particular articles of impeachment against him and make good the same, and we do demand that the Senate take order for the appearance of the said James H. Peck to answer to said impeachment.

Messrs. Buchanan and Storrs, having retired,

Mr. Littleton W. Tazewell, of Virginia, rose and said that in looking over similar cases for the purpose of ascertaining what would be the proper course of proceeding, he discovered that messages, similar in most particulars to the one just received, had been presented to the Senate in three cases. The first was the case of Blount, one of the Members of this body; the next was that of John Pickering, judge of the district court of New Hampshire, and the third was that of Judge Chase. Upon each of these cases there seemed to have been some anxious consideration in order to adopt the course most proper to be pursued. Mr. Tazewell would state in what the proceedings in these cases differed. The case of Mr. Blount, being the first of the kind that had ever occurred, presented so anomalous a practice that it never could be referred to as a precedent. The other two were consistent with the general principles of law and justice. From these it seems that it had been settled that when the House of Representatives informed the Senate that they were about to present articles of impeachment a select committee was appointed to take the subject into consideration and report what measures were proper to be taken. He would read for the information of the Senate the cases as they occurred.

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[16] House Journal, p. 670.
[17] Senate Journal, p. 269; Debates, pp. 383, 384.
[18] John C. Calhoun, of South Carolina, Vice-President, and President of the Senate.

Mr. Tazewell, having read the precedents in the case of Blount, Pickering, and Chase, said that as to the precedent in the case of Blount the idea of calling upon an individual to enter into a recognizance to appear at no named time at no given place to answer charges not yet set forth in articles of impeachment was so manifestly contrary to justice that the Senate itself seemed to have abandoned it. Therefore he concluded that the Blount case would not be considered a fit precedent, so he moved the following resolution to the message:

Resolved, That it be referred to a select committee, to consist of three members, to consider and report thereon.

This resolution was agreed to.

The Senate then proceeded to ballot for the committee.

Mr. Thomas H. Benton, of Missouri, asked to be excused from voting on the question, and the question being taken he was excused.

Then the committee were chosen, as follows: Messrs. Tazewell, Samuel Bell, of New Hampshire, and Daniel Webster, of Massachusetts.

On the same day, in the House,[19] Mr. Buchanan reported that, in obedience to the order of the House, they had been to the Senate, and in the name of the House of Representatives and of all the people of the United States had impeached James H. Peck, judge, etc., of high misdemeanors in office; that the committee had acquainted the Senate that the House of Representatives would, in due time, exhibit particular articles of impeachment against the said James H. Peck and make good the same, and that the committee had demanded that the Senate take order for the appearance of the said James H. Peck to answer to the said impachment.

On April 27,[20] in the Senate, Mr. Tazewell, from the Select Committee appointed on the subject, made the following report; which was concurred in by the Senate:

Whereas the House of Representatives on the 26th of the present month, by two of their members, Messrs. Buchanan and Storrs, of New York, at the bar of the Senate, impeached James H. Peck, judge of the district court of the United States for the district of Missouri, of high misdemeanors in office, and acquainted the Senate that the House of Representatives will, in due time, exhibit particular articles of impeachment against him, and make good the same; and likewise demanded that the Senate take order for the appearance of the said James H. Peck, to answer the said impeachment; Therefore,

Resolved, That the Senate will take proper order thereon, of which due notice shall be given to the House of Representatives.

And the committee further recommended to the Senate that the Secretary be directed to notify the House of Representatives of the foregoing resolution.

Accordingly, after the report had been concurred in, it was

Ordered, That the Secretary notify the House of Representatives accordingly.

On the same day the message was communicated to the House.[21]

2368. Peck's impeachment continued.

The respondent in the Peck impeachment communicated with the Senate as to the trial before articles had been presented.

The article of impeachment against Judge Peck was considered in Committee of the Whole before being agreed to by the House.

[19] House Journal, p. 671.
[20] Senate Journal, p. 271; Debates, p. 385.
[21] House Journal, pp. 573, 574.

All of the committee who framed the article in the Peck case had voted for the impeachment. (Footnote.)

The article in the Peck impeachment appears in the House Journal on the day of its adoption.

The managers of the Peck impeachment were chosen by ballot, a majority vote being required for election.

Instance wherein the Journal recorded the names of the tellers on a vote by ballot.

Form of resolutions providing for carrying to the Senate the article impeaching Judge Peck.

All the managers in the Peck trial were of those who had voted for impeachment.

On April 28 [22] the Vice-President communicated to the Senate two letters from Judge Peck, notifying the Senate of his intention to go to Baltimore, where he should remain some days; and requesting that, in the arrangement of the Senate chamber preparatory to his impeachment, a seat might be assigned him by which he might avoid facing the windows. The letters, having been read, were laid on the table.

On April 29,[23] Mr. Buchanan, from the committee appointed for the purpose, reported an article, to be exhibited to the Senate of the United States in behalf of themselves and of all the people of the United States, against Judge Peck, a judge of the district court of the United States for the district of Missouri, in maintenance and support of their impeachment against him. It was laid on the table and directed to be printed.

On April 30,[24] on motion of Mr. Buchanan,

Ordered, That the article of impeachment against James H. Peck, judge of the district court of the United States for the district of Missouri, be committed to the Committee of the Whole House on the State of the Union.

On May 1,[25] the article was considered in Committee of the Whole, and, after a verbal amendment, was reported favorably to the House.

And the question was then put:

Will the House adopt the said article, as its article of impeachment against James H. Peck, judge of the district court of the United States for the district of Missouri?

And it passed in the affirmative, without division.

The article [26] appears in full in the Journal of the House of this date.

On motion of Mr. Buchanan,

Resolved, That five managers be appointed, by ballot, to conduct the impeachment against James H. Peck, judge of the district court of the United States for the district of Missouri, on the part of this House.

The House proceeded to the appointment of five managers, by ballot, when the following gentlemen received a majority of votes, and were appointed, viz: James Buchanan, of Pennsylvania; Henry R. Storrs, of New York; George McDuffie of South Carolina; Ambrose Spencer, of New York, and Charles Wickliffe, of Kentucky.

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[22] Senate Journal, p. 272.
[23] House Journal, p. 584; Debates, p. 863.
[24] House Journal, p. 588; Debates, p. 866.
[25] House Journal, pp. 591–596; Debates, p. 869.
[26] As shown above, the committee which framed this article was composed entirely of Members who voted for the impeachment.

The first four were elected on the first ballot. But four ballots were taken before a majority was given for Mr. Wickliffe.

The Journal records that Messrs. William McCoy, of Virginia, Daniel H. Miller, of Pennsylvania, and Robert Desha, of Tennessee, were appointed tellers to examine the ballots on the vote.

The managers were the same as the committee appointed to prepare the article of impeachment; and all had been favorable to the impeachment.

On motion of Mr. Buchanan, it was

Resolved, That the article agreed to by this House, to be exhibited, in the name of themselves and of all the people of the United States, against James H. Peck, in maintenance of their impeachment against him for high misdemeanors in office, be carried to the Senate by the managers appointed to conduct said impeachment.

On motion of Mr. Buchanan, it was

Resolved, That a message be sent to the Senate, to inform them that this House have appointed managers to conduct the impeachment against James H. Peck, judge of the district court of the United States for the district of Missouri, and have directed the said managers to carry to the Senate the article agreed upon by this House, to be exhibited in maintenance of their impeachment against the said James H. Peck, and that the Clerk of this House do go with said message.

2369. Peck's impeachment continued.

The message announcing to the Senate that an article impeaching Judge Peck would be presented gave the names of the managers.

The Senate adopted a rule prescribing ceremonies for receiving as a court the articles impeaching Judge Peck.

Form of oath prescribed for Senators in the Peck trial.

Form of proclamation of the Sergeant-at-Arms when articles of impeachment against Judge Peck were to be presented.

On May 3,[37] in the Senate, the Clerk of the House delivered this message:

Mr. President, I am directed to inform the Senate that the House of Representatives have appointed Mr. Buchanan, of Pennsylvania, etc. (naming the others), managers to conduct the impeachment against James H. Peck, judge of, etc.; and have directed the said managers to carry to the Senate the articles agreed upon by the House to be exhibited in maintenance of their impeachment against the said James H. Peck.

The message having been delivered and read, on motion by Mr. Tazewell, it was

Resolved, That at 12 o'clock to-morrow the Senate will resolve itself into a court of impeachment, at which time the following oath or affirmation shall be administered by the Secretary to the President of the Senate, and by him to each Member of the Senate, viz:

"I solemnly swear (or affirm, as the case may be) that in all things appertaining to the trial of the impeachment of James H. Peck, judge of the district court of the United States for the district of Missouri, I will do impartial justice according to law."

Which court of impeachment being thus formed will, at the time aforesaid, receive the managers appointed by the House of Representatives to exhibit articles of impeachment, in the name of themselves and of all the people of the United States, against James H. Peck, judge of the district court of the United States for the district of Missouri, pursuant to notice given to the Senate this day by the House of Representatives that they had appointed managers for the

[37] Senate Journal, p. 282; Debates, p. 405.

purposes aforesaid; and that the Secretary of the Senate lay this resolution before the House of Representatives.

Resolved, That after the managers of the impeachment shall be introduced to the bar of the Senate, and shall have signified that they are ready to exhibit articles of impeachment against James H. Peck, the President of the Senate shall direct the Sergeant-at-Arms to make proclamation, who shall, after making proclamation, repeat the following words: "All persons are commanded to keep silence, on pain of imprisonment, while the grand inquest of the nation is exhibiting to the Senate of the United States articles of impeachment against James H. Peck, judge of the district court of the United States for the district of Missouri." After which the articles shall be exhibited and the President of the Senate shall inform the managers that the Senate will take proper order on the subject of the impeachment, of which due notice shall be given to the House of Representatives.

On the same day the first of the above resolutions was communicated to the House of Representatives by message.[28]

On May 4[29] the Senate resolved itself into a high court of impeachment,[30] and the Secretary administered the prescribed oath to the Vice-President, who then administered it in turn to the Senators.

The managers on the part of the House of Representatives appeared and were admitted; and Mr. Buchanan, their chairman, having announced that they were the managers instructed by the House of Representatives to exhibit a certain article of impeachment against James H. Peck, judge of the district court of the United States for the district of Missouri, they were requested by the Vice-President to take seats assigned them within the bar; and the Sergeant-at-Arms was directed to make proclamation in the words following:

Oyez! Oyez! Oyez! All persons are commanded to keep silence, on pain of imprisonment, while the grand inquest of the nation is exhibiting to the Senate of the United States articles of impeachment against James H. Peck, judge of the district court of the United States for the district of Missouri.

2370. Peck's impeachment, continued.

The article of impeachment against Judge Peck.

The article of impeachment in the Peck case was signed by the Speaker and attested by the Clerk.

The article of impeachment in the Peck case was read by the chairman of the managers, and appears in full on the journal of the trial.

Having laid the article impeaching Judge Peck on the Senate table, the managers returned and reported verbally to the House.

The article of impeachment against Judge Peck having been presented, the Senate ordered a writ of summons to issue, and informed the House thereof.

After which the managers rose, and Mr. Buchanan, their chairman, read the following article, which appears in full in the journal of the impeachment:

Article exhibited by the House of Representatives of the United States, in the name of themselves, and of all the people of the United States, against James H. Peck, judge of the district court of the United States for the district of Missouri, in maintenance and support of their impeachment against him for high misdemeanors in office.

[28] House Journal, p. 603.
[29] Senate Impeachment Journal, second session Twenty-first Congress, pp. 240–243; Debates, pp. 411–413.
[30] During this trial the court is described by the singular number "impeachment." In former trials the word has been "impeachments."

ARTICLE

That the said James H. Peck, judge of the district court of the United States for the district of Missouri, at a term of the said court, holden at St. Louis, in the State of Missouri, on the 4th Monday in December, 1825, did, under and by virtue of the power and authority vested in the said court, by the act of the Congress of the United States, entitled "An act enabling the claimants to lands within the limits of the State of Missouri and Territory of Arkansas to institute proceedings to try the validity of their claims," approved on the 26th day of May, 1824, render a final decree of the said court in favor of the United States, and against the validity of the claim of the petitioners, in a certain matter or cause depending in the said court, under the said act, and before that time prosecuted in the said court, before the said judge, by Julie Soulard, widow of Antoine Soulard, and James G. Soulard, Henry G. Soulard, Eliza Soulard, and Benjamin A. Soulard, children and heirs at law of the said Antoine Soulard, petitioners against the United States, praying for the confirmation of their claim, under the said act, to certain lands situated in the said State of Missouri; and the said court did, thereafter, on the 30th day of December, in the said year, adjourn to sit again on the third Monday in April, 1826.

And the said petitioners did, and at the December term of the said court, holden by and before the said James H. Peck, judge as aforesaid, in due form of law, under the said act, appeal against the United States from the judgment and decree so made and entered in the said matter, to the Supreme Court of the United States; of which appeal, so made and taken in the said district court, the said James H. Peck, judge of the said court, had then and there full notice. And the said James H. Peck, after the said matter or cause had so been duly appealed to the Supreme Court of the United States, and on or about the 30th day of March, 1826, did cause to be published, in a certain public newspaper, printed at the city of St. Louis, called "The Missouri Republican," a certain communication, prepared by the said James H. Peck, purporting to be the opinion of the said James H. Peck, as judge of the said court, in the matter or cause aforesaid, and purporting to set forth the reasons of the said James H. Peck, as such judge, for the said decree; and that Luke Edward Lawless, a citizen of the United States, and an attorney and counsellor at law in the said district court, and who had been of counsel for the petitioners in the said court, in the matter aforesaid, did, thereafter, and on or about the 8th day of April, 1826, cause to be published in a certain other newspaper, printed at the city of St. Louis, called "The Missouri Advocate and St. Louis Enquirer," a certain article signed "A Citizen," and purporting to contain an exposition of certain errors of doctrine and fact alleged to be contained in the opinion of the said James H. Peck, as before that time so published, which publication by the said Luke Edward Lawless was to the effect following, viz:

"*To the Editor:*

"SIR: I have read, with the attention which the subject deserves, the opinion of Judge Peck on the claim of the widow and heirs of Antoine Soulard, published in the Republican of the 30th ultimo. I observe that, although the judge has thought proper to decide against the claim, he leaves the grounds of his decree open for further discussion.

"Availing myself, therefore, of this permission, and considering the opinion so published to be a fair subject of examination to every citizen who feels himself interested in, or aggrieved by, its operation, I beg leave to point the attention of the public to some of the principal errors which I think I have discovered in it. In doing so, I shall confine myself to little more than an enumeration of those errors, without entering into any demonstration or developed reasoning on the subject. This would require more space than a newspaper allows, and, besides, is not, as regards most of the points, absolutely necessary.

"Judge Peck, in this opinion, seems to me to have erred in the following assumptions, as well of fact as of doctrine:

"1. That, by the ordinance of 1754, a subdelegate was prohibited from making a grant in consideration of services rendered or to be rendered.

"2. That a subdelegate in Louisiana was not a subdelegate, as contemplated by the said ordinance.

"3. That O'Reilly's regulations, made in February, 1770, can be considered as demonstrative of the extent of the granting power of either the governor-general or the subdelegates, under the royal order of August, 1790.

"4. That the royal order of August, 1770 (as recited or referred to in the preamble to the regulations of Morales, of July, 1799), related exclusively to the governor-general.

"5. That the word 'mercedes,' in the ordinance of 1754, which, in the Spanish language, means 'gifts,' can be narrowed, by anything in that ordinance, or in any other law, to the idea of a grant to an Indian, or a reward to an informer, and much less to a mere sale for money.

"6. That O'Reily's regulations were in their terms applicable, or ever were in fact applied to, or published in, upper Louisiana.

"7. That the regulations of O'Reily have any bearing on the grant to Antoine Soulard, or that such a grant was contemplated by them.

"8. That the limitations to a square league of grants to new settlers in Opelousas, Attakapas, and Natchitoches (in eighth article of O'Reily's regulations) prohibits a larger grant in upper Louisiana.

"9. That the regulations of the governor-general, Gayoso, dated 9th September, 1797, entitled 'Instructions to be observed for the admission of new settlers,' prohibit, in future, a grant for services, or have the effect of annulling that to Antoine Soulard, which was made in 1796, and not located or surveyed until February, 1804.

"10. That the complete titles made by Gayoso are not to be referred to as affording the construction made by Gayoso himself, of his own regulations.

"11. That, although the regulations of Morales were not promulgated as law in upper Louisiana, the grantee in the principal case was bound by them, inasmuch as he had notice, or must be presumed, 'from the official station which he held,' to have had notice, of their terms.

"12. That the regulations of Morales 'exclude all belief that any law existed under which a confirmation of the title in question could have been claimed.'

"13. That the complete titles (produced to the court) made by the governor-general, or the intendant-general, though based on incomplete titles, not conformable to the regulations of O'Reily, Gayoso, or Morales, afford no inference in favor of the power of the lieutenant-governor, from whom these incomplete titles emanated, and must be considered as anomalous exercises of power in favor of individual grantees.

"14. That the language of Morales himself, in the complete titles issued by him, on concessions made by the lieutenant-governor of upper Louisiana, anterior to the date of his regulations, ought not to be referred to as furnishing the construction which he, Morales, put on his own regulations.

"15. That the uniform practice of the subdelegates, or lieutenant-governor of upper Louisiana, from the first establishment of that province to the 10th March, 1804, is to be disregarded as proof of law, usage, or custom therein.

"16. That the historical fact that nineteen-twentieths of the titles to lands in upper Louisiana were not only incomplete but not conformable to the regulations of O'Riley, Gayoso, or Morales at the date of the cession to the United States, affords no inference in favor of the general legality of those titles.

"17. That the fact that incomplete concessions, whether floating or located, were, previous to the cession, treated and considered by the Government and population of Louisiana as property, salable, transferable, and the subject of inheritance and distribution ab intestato, furnishes no inference in favor of those titles, or to their claim to the protection of the treaty of cession, or of the law of nations.

"18. That the laws of Congress heretofore passed in favor of incomplete titles furnish no argument or protecting principle in favor of those titles of a precisely similar character, which remain unconfirmed.

"In addition to the above, a number of other errors, consequential on those indicated, might be stated. The judge's doctrine as to the forfeiture which he contends is inflicted by Morale's regulations, seems to me to be peculiarly pregnant with grievous consequences. I shall, however, not tire the reader with any further enumeration, and shall detain him only to observe, by way of conclusion, that the judge's recollection of the argument of the counsel for the petitioner, as delivered at the bar, differs materially from what I can remember, who also heard it. In justice to the counsel I beg to observe that all that I have now submitted to the public has been suggested by that argument as spoken, and by the printed report of it, which is even now before me.

"A CITIZEN."

And the said James H. Peck, judge as aforesaid, unmindful of the solemn duties of his station, and that he held the same, by the Constitution of the United States, during good behavior only, with intention wrongfully and unjustly to oppress, imprison, and otherwise injure the said Luke Edward Lawless, under

color of law, did, thereafter, at a term of the said district court of the United States for this district of Missouri, begun and held at the city of St. Louis, in the State of Missouri, on the 3d Monday in April, 1826, arbitrarily, oppressively, and unjustly, and under the further color and pretense that the said Luke Edward Lawless was answerable to the said court for the said publication signed "A Citizen," as for a contempt thereof, institute, in the said court, before him, the said James H. Peck, judge as aforesaid, certain proceedings against the said Luke Edward Lawless, in a summary way, by attachment issued for that purpose by the order of the said James H. Peck, as such judge, against the person of the said Luke Edward Lawless, touching the said pretended contempt, under and by virtue of which said attachment the said Luke Edward Lawless was, on the 21st day of April, 1826, arrested, imprisoned, and brought into the said court, before the said judge, in the custody of the marshal of the said States; and the said James H. Peck, judge as aforesaid, did, afterwards, on the same day, under the color and pretenses aforesaid, and with the intent aforesaid, in the said court, then and there, unjustly, oppressively, and arbitrarily, order and adjudge that the said Luke Edward Lawless, for the cause aforesaid, should be committed to prison for the period of twenty-four hours, and that he should be suspended from practicing as an attorney or counsellor at law in the said district court for the period of eighteen calendar months from that day, and did then and there further cause the said unjust and oppressive sentence to be carried into execution; and the said Luke Edward Lawless was, under color of the said sentence, and, by the order of the said James H. Peck, judge, as aforesaid, thereupon suspended from practicing as such attorney or counsellor in the said court for the period aforesaid, and immediately committed to the common prison in the said city of St. Louis, to the great disparagement of public justice, the abuse of judicial authority, and to the subversion of the liberties of the people of the United States.

And the House of Representatives, by protestation, saying to themselves the liberty of exhibiting, at any time hereafter, any further articles, or other accusations or impeachment, against the said James H. Peck, and also of replying to his answers which he shall make unto the article herein preferred against him, and of offering proof to the same, and every part thereof, and to all and every other articles, accusation, or impeachment, which shall be exhibited by them as the case shall require, do demand that the said James H. Peck may be put to answer the misdemeanors herein charged against him, and that such proceedings, examinations, trials, and judgments, may be thereupon had and given, as may be agreeable to law and justice.

A. STEVENSON,
Speaker of the House of Representatives, United States.

Attest:
M. ST. CLAIR CLARKE,
Clerk House of Representatives, United States.

The Vice-President then informed the managers that the Senate would take proper order thereon, of which the House of Representatives should have due notice.

The managers, by their chairman, delivered the article of impeachment at the table of the Secretary, and then withdrew.

On motion by Mr. Tazewell, it was

Resolved, That the Secretary be directed to issue a summons, in the usual form, to James H. Peck, judge of the district court of the United States for the district of Missouri, to answer a certain article of impeachment exhibited against him by the House of Representatives on this day; that the said summons be returnable here on Tuesday next, the 11th instant, and be served by the Sergeant-at-Arms, or some person to be deputed by him, at least three days before the return day thereof; and that the Secretary communicate this resolution to the House of Representatives.

On motion by Mr. Tazewell,

The court then adjourned to Tuesday next at 12 o'clock.

On the same day, in the House, the managers reported: [31]

[31] House Journal, p. 605; Debates, p. 872.

That they did, this day, carry to the Senate, then in session as a high court of impeachment, the article of impeachment agreed to by this House on the 1st instant, and that they were informed that they would take proper measures relative to the said impeachment, of which the House would be duly notified.

A little later, on the same day, the Secretary of the Senate communicated [32] a message:

IN SENATE OF THE UNITED STATES,
HIGH COURT OF IMPEACHMENT,
Tuesday, May 4, 1830.

The United States. *v.* James H. Peck.

Resolved, That the Secretary be directed to issue a summons, etc. [here follows the text of the resolution already given above]

Attest:

WALTER LOWRIE, *Secretary.*

2371. Peck's impeachment continued.

Form of proclamation of Sergeant-at-Arms enjoining silence at the opening of the high court of impeachment for the Peck trial.

Form used by the Sergeant-at-Arms in calling Judge Peck to appear and answer the article.

Form of return made by the Sergeant-at-Arms in the Peck trial, and oath taken by him at the time.

Ceremonies at the appearance of Judge Peck in response to the writ of summons.

Judge Peck appeared in person, attended by counsel, in answer to the writ of summons.

Having appeared, Judge Peck asked time to prepare his answer, accompanying the request with an affidavit.

The Senate declined to allow Judge Peck until the next session of Congress to file his answer, and set an earlier date.

The answer of Judge Peck to the article of impeachment was ordered to be filed with the Secretary.

The Senate notified the House of the date fixed for Judge Peck to file his answer.

On May 11,[33] the high court of impeachment was opened by proclamation of silence by the Sergeant-at-Arms, as follows:

Oyez! Oyez! Oyez! Silence is commanded on pain of imprisonment while the Senate of the United States is sitting as a high court of impeachment for the trial of James H. Peck, judge of the district court of the United States for the district of Missouri.

The return of the Sergeant-at-Arms of the summons issued to James H. Peck was read, as follows:

I, Mountjoy Bayly, Sergeant-at-Arms of the Senate of the United States, in obedience to the within summons, to me directed, did proceed to Barnum's Hotel, in the city of Baltimore, on Thursday, the 6th instant, and did then and there deliver to, and leave with, the within-named James H. Peck a true copy of the within writ of summons and a true copy of the precept thereon indorsed, and did show him both.

MOUNTJOY BAYLY.

WASHINGTON, *May 8, 1830.*

The Secretary then administered the following oath to the Sergeant-at-Arms:

You, Mountjoy Bayly, Sergeant-at-Arms to the Senate of the United States, do swear that the return made and subscribed by you upon the process issued on the

[32] House Journal, p. 606.
[33] Senate Impeachment Journal, second session Twenty-first Congress, pp. 244–248; Debates, p. 432.

4th day of May, instant, by the Senate of the United States against James H. Peck, judge of the district court of the United States for the district of Missouri, is truly made, and that you have performed said services as therein described. So help you God.

Proclamation was then made as follows:

Oyez, oyez, oyez. James H. Peck, judge of the district court of the United States for the district of Missouri, come forward and answer the article of impeachment exhibited against you by the House of Representatives.

Whereupon James H. Peck appeared at the bar, attended by William Wirt, as his counsel, and they were seated within the bar.

The Vice-President informed Judge Peck that the court was ready to receive his answer.

Judge Peck rose and addressed the Senate as follows:

Mr. President: I appear, in obedience to a summons from this honorable court, to answer an article of impeachment exhibited against me by the honorable the House of Representatives; and I have a motion to make, which I request may be done by my counsel.

The Vice-President having signified the willingness of the court to receive the motion,

Mr. Wirt rose and read a letter addressed to the President of the Senate and signed by the respondent, in which were set forth the necessity of time to prepare a defense, and in which was also included a motion, respectfully submitted:

1. That a reasonable time may be allowed me to prepare my answer and plea; and, for this purpose, I ask, until the 25th day of the present month.
2. That, after my answer and plea shall be filed, process for witnesses may be awarded to me, and a reasonable time may be allowed to collect my witnesses and proofs from the State of Missouri.

The communication also referred to an accompanying affidavit. In this affidavit James H. Peck made oath that certain named persons were material witnesses for him, that there were other witnesses not named who would be material, and that there were certain public records needful to his defense; and that in order to produce these the delay asked for was not too much. He further made oath that his application was not for purposes of delay.

The reading having concluded, Mr. Daniel Webster, of Massachusetts, then submitted the following order:

Ordered, That James H. Peck file his answer and plea with the Secretary of the Senate to the article of impeachment exhibited against him by the House of Representatives, on or before the second Monday of the next session of Congress.

On motion of Mr. George M. Bibb, of Kentucky, this order was amended by striking out all after the words "on or before" and inserting "the 25th day of the present month;" and as amended the order was agreed to.

It was further—

Ordered, That the Secretary notify the foregoing order to the House of Representatives and to James H. Peck.

On the same day this message was duly communicated to the House.[34]

[34] House Journal, p. 625.

2372. Peck's impeachment, continued.

In the Peck trial new rules were not adopted, the rules framed in the Chase trial being considered as operative.

On May 11,[35] also, the Senate (not the high court of impeachment) agreed to the following:

Ordered, That the Secretary of the Senate direct copies of the rules of proceedings, prescribed in cases of impeachment, to be printed for the use of the Members, and laid on their tables on the first day of the next session of the court; and also that copies be furnished to the managers of the impeachment in the case of James H. Peck and to the accused and his counsel.

The rules referred to are those agreed upon at the trial of Samuel Chase. They are printed as a footnote in the Journal of the impeachment; but they were not acted on in any way by the court at this time, being treated as existing rules.[36]

2373. Peck's impeachment continued.

In the Peck trial the House decided to attend its managers at the presentation of the answers but not during the trial.

On May 25,[37] in the House, Mr. Storrs, of New York, observed that, as the Senate would meet to-day as a court of impeachment for the purpose of receiving the answer of the respondent, Judge Peck, it was indispensable that the House come to some order immediately on the subject. He therefore moved a resolution that the House would, in Committee of the Whole, attend the Senate during the trial of James H. Peck. Mr. Storrs argued that the resolution was in accordance with former usage and that the House should be present during every day of the trial. The appointment of managers was not intended to dispense with the presence of the House. The managers could take no step without consulting the House, which must, therefore, be present.

On the other hand, Mr. Pettis and Mr. Joel B. Sutherland, of Pennsylvania, insisted that the presence of the managers alone would be sufficient, and that if the House were to attend daily the other business would suffer. Mr. Sutherland said it would be very proper to go to the Senate today, and be present at the opening of the court for the impeachment, and receiving the answer of the accused; but afterwards, unless some very pressing occasion should require it, the presence of the House would be unnecessary. The object in appointing managers was to leave it to them to conduct the impeachment. He cited Jefferson's Manual to sustain his opinion, and moved to modify the resolution so as to provide that the House would attend this day.

In accordance with this suggestion, the resolution was modified and agreed to as follows:

Resolved, That this House will, this day, at such hour as the Senate shall appoint, resolve itself into Committee of the Whole, and attend in the Senate on the trial of the impeachment there pending of James H. Peck, judge of the district court of the United States for the district of Missouri.

2374. Peck's impeachment continued.

Arrangement of the Hall and ceremonies at the presentation of Judge Peck's answer.

Form of answer of Judge Peck in answer of the article of impeachment.

[35] Senate Journal, first session Twenty-first Congress, p. 296.
[36] Senate Impeachment Journal, second session Twenty-first Congress, pp. 248–250.
[37] House Journal, p. 714; Debates, p. 1134.

Judge Peck, in his plea, declared that the acts charged were justified by the law of the land.

The answer in the Peck case was read by counsel for respondent and then delivered to the Secretary.

Form of journal entry describing the attendance of the House in Committee of the Whole at the Peck trial.

The House was furnished by the court with a copy of Judge Peck's answer.

On the same day, May 25,[38] in the high court of impeachment, at the hour of 12 o'clock, the court was opened by proclamation in the usual form.

On motion by Mr. Webster, it was

Ordered, That the Secretary give notice to the House of Representatives that the Senate are now in their Chamber and are ready to proceed on the trial of the impeachment of James H. Peck, judge of the district court of the United States for the district of Missouri; and that seats are provided for the accommodation of the Members of the House of Representatives.

And this notice was duly received by the House.[39]

In the high court seats had been arranged on the right and left of the Chair, for the accommodation of the Senators, and their seats assigned to the managers and Members of the House of Representatives, and the accused and his counsel.

Judge Peck appeared, accompanied by William Wirt and Jonathan Meredith as his counsel, and they occupied seats assigned them to the right of the Chair.

The managers and Members of the House of Representatives appeared and took the seats usually occupied by the Senate.

The Vice-President then asked Judge Peck whether he was prepared to answer the article of impeachment exhibited against him.

Judge Peck replied that his answer and plea were prepared and desired that they might be read by his counsel.

The Vice-President asked Judge Peck whether the answer now to be made was to be considered as his final answer on which he intended to rely; and the judge having answered in the affirmative, the counsel was directed to proceed to read it.

Mr. Meredith read the answer (which occupied upward of two hours). In form the answer began as follows:

The answer of James H. Peck to the article of impeachment exhibited against him by the honorable House of Representatives of the United States.

The said James H. Peck, saving to himself all exceptions whatsoever to the said article and the charges therein contained, answers and says:

Here follows the answer in detail, and the conclusion:

In all which actions and doings of this respondent in the premises, he avers that he was supported and justified by the Constitution and laws of the land, and that he will be prepared to make good this averment at such time as this honorable court shall appoint.

And, solemnly denying the intention charged to him by the article of impeachment, "wrongfully and unjustly to oppress, imprison, and otherwise injure the said Luke E. Lawless, under color of law," and asserting, in the presence of the Supreme Searcher of Hearts, that in all that he did in the premises he was actuated by the purest sense of what he deemed a high official duty and was, as he believed and still confidently believes, well warranted and supported in every step

[38] Senate Impeachment Journal, second session Twenty-first Congress, pp. 249–326; Debates, pp. 455, 456.
[39] House Journal, p. 717.

by the Constitution and laws of the land, this respondent, for plea to the said article of impeachment, saith that he is not guilty of any misdemeanor, as in and by said article is alleged, and this he prays may be inquired of by this honorable court in such manner as law and justice shall seem to them to require.

JAMES H. PECK.

This answer, with sundry exhibits referred to therein, is spread on the Journal of the high court of impeachment. It was delivered to the Secretary of the Senate after the reading.

Mr. Storrs, in behalf of the managers, moved

That they have time to consult the House of Representatives on a replication, and that they be furnished with a copy of the answer of the respondent, which was agreed to.

On motion by Mr. Webster it was

Ordered, That when this court adjourn, it adjourn to meet again on the second Monday of the next session of Congress, at 12 o'clock, then to proceed with the said impeachment.

Mr. Wirt desired to know whether blank summons as for the attendance of witnesses would be allowed to the respondent.

The Vice-President replied that they would.

The court then adjourned to the second Monday of the next session of Congress.

The House Journal of this day has this entry: [40]

The House then, in pursuance of a resolution agreed to this day, resolved itself into a Committee of the Whole House, and proceeded in that capacity to the Senate Chamber, to attend the trial by the Senate of the impeachment against James H. Peck, judge of the district court of the United States for the district of Missouri; and, after sometime spent therein, the committee returned into the Chamber of the House; and the Speaker having resumed the Chair, Mr. P. P. Barbour, of Virginia, from the said Committee of the Whole, reported that the committee had, according to order, attended the trial by the Senate of the said impeachment; that the answer and plea of the said James H. Peck were delivered in their presence; that some progress was made in said trial, and that the Senate, sitting as a high court of impeachment, had adjourned to meet again on the second Monday of the next session of Congress, at 12 o'clock.

And on May 31 [41] the Congress adjourned.

2375. Peck's impeachment continued.

A recess of Congress intervened between the filing of the answer and the presentation of the replication in the Peck trial.

Form of replication to Judge Peck's answer and forms of resolutions providing for its presentation.

Senators elected after the beginning of an impeachment trial are sworn as in the case of other Senators.

At the next session of Congress the proceedings were resumed where they had ended at the preceding session.

On December 13,[42] 1830, in the House,

Mr. Buchanan, on behalf of the managers appointed to conduct the impeachment against Judge James H. Peck, submitted the following report:

The committee of managers appointed by the House of Representatives to conduct the impeachment against James H. Peck, judge of the district court of the United States for the district of Missouri, report that they have had under

[40] Page 717.
[41] House Journal, p. 812.
[42] Second session Twenty-first Congress, House Journal, pp. 47, 48; Debates, pp. 354, 355.

consideration the answer of Judge Peck to the article of impeachment exhibited against him by the House, and recommend the adoption of the following replication thereto:

REPLICATION

By the House of Representatives of the United States to the answer and plea of James H. Peck, judge of the district court of the United States for the district of Missouri, to the article of impeachment exhibited against him by the said House of Representatives.

The House of Representatives of the United States having considered the answer and plea of James H. Peck, judge of the district court of the United States for the district of Missouri, to the article of impeachment against him by them exhibited, in the name of themselves and of all the people of the United States, reply that the said James H. Peck is guilty in such manner as he stands impeached; and that the House of Representatives will be ready to prove their charges against him at such convenient time and place as shall be appointed for that purpose.

The replication being read was agreed to by the House.

Thereupon, on motion of Mr. Buchanan,

Resolved, That the foregoing replication be put into the answer and plea of the aforesaid James H. Peck on behalf of this House; and that the managers be instructed to maintain the said replication at the bar of the Senate, at such time as shall be appointed by the Senate.

Resolved, That a message be sent to the Senate to inform them that this House have agreed to a replication on their part to the answer and plea of James H. Peck, judge of the district court of the United States for the district of Missouri, to the article of impeachment exhibited to the Senate against him by this House, and have directed the managers appointed to conduct the said impeachment to carry the said replication to the Senate, and to maintain the same at the bar of the Senate, at such times as shall be appointed by the Senate.

On the same day [43] the high court of impeachment was opened by proclamation,[44] and the President [45] administered the oath to Messrs. David J. Baker, of Illinois, and George Poindexter, of Mississippi, newly-elected Senators who had taken their seats at the first of the session.

On motion of Mr. Levi Woodbury, of New Hampshire,

Ordered, That the Secretary inform the House of Representatives that the Senate are in their public Chamber, and are ready to proceed on the trial of the impeachment of James H. Peck, judge of the district court of the United States for the district of Missouri, and that seats are provided for the accommodation of the Members.

The message from the House of Representatives announcing that the managers had been directed to carry the replication was received.

The respondent, accompanied by Mr. Wirt and Mr. Meredith, his counsel, appeared at the bar of the Senate. They were conducted to seats, with a table before them, prepared for their convenience.

In a few minutes the managers to conduct the impeachment on the part of the House of Representatives also came in and took their seats.

Mr. Buchanan, one of the managers, rose and said that the managers, on the part of the House of Representatives, were ready to present the replication of that House, to the answer and plea of James H. Peck, judge of the district court of the United States for the district of Missouri, to the articles of impeachment exhibited against him by that body. He then read the replication, after which it was handed to the Secretary to be filed.

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[43] Senate Impeachment Journal, pp. 326, 327; Debates, p. 3.

[44] The Debates say that this proclamation was made by the marshal of the District of Columbia.

[45] John C. Calhoun, of South Carolina, Vice-President and President of the Senate.

2376. Peck's impeachment continued.

In the Peck trial, after the witnesses had been called, the court granted the request of the managers for delay to await a material witness.

The President then informed the managers that they were at liberty to proceed in support of the article of impeachment exhibited.

On request of Mr. Buchanan the witnesses on behalf of the managers were called; and on request of Mr. Meredith the witnesses for the respondent were also called.

Then it was—

Ordered, That the Secretary inform the House of Representatives that the Senate will, on Monday next, at 12 o'clock, be ready further to proceed on the trial of the impeachment of James H. Peck, judge. * * *

The court then adjourned to Monday next at 11 o'clock.

2377. Peck's impeachment continued.

The House attended its managers a portion of the time during the Peck trial, including the days of final argument.

The subject of attendance with the managers was discussed during the Peck trial, with citation of American and English precedents.

The court of impeachment provided that the House should be notified daily of its sittings.

The court of impeachment may adjourn over without interfering with session of the Senate in the interim.

When the managers had returned to the House,[46] a question was raised over the fact that the House itself had not attended the managers. Mr. Buchanan said that no motion had been made on the subject, and the managers had felt it their duty to go and present the replication without awaiting action. As to the question of attendance generally, with the permission of the House he would state the course that had been pursued by the managers. They had examined all the precedents which had occurred in this country to guide them to a correct performance of their duty. It was ascertained that since the adoption of the present Constitution there had been three impeachments, viz, those of Messrs. Blount and Pickering and Judge Chase. On the trial of the first two the House did not attend in a body, but left it to the managers to conduct the impeachment; on the trial of Judge Chase, they did attend every day. It not being considered by the managers of the pending trial that any principle so important as to interrupt the legislative business of the House was involved in the present case, they had gone to the Senate this day, as managers, and presented to that body the replication agreed upon by the House. Mr. Buchanan further remarked that he had consulted the English precedents. On the trial of Warren Hastings the House of Commons attended at the commencement of the trial, but they did not continue to do so. On the trial of the Earl of Macclesfield they did not attend until his conviction by the House of Lords; and then they attended in consequence of a message having been sent them by that body that they were ready to pronounce judgment on the impeached, if the House of Commons would attend and demand it.

[46] Debates, p. 358.

This question arose from time to time during the trial. On December 20,[47] when the trial was to begin, Mr. Michael Hoffman, of New York, proposed an order that the House, from time to time, resolve itself into Committee of the Whole to attend, but after discussion as to the state of the general business before the House, it was decided to modify the proposition so as to provide merely for attendance on that day. On December 22 [48] a proposed order that the House attend each day until otherwise ordered was disagreed to, yeas 83, nays 88. On December 23,[49] by a vote of yeas 96, nays 30, it was—

Resolved, That during the trial of the impeachment now pending before the Senate this House will meet daily at the hour of 11 o'clock in the forenoon; and that, from day to day, it will resolve itself into a Committee of the Whole and attend said trial during the continuance thereof, and until the conclusion of the same.

The House acted in accordance with this resolution until January 4,[50] when the vote agreeing to it was reconsidered, and then the resolution was disagreed to, yeas 69, nays 118. Thereupon Mr. Kensey Johns, jr., of Delaware, proposed this resolution:

Resolved, That a message be sent by the Clerk of the House, informing the Senate that the House of Representatives decline further attendance during the trial of the impeachment of Judge Peck.

This was criticised as likely to give an impression that the House had abandoned the impeachment. Finally, after being amended, on motion of Mr. Storrs, the resolution was agreed to in this form:

Resolved, That the managers appointed to conduct the impeachment of James H. Peck be instructed to attend the trial of the said impeachment, at such times as the Senate shall appoint for that purpose; and that the attendance of the House be dispensed with until otherwise ordered by the House, and that the Clerk communicate this resolution to the Senate.

On January 17 [51] it was resolved by the House that "during the argument of counsel in the impeachment" this House "will, from day to day, resolve itself into a Committee of the Whole on the state of the Union and attend the same."

And in accordance with this order the House attended until the end of the session.

On December 24,[52] after the House had decided to attend each day, the high court of impeachments—

Ordered, That the Secretary notify the House of Representatives, from day to day, that the Senate is sitting as a high court of impeachment for the trial of James H. Peck, judge of the district court of the United States for the district of Missouri.

And on January 3, 1831,[53] when it was ordered that the adjournment of the high court on that day (a Monday) be to Wednesday, it was also ordered that the House be informed. It may be noted that while the high court of impeachment adjourned over January 4, the Senate itself was in session on that day.

2378. Peck's impeachment continued.

The presentation of evidence and the arguments in the Peck trial.

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[47] Debates, p. 378; House Journal, p. 80.
[48] Debates, p. 379; House Journal, pp. 91, 92.
[49] Debates, p. 382; House Journal, p. 97.
[50] Debates, p. 399; House Journal, p. 140.
[51] Debates, p. 518; House Journal, p. 186.
[52] Senate Impeachment Journal, p. 329.
[53] Senate Journal, pp. 67, 330.

On the final arguments in the Peck trial the managers had the opening and closing.

In the Peck trial a Senator was examined as a witness on behalf of respondent.

On receipt of a letter from a physician, showing the illness of one of Judge Peck's counsel, the court adjourned.

On Monday, December 20,[54] the court having been opened by proclamation, and the managers accompanied by the House of Representatives, and the respondent accompanied by his counsel having attended, at the request of Mr. Meredith the witnesses in behalf of the respondent were called. Although one or two material witnesses failed to answer, Mr. Meredith announced that they were ready to go to trial.

The President informed the managers that they might now proceed to substantiate their charge.

Mr. McDuffie thereupon proceeded to open the cause, and concluded on the succeeding day. Then, on December 21 [55] and thereafter until January 5, 1831, witnesses were called for the managers, the same being cross-examined on behalf of the respondent.

On January 5,[56] Mr. Meredith opened the defense and began the introduction of testimony, which continued to January 17.

On January 11,[57] Thomas H. Benton, a senator from Missouri, was sworn on behalf of the respondent.

On January 13,[58] the Vice-President communicated a letter from the physician attending Mr. Wirt, one of the counsel for the respondent, stating that Mr. Wirt would be unable to attend until the 17th. Thereupon the high court adjourned until that date. Once previously it had adjourned for the same reason at request of counsel and with consent of managers.

On January 17,[59] Mr. Spencer, on behalf of the managers, commenced the argument in support of the article of impeachment, and on January 18, Mr. Wickliffe, also on behalf of the managers, continued.

On January 19,[60] Mr. Meredith commenced the argument on behalf of the respondent, and continued until January 22, when Mr. Wirt continued the argument for the respondent until January 25, when he concluded.

From January 26 to 29,[61] Messrs. Storrs and Buchanan occupied the time with the arguments for the managers.

2379. Peck's impeachment continued.

In the arguments in the Peck trial the managers resisted the theory that impeachment might be only for indictable offenses.

Argument of Mr. Manager Spencer on the nature of impeachable offenses.

In the course of the argument the managers and counsel for respondent considered not only the evidence and law applicable to the article itself, but discussed the nature of the power of impeachment. Mr. Manager Spencer said: [62]

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[54] Senate Impeachment Journal, pp. 327, et seq.; Debates, p. 10.
[55] Senate Impeachment Journal, pp. 328–330.
[56] Journal, pp. 331; Annals, p. 26.
[57] Journal, p. 334; Debates, p. 28.
[58] Journal, p. 335; Debates, pp. 23, 27, 28.
[59] Journal, p. 335; Debates, p. 34.
[60] Journal, pp. 335, 336; Debates, p. 34.
[61] Journal, p. 337; Debates, p. 44.
[62] Report of the trial of James H. Peck, p. 290.

It is necessary to a right understanding of the impeachment to ascertain and define what offenses constitute judicial misdemeanors. A judicial misdemeanor consists, in my opinion, in doing an illegal act, colore officii, with bad motives, or in doing an act within the competency of the court or judge in some cases, but unwarranted in a particular case from the facts existing in that case, with bad motives. To illustrate the last proposition: The eighth article of the amendments of the Constitution forbids the requirement of excessive bail, the imposition of excessive fines, or the infliction of cruel or unusual punishments. If a judge should disregard these provisions, and from bad motives violate them, his offense would consist, not in the want of power, but in the manner of his executing an authority intrusted to him, and for exceeding a just and lawful discretion.

2380. Peck's impeachment continued.

Argument of Mr. Manager Wickliffe on the constitutional provisions relating to impeachment.

Mr. Manager Wickliffe said: [83]

I do not know that it will be contended by the counsel for the respondent, as it has been on a former impeachment before the Senate of the United States, with great ability and apparent confidence, "that a judge can not be impeached for any offense which is not indictable; that the Constitution declares the judges shall be removed from office by impeachment for treason, bribery, and other high crimes and misdemeanors;" consequently as nothing less than the commission of some offense which may be punishable by indictment, presentment, or information comes within the known interpretation of the terms "high crimes and misdemeanors," no act, judicial or otherwise, unless indictable, is impeachable.

I do not agree with this interpretation of the Constitution. * * *

I maintain the proposition that any official act committed or omitted by the judge, which is in violation of the condition upon which he holds his office, is an impeachable offense under the Constitution. * * *

The framers of the Constitution wisely limited the punishment which this court may award, fixing a point beyond which you can not go, but leaving you in the exercise of a sound discretion to make it less than removal from office. They were governed by equal wisdom when they left the official delinquent to answer personally to the offended laws of the State in which he had committed any crime or misdemeanor against their injunctions.

The offense for which an officer may be impeached might not, in the judgment of his triers (though deserving punishment), require the infliction of the severer punishment, that of removal from the disqualification for office. It might not deserve both of these penalties, perhaps neither; a reprimand, a temporary suspension of his functions and salary, might, in particular cases, be a punishment equal to the official misdemeanor.

If nothing else had been said in this Constitution upon the subject of impeachment, who would doubt the plenitude of power, the nature of the punishment, or the objects upon which Congress could exercise it? But, sir, the members of the convention, as if solemnly impressed with the danger to the judiciary and other departments of the Government, resulting from the humanity and mercy of the members of the tribunal for the trial of impeachment; or, perhaps, looking at the dark side of the picture of human nature, believing it possible that the time might come when a judge or other officer, though stained with the foul crime of treason and bribery, or other high crimes and misdemeanors, would find favor in the sympathies, or cover in the bad passions of his triers, who would blush, however, to pronounce him not guilty in the face of conclusive evidence, but who would, nevertheless, diminish the punishment under the discretionary power in the first article, and leave the traitor or convicted felon to disgrace the judicial ermine or official robe. To guard against this possible state of the case, * * * the members of the convention intended, by the sixth section of the second article, to declare what shall be the punishment to be awarded by the court of impeachment for the enumerated offenses of treason, bribery, and other high crimes and misdemeanors; hence they declared that "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 misde-

[83] Report of the trial of James H. Peck, pp. 308–310.

meanors." This language is imperative; it leaves you no discretion, you can not stop short of removal from office; you can not exceed it.

If the construction of the Constitution which was contended for in the impeachment to which I have referred be the true reading of the instrument, and it shall be decided that no offense, no conduct of an officer, unless it be a high crime and misdemeanor, with the technical meaning of these terms, and punishable by some known and existing criminal law, is impeachable, what would be the condition of our Government, and especially the judicial department? No matter what was the conduct of a judge in or out of court, if he kept himself without the pains and penalties enacted for the punishment of treason, felony and vice, in the most degraded of civil society, no power exists to strip him of the judicial character which he degraded. He would, covered with disgrace and immorality, smile with contempt at your power, and shield himself under the imputed ignorance of the members of the convention.

A few cases will, I think, suffice to prove the fallacy of such a construction of the Constitution. Suppose a judge, who is bound to open his court at stated periods for the trial of causes, fulfills the letter of the law, opens his court at the regular stated terms, but as regularly adjourns, and refuses to hear and decide the causes pending in court. This, sir, would be no indictable offense under any law; yet I am inclined to believe this court would remove him from office for official misconduct, for misbehavior in office, a forfeiture of the condition, upon which he held his commission.

Suppose a judge, under the influence of political feeling, * * * shall award to his favorite a new trial, in an important cause, against known law, would this be an indictable offense under any code of laws in force in this Government?

Suppose a judge shall forget the dignity which belongs to the station he fills, and to disregard that decorum which should ever regulate the conduct of a judge, in and out of court, shall, while in court, take advantage of his situation, and labor for two hours in pouring forth his abuse and vituperation upon a respectable and unoffending citizen, whom he has dragged before him by the strong arm of usurped power—in what court would you file your indictment against him, for a high misdemeanor? * * *

Take the case of the President of the United States. Suppose him base enough, or foolish enough, if you please, to refuse his sanction to any and every act which Congress may pass. This is a power which, according to the Constitution, he can exercise. Will it be contended that he could be indicted for it, as a misdemeanor, in any court, State or Federal? Yet where is the man who would hesitate to remove him from office by impeachment? If one of the heads of a department shall so far forget the obligations of his official duty as to direct his power and patronage, not to the promotion of the welfare of the country, but with the known and avowed purpose of his own personal or political aggrandizement, who would think of finding an indictment in a criminal court of justice against him? Yet who would not remove him from office by impeachment?

If precedent is to have any authority in this court, I consider the question settled by the Senate of the United States in the trial of Judge Pickering, of New Hampshire. The principal charge exhibited against him was a disregard of a plain statute of the United States, which makes it the duty of a district court, before restoration of goods libeled for a violation of the revenue laws of the United States, to the claimant in court, to take from him bond and security to return the goods or to perform the judgment of the court. Upon this charge the Senate found him guilty and removed him from office. He was also charged with intemperance, which, though a misdemeanor, has never been denominated or regarded by the laws of any country a "high misdemeanor."

2381. Peck's impeachment continued.

Argument of Mr. Manager Buchanan on the nature of impeachable offenses.

Argument that the proof of intention is not necessary in an impeachment trial to secure punishment for the fact.

Mr. Manager Buchanan said: [64]

The Constitution of the United States declares the tenure of the judicial office to be "during good behavior." Official misbehavior, therefore, in a judge is a forfeiture of his office. But when we say this we have advanced only a small

[64] Report of the trial of James H. Peck, pp. 427–429.

distance. Another question meets us. What is misbehavior in office? In answer to this question, and without pretending to furnish a definition, I freely admit that we are bound to prove that the respondent has violated the Constitution or some known law of the land. This, I think, was the principle fairly to be deduced from all the arguments on the trial of Judge Chase, and from the votes of the Senate in the articles of impeachment against him, in opposition to the principle for which his counsel in the final first instance strenuously contended, that in order to render an offense impeachable it must be indictable. But this violation of law may consist in the abuse, as well as in the usurpation of authority. The abuse of a power which has been given may be as criminal as the usurpation of a power which has not been granted. Can there be any doubt of this? Suppose a man to be indicted for an assault and battery. He is tried and found guilty, and the judge, without any circumstances of peculiar aggravation having been shown, fines a thousand dollars and commits him to prison for one year. Now, although the judge may possess the power to fine and imprison for this offense, at his discretion, would not this punishment be such an abuse of judicial discretion and afford such evidence of the tyrannical and arbitrary exercise of power as would justify the House of Representatives in voting an impeachment? But why need I fancy cases? Can fancy imagine a stronger case than is now, in point of fact, before us? A member of the bar is brought before a court of the United States guilty, if you please, of having published a libel on the judge—a libel, however, perfectly decorous in its terms and imputing no criminal intention, and so difficulty of construction that though the counsel for the respondent have labored for hours to prove it to be a libel, still that question remains doubtful. If, in this case, the judge has degraded the author by imprisonment and deprived him of the means of earning bread for himself and his family by suspending him from the practice of his profession for eighteen months, would not this be a cruel and oppressive use of authority, even admitting the power to punish in such a case to be possessed by the judge?

A gross abuse of granted power and an usurpation of power not granted are offenses equally worthy of and liable to impeachment. If therefore the gentleman could establish, on the firmest foundation, that the power to punish libels as contempts may be legally exercised by all the courts of the United States, still he would not have proceeded far toward the acquittal of his client. * * *

It has been contended that even supposing the judge to have transcended his power and violated the law, yet he can not be convicted unless the Senate should believe he did the act with criminal intention. It has been said that crime consists in two things—a fact and an intention; and in support of this proposition the legal maxim has been quoted that "actus non fit reum, nisi, mens rea." This may be true as a general proposition, and yet it may have but a slight bearing upon the present case. Did the gentlemen mean to contend that before the judge could be convicted we must prove by positive testimony malice in his breast, a lurging enmity against Mr. Lawless and the purpose of gratifying a base revenge? I should suppose that to have been the reason for which they asked so many questions to show that the judge and Mr. Lawless had previously been upon good terms. This argument may be answered with great force in the strong language of the respondent himself in his answer to the article of impeachment. "Both in law and morals (says the judge) every man is presumed to intend the natural consequences of his own actions." This was the rule by which he tried Mr. Lawless. He took up the article signed "A Citizen" and from that article alone he inferred the intention of its author. In doing this he acted correctly; but his jaundiced mind and wounded vanity had so diseased his perceptions that he saw burnt letters upon the scroll, although in themselves they were perfectly innocent and harmless. * * *

I admit that if the charge against a judge be merely an illegal decision on a question of property, in a civil cause, his error ought to be gross and palpable, indeed, to justify the inference of a criminal intention and to convict him upon an impeachment. And yet one case of this character has occurred in our history. Judge Pickering was tried and condemned upon all the four articles exhibited against him, although the three first contained no other charge than that of making decisions contrary to law in a cause involving a mere question of property, and then refusing to grant the party injured an appeal from his decision, to which he was entitled.

And yet am I to be told that if a judge shall do an act which is in itself criminal, if he shall, in an arbitrary and oppressive manner, and without the authority of law, imprison a citizen of this country, and thus consign him to

infamy, you are not to infer his intention from the act? Is not the act itself the best source from which to draw the inference? * * *

The fourth article of impeachment exhibited against Judge Pickering charged him with having appeared upon the bench in a state of total intoxication. This was gross official misbehavior. Would the Senate in that case have gravely listened to an argument to prove that the judge might have got drunk without an evil intention? Certainly not. The act was done. The tribunal had been disgraced, and the Senate inferred his intention from his conduct and turned him out of office.

2382. Peck's impeachment continued.

Mr. William Wirt argued in defense of Judge Peck that a judge might not be impeached for a mere mistake of the law without guilty intent.

Mr. William Wirt's argument that intent was not established by proof of the mere commission of an unlawful act.

Arguing for the respondent, Mr. Wirt said: [65]

Even if the judge were proved to have mistaken the law, that would not warrant a conviction, unless the guilt of intention be also established. For a mere mistake of the law is no crime or misdemeanor in a judge. It is the intention that is the essence of every crime. The maxim is (for the principal is so universally admitted that it has grown into a maxim) actus non facit reum nisi mens sit rea.

Sir, if the impeachment had not contained the charge of the guilty intention the respondent, under the advice of his counsel, would have demurred to it; not by any special demurrer to the form, but a general demurrer to the substance, for the intention is the substance of the crime. The honorable managers who prepared this article of impeachment were perfectly aware of this and have, therefore, very properly charged the intention in express terms. Sir, it is a material part of the charge, and what it was material to charge it is material to prove. * * * One of the honorable managers, seeming to perceive the impossibility of satisfying any candid mind that the respondent was guilty of the intention charged, endeavored to escape this rule of the criminal law by contending that if they fixed on the respondent the commission of an unlwaful act, the guilty intention charged in the impeachment followed as a necessary implication of law. This I deny; for then every mistake of law on the part of a judge would become a crime or a civil injury, for which he would be personally responsible. The honorable manager sought to illustrate his proposition by the cases of murder and forgery. "If," said he, "a party be proved to have committed a deliberate murder, will he not be presumed to have intended to commit murder? Is separate proof of intention ever required in such case? Or if a man be proved to have commited forgery, will not the law infer the intention from the act?" This is plausible; let us examine its solidity: It is the proposition which they must maintain, and from which alone they can have any hope of success in this case. Is it sound?

Mr. Wirt then proceeded to discuss the crimes of murder and forgery to show that guilty intention was part of the proof in such cases, since neither crime existed without guilty intention. Continuing, he said:

Another of the honorable managers (Mr. Wickliffe) has advanced a proposition so novel and so directly confronted by all the authorities, that had it not been for some other things that I have heard in this case, I should have heard it with unmixed surpise. The honorable manager tells us that "he cares not for proof of intention; that he cares not whether the judge acted wrong from ignorance or intention. That ignorance of the law is no excuse in an unlearned layman, much less in a learned judge. That every man is presumed to know the law, and a fortiori, a judge whose office it is to understand and administer the law. If, therefore, a judge through ignorance of the law has done that which he has no power to do, he is just as guilty in the eye of the law as if he had sinned intentionally against the light of knowledge."

Then, according to this process of reasoning, a mistake of the law by a judge is an impeachable offense. But is it possible that the honorable manager can mean to contend that a judge is answerable, either civilly or criminally, for an error of

[65] Report of the trial of Judge Peck, pp. 485, 486, 492, 494–497.

judgment; that he can be either sued, indicted, or impeached for such an error? If such be his meaning, he is in direct conflict with all the authorities on the subject. The question is not a new one. It has been long since settled both in England and the United States; and I am not aware that, for many centuries, any judge or advocate has, even by inadvertence, sanctioned or even countenanced the position which has been thrown out by the gentleman. From the reign of Edward II to the present day the current of authorities is clear and uniform the other way, and established beyond controversy the principle that the judge of a court of record is not answerable either civilly or criminally for a mistake of judgment in his judicial character.

Mr. Wirt then discusses the case of Yates and Lansing, wherein the English authorities were reviewed by Chief Justice Kent, and says:

What does the judge declare would be an impeachable offense? The acting with knowledge (scienter) that the judge was violating the law "the intentional violation of the law." The chancellor, he says, was bound to imprison the party if he considered his conduct as a contempt of court. He might have been mistaken in considering that as a contempt, which in truth was not one. But this would have been a mere error of judgment, for which he was not answerable either civilly much less criminally. If he knew it was not a contempt, and still punished it as one, it would have been an intentional violation of the law, which would have been an impeachable offense. Here is the very doctrine for which we are contending—that it is the guilty intention which forms the gist of the charge in every impeachment, and that a mere mistake of judgment is not an impeachable offense. * * *

I have examined, with all the attention and care in my power, the various cases of impeachment of judges, both in England and the United States, and I have not observed that any counsel, even under the severest stress of the evidence, has taken refuge in so bold a proposition as this which we are considering—that error of judgment is an impeachable offense. On the contrary, I think it will be found, on the strictest perusal of all the cases that have been cited, that the counsel on both sides have uniformly proceeded on the concession that the guilty intention is the gist of the impeachment.

The discussion of the power of impeachment was preliminary merely, the main force of the arguments going to the question of law as to the right of the judge to punish for contempt, and the question of fact as to his intention.

2383. Peck's impeachment continued.

The Senate proceeded to judgment in the Peck case without prior deliberation in secret session.

The House accompanied its managers when the court pronounced judgment in the Peck impeachment.

Form of question put in ascertaining the judgment of the court in the Peck trial.

A Senator who had been a witness for respondent was excused from voting on the judgment in the Peck trial.

A Senator who had taken his seat after part of the testimony in the Peck trial had been taken was excused from voting.

Two-thirds not voting guilty, the Vice-President declared Judge Peck acquitted.

Judgment being rendered in the Peck impeachment, the Vice-President directed an adjournment sine die.

On Saturday, January 29,[66] at the conclusion of the arguments, on motion of Mr. Daniel Webster, of Massachusetts:

Resolved, That the Senate will, on Monday next, at 12 o'clock, proceed further on the trial of the article of impeachment exhibited by the House of Representa-

[66] Senate Impeachment Journal, p. 337.

tives of the United States against James H. Peck, judge of the district court of the United States for the district of Missouri.

On Monday, January 31,[67] the court was opened as usual, with proclamation. The managers, accompanied by the House of Representatives, attended. James H. Peck, the respondent, and his counsel also attended.

Mr. Littleton W. Tazewell, of Virginia, moved the following resolution:

Resolved, That this court will now pronounce judgment upon James H. Peck, judge of the district court of the United States for the district of Missouri.

Mr. Tazewell observed that if there were one member of the court unprepared for a decision on this impeachment at this time, or preferred any other mode of proceeding to pronounce judgment, he would cheerfully withdraw the resolution.

No objection having been made, the resolution was unanimously adopted.

The names of the Senators were then called over by the Secretary.

The Secretary of the Senate, under the direction of the Vice-President, read the article of impeachment exhibited by the House of Representatives against James H. Peck, judge of the district court of the United States for the district of Missouri.

The Vice-President rose and said:

Senators: You have heard the article of impeachment read; you have heard the evidence and the arguments for and against the respondent; when your names are called you will rise from your seats and distinctly pronounce whether he is guilty or not guilty, as charged by the House of Representatives.

The Vice-President then, in an audible voice, put the following question to each of the Senators in alphabetical order:

Mr. Senator ———: What say you: Is James H. Peck, judge of the district court of the United States for the district of Missouri, guilty or not guilty of the high misdemeanor charged in the article of impeachment exhibited against him by the House of Representatives?

Each Senator rose from his seat as this question was propounded to him, and answered.

Messrs. Thomas H. Benton, of Missouri, who had been a witness, and John M. Robinson, of Illinois, who had taken his seat on January 4, after the testimony for the managers had been concluded, were, on their request, excused from voting.

The vote having been ascertained, the Vice-President said:

Senators: Twenty-one Senators having voted that the respondent is guilty and 22 that he is not guilty, and two-thirds of the Senate not having voted for his conviction, it becomes the duty of the Chair to pronounce that James H. Peck, the judge of the district court of the United States for the district of Missouri, stands acquitted of the charge exhibited against him by the House of Representatives.

The Vice-President then directed the marshal to adjourn the court of impeachment; and it was accordingly adjourned sine die.

2384. Peck's impeachment continued.

A report of the acquittal of Judge Peck was made in the House in the report of the chairman of the Committee of the Whole.

Forms of reports made by a chairman of a Committee of the Whole after attending an impeachment trial. (Footnote.)

[67] Journal, pp. 337, 338; Debates, p. 45.

The House attended the Peck trial as a Committee of the Whole House. (Footnote.)

The journal of the House for this day has this entry: [68]

The House again resolved itself into a Committee of the Whole House, and proceeded to the Senate Chamber to attend the trial by the Senate of the impeachment of James H. Peck, judge of the district court of the United States for the district of Missouri; and, after some time spent therein, the committee returned into the Chamber of the House; and, the Speaker having resumed the chair, Mr. Cambreleng [Churchill, C., of New York], from the Committee of the Whole, reported that the committee had, according to order, attended the trial of the said impeachment, and that the said James H. Peck had been acquitted by the Senate of the matter whereof he stood charged by the House of Representatives, as contained in their article of impeachment exhibited against him.[69]

[68] House Journal, p. 236.

[69] The reports from day to day had been similar, but varied to meet the conditions. Usually they ended somewhat like this: "That further progress had been made therein, and that the court of impeachment had adjourned to meet again tomorrow, at 12 o'clock meridian." If no progress had been made, the report simply gave the hour to which the court had adjourned. (Journal, pp. 226, 229.) Mr. William D. Martin, of South Carolina, acted as chairman of the Committee of the Whole a portion of the time.

It is to be noticed that, while the impeachment had been considered in Committee of the Whole House on the state of the Union, the House resolved itself into the Committee of the Whole House to attend the proceedings.

The Impeachment and Trial of West H. Humphreys*

1. Preliminary investgiation by the House. Section 2385.
2. Presentation of the impeachment at the bar of the Senate. Section 2386.
3. Choice of managers and drawing and presentation of articles. Sections 2387–2390.
4. Writ of summons and calling respondent to answer. Sections 2391, 2392.
5. Proclamation issued on respondent's failure to appear. Section 2393.
6. Trial proceeds in absence of respondent. Section 2394.
7. Managers, without argument, demand judgment. Section 2395.
8. Questions arising in judgment. Sections 2396, 2397.

2385. The impeachment and trial of West H. Humphreys, United States judge for the several districts of Tennessee.

It being declared by common fame that Judge Humphreys had joined the foes of the Government the House voted to investigate his conduct.

After an ex parte investigation the House voted to impeach Judge Humphreys.

Form of resolution providing for carrying the impeachment of Judge Humphreys to the Senate.

The impeachment of Judge Humphreys was carried to the Senate by a committee of two representing the two political parties.

On January 8, 1862,[1] Mr. Horace Maynard, of Tennessee, presented the following preamble and resolution, which were agreed to by the House without debate or division:

Whereas it is alleged that West H. Humphreys, now holding a commission as one of the judges of the district court of the United States, has, for nearly twelve months, failed to hold the courts for the districts of East, Middle, and West Tennessee, as by law he was required to do, and that he has accepted a judicial commission in hostility to the Government of the United States, and is assuming to act under it,

Resolved, That the Committee on the Judiciary inquire into the truth of the said allegations, with power to send for persons and papers, and report from time to time such action as they may deem proper.

On March 4, 1862,[2] Mr. John A. Bingham, of Ohio, submitted the report of the committee. This report showed that the committee examined four witnesses, Mr. Maynard, Member of the House, and Messrs. Trigg, McFall, and Lellyet, citizens of Tennessee. It does not appear that anyone was present to represent Judge Humphreys at the investigation, or that any suggestion was made in his behalf. From the testimony it appeared that Judge Humphreys, who still held and had

*Hind's Precedents, vol. 3, p. 805 (1907).
[1] Second session Thirty-seventh Congress, Journal, p. 150; Globe, p. 229.
[2] Journal, p. 400; Globe, p. 1062; House Report No. 44.

not resigned his commission, had publicly declared in favor of secession; that he had neglected his duties as judge; that he had officiated as judge for the confederacy, and in that capacity had entertained proceedings against loyal citizens. Therefore the committee proposed this resolution:

Resolved, That West H. Humphreys, judge of the district court of the United States for the several districts of Tennessee, be impeached of high crimes and misdemeanors.

On May 6,[3] after the reading of the report and very brief debate, the House agreed to the resolution without division.

Thereupon, Mr. Bingham, stating that he followed the usual precedents, offered the following resolution, which was agreed to without division:

Resolved, That a committee of two be appointed to go to the Senate, and at the bar thereof, in the name of the House of Representatives and of all of the people of the United States, to impeach West H. Humphreys, judge of the district court of the United States for the several districts of Tennessee, of high crimes and misdemeanors, and to acquaint the Senate that the House of Representatives will in due time exhibit particular articles of impeachment against him and make good the same, and that the committee do demand that the Senate order for the appearance of said West H. Humphreys to answer said impeachment.

The Speaker[4] thereupon appointed Mr. Bingham and Mr. George H. Pendleton, of Ohio, as the committee; both were members of the Judiciary Committee, and Mr. Bingham represented the majority party in the House and Mr. Pendleton the minority party.

2386. Humphreys's impeachment continued.

Forms and ceremonies of presenting the impeachment of Judge Humphreys in the Senate.

Form of resolution adopted by the Senate in taking order for the impeachment of Judge Humphreys.

On May 7,[5] in the Senate, a message was received from the House by its Clerk, announcing the passage of the resolution and the committee appointed in accordance therewith.

Immediately thereafter the committee, Messrs. Bingham and Pendleton, appeared at the bar of the Senate, and Mr. Bingham spoke as follows:

Mr. President, by order of the House of Representatives, we appear at the bar of the Senate, and in the name of the House of Representatives and of all the people of the United States, we do impeach West H. Humphreys, judge of the district court of the United States for the several districts of Tennessee, of high crimes and misdemeanors, and we do further inform the Senate that the House of Representatives will in due time exhibit particular articles of impeachment against him, and make good the same, and in their name we do demand that the Senate take order for the appearance of said West H. Humphreys to answer to said impeachment.

The Presiding Officer[6] said:

The Senate will take order in the premises.

It does not appear that the committee from the House reported to that body on their return from the Senate.

In the Senate, on May 8,[7] the message from the House was read, and

[3] Journal, p. 646; Globe, pp. 1966, 1967.
[4] Galusha A. Grow, of Pennsylvania, Speaker.
[5] Senate Journal, p. 454; Globe, p. 1991.
[6] Lafayette S. Foster, of Connecticut, in the chair.
[7] Senate Journal, pp. 456, 457; Globe, p. 2010.

on motion of Mr. Lafayette S. Foster, of Connecticut, the subject was referred to a select committee of three, to be appointed by the Chair. Thereupon the President pro tempore [8] appointed Messrs. Foster, James R. Doolittle, of Wisconsin, and Garrett Davis, of Kentucky.

On May 9,[9] in the Senate, Mr. Foster reported from the select committee the following resolution, which was agreed to without division or debate:

Whereas the House of Representatives, on the 7th day of the present month, by two of their Members, Messrs. Bingham and Pendleton, at the bar of the Senate impeached West H. Humphreys, judge of the district court of the United States for the several districts of Tennessee, of high crimes and misdemeanors, and informed the Senate that the House of Representatives will in due time exhibit particular articles of impeachment against him, and make good the same, and likewise demanded that the Senate take order for the appearance of the said West H. Humphreys to answer the said impeachment: Therefore,

Resolved, That the Senate will take proper order thereon, of which due notice shall be given to the House of Representatives.

On the same day a message announcing the action of the Senate was received in the House.[10]

2387. Humphreys's impeachment continued.

The committee to draw the articles in the Humphreys impeachment were appointed by the Speaker, and all but one was of the majority party.

The articles of impeachment against Judge Humphreys were agreed to by the House without debate.

On May 14,[11] in the House, Mr. Bingham submitted the following resolution, which was agreed to without debate or division:

Resolved, That a committee of five be appointed to prepare and report articles of impeachment against West H. Humphreys, judge of the district court of the United States for the several districts of Tennessee, with power to send for persons, papers, and records.

The Speaker thereupon appointed Messrs. Bingham, John Hickman, of Pennsylvania, George H. Pendleton, of Ohio, Charles R. Train, of Massachusetts, and Charles W. Walton, of Maine. All of this committee but Mr. Pendleton, of Ohio, appear to have been of the majority party in the House. All but Messrs. Train and Walton were members of the Judiciary Committee.

On May 19 [12] Mr. Bingham, from the select committee, reported articles of impeachment, which were read and at once, without debate or division, were adopted by the House and ordered printed. They appear in full in the Journal of the House of this date.

2388. Humphreys's impeachment continued.

Form of resolutions providing for selection of managers and the presentation of the articles to the Senate in the Humphreys impeachment.

The managers of the Humphreys impeachment were appointed by the Speaker, and all but one belonged to the majority party.

The message informing the Senate that articles impeaching

[8] Solomon Foot, of Vermont, President pro tempore.
[9] Senate Journal, pp. 464, 465; Globe, p. 2039.
[10] House Journal, p. 665.
[11] House Journal, p. 684; Globe, p. 2134.
[12] House Journal, pp. 709–712; Globe, pp. 2205, 2206.

Judge Humphreys would be brought contained the names of the managers.

Mr. Bingham then offered the following resolutions, which were agreed to without debate or division:

Resolved, That five managers be appointed by the Speaker of this House to conduct the impeachment against West H. Humphreys, judge of the district court of the United States for the several districts of Tennessee.

Resolved, That the articles agreed to by this House, to be exhibited, in the name of themselves and of all the people of the United States, against West H. Humphreys in maintenance of their impeachment against him for high crimes and misdemeanors, be carried to the Senate by the managers appointed to conduct the impeachment.

Resolved, That a message be sent to the Senate to inform them that this House have appointed managers on their part to conduct the impeachment against West H. Humphreys, and have directed the said managers to carry to the Senate the articles of impeachment agreed upon by the House to be exhibited in maintenance of their impeachment against the said West H. Humphreys.

On May 20 [13] the Speaker announced the appointment of the following managers: Messrs. Bingham, Hickman, Pendleton, Train, and George W. Dunlap, of Kentucky. All but Mr. Pendleton belonged to the majority part in the House.

On May 21 [14] the Clerk of the House delivered the message in the Senate as follows:

Mr. President: I am directed to inform the Senate that the House of Representatives has appointed Mr. Bingham, of Ohio, Mr. Hickman, of Pennsylvania, Mr. Pendleton, of Ohio, Mr. Train, of Massachusetts, and Mr. Dunlap, of Kentucky, managers to conduct the impeachment against West H. Humphreys, judge of the district court of the United States for the several districts of Tennessee, and has directed the said managers to carry to the Senate the articles of impeachment agreed upon by the House, to be exhibited in maintenance of their impeachment against the said West H. Humphreys.

2389. Humphreys's impeachment, continued.

The Senate followed the precedents in adopting rules prescribing forms and ceremonies for receiving the articles in the Humphreys impeachment.

Forms of oath taken and proclamations made in the court opened to receive the articles impeaching Judge Humphreys.

Resolved, That at 1 o'clock to-morrow afternoon the Senate will resolve itself into a court of impeachment, at which time the following oath and affirmation shall be administered by the Secretary to the President of the Senate, and by him to each Member of the Senate, to wit: "I solemnly swear (or affirm, as the case may be) that in all things appertaining to the trial of the impeachment of West H. Humphreys, judge of the district court of the United States for the districts of Tennessee, I will do impartial justice, according to law;" which court of impeachment, being thus formed, will, at the time aforesaid, receive the managers appointed by the House of Representatives to exhibit articles of impeachment in the name of themselves and of all the people of the United States against West H. Humphreys, judge of the district court of the United States for the districts of Tennessee, pursuant to notice given to the Senate this day by the House of Representatives that they had appointed managers for the purpose aforesaid.

Ordered, That the Secretary lay this resolution before the House of Representatives.

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[13] House Journal, pp. 717, 718; Globe, p. 2262.
[14] Senate Journal, pp. 515–517; Globe, pp. 2247, 2248.

The resolution having been agreed to, Mr. Foster offered the following, which was also agreed to:

Resolved, That after the managers of the impeachment shall be introduced to the bar of the Senate, and shall have signified that they are ready to exhibit articles of impeachment against West H. Humphreys, the President of the Senate shall direct the Sergeant-at-Arms to make proclamation, who shall, after making proclamation, repeat the following words: "All persons are commanded to keep silence, on pain of imprisonment, while the grand inquest of the nation is exhibiting to the Senate of the United States articles of impeachment against West H. Humphreys, judge of the district court of the United States for the districts of Tennessee;" after which the articles shall be exhibited, and then the President of the Senate will take proper order on the subject of the impeachment, of which due notice shall be given to the House of Representatives.

On the same day the first of the above resolutions was communicated to the House by message.[15]

On May 22,[16] in the Senate, the Vice-President [17] announced:

The hour of 1 o'clock having arrived, the Senate will now resolve itself into a court of impeachment, in pursuance of its order of yesterday, for the trial of West H. Humphreys, judge of the district court of the United States for the State of Tennessee.

The following oath was administered to the Vice-President by the Secretary of the Senate:

I, Hannibal Hamlin, do solemnly swear that in all things appertaining to the trial of the impeachment of West H. Humphreys, judge of the district court of the United States for the districts of Tennessee, I will do impartial justice according to law. So help me God.

The Vice-President said:

The Secretary will now call the roll of Senators alphabetically, calling them in numbers of four and Senators will please to advance as they are called.

The Secretary called the names of Senators, and they advanced by fours to the desk, when the Vice-President administered the oath to them.

2390. Humphreys' impeachment, continued.

The House being notified that the Senate was ready to receive the articles impeaching Judge Humphreys, the managers attended unaccompanied.

The articles impeaching Judge Humphreys and their presentation.

The articles impeaching Judge Humphreys were signed by the Speaker and attested by the Clerk.

The oath having been administered to the Senators, it was then—

Ordered, That the Secretary inform the House of Representatives that the Senate has resolved itself into a high court of impeachment, and is now ready to receive the managers appointed by the House to exhibit articles of impeachment against West H. Humphreys, judge of the district court of the United States for the districts of Tennessee.

This message was duly delivered in the House, and presently four of the managers appointed by the House of Representatives, namely, Mr. Bingham, Mr. Pendleton, Mr. Train, and Mr. Dunlap (Mr. Hickman not being present), appeared below the bar.

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[15] House Journal, p. 723; Globe, p. 2271.
[16] Senate Impeachment Journal, pp. 889–892; Globe, pp. 2277, 2278.
[17] Hannibal Hamlin, of Maine, Vice-President and President of the Senate.

Mr. Bingham advanced and said:

Mr. President, myself and associates are managers appointed by the House of Representatives, and instructed in their name to appear at the bar of the Senate, and present articles of impeachment against West H. Humphreys, judge of the district court of the United States for the several districts of Tennessee, for high crimes and misdemeanors.

The VICE-PRESIDENT. The managers on the part of the House of Representatives will please be seated, at seats prepared for them within the bar of the Senate.

The managers were conducted to the seats prepared for them in the area between the Secretary's desk and the seats of the Senators.

The VICE-PRESIDENT. The Sergeant-at-Arms of the Senate will now make the usual proclamation.

The Sergeant-at-Arms, GEORGE T. BROWN, Esq. Oyez! oyez! oyez! All persons are commanded to keep silence on pain of imprisonment, while the grand inquest of the nation is exhibiting to the Senate of the United States articles of impeachment against West H. Humphreys, judge of the district court of the United States for the districts of Tennessee.

Mr. Bingham (all the managers standing) read the articles of impeachment, as follows:

Articles exhibited by the House of Representatives of the United States in the name of themselves and of all the people of the United States against West H. Humphreys, judge of the district court of the United States for the several districts of the State of Tennessee, in maintenance and support of their impeachment against him for high crimes and misdemeanors.

ARTICLE 1. That, regardless of his duties as a citizen of the United States, and unmindful of the duties of his said office, and in violation of the sacred obligation of his official oath "to administer justice without respect to persons," "and faithfully and impartially discharge all the duties incumbent upon him as judge of the district court of the United States for the several districts of the State of Tennessee agreeable to the Constitution and laws of the United States for the several districts of the State of Tennessee agreeable to the Constitution and laws of the United States," the said West H. Humphreys, on the 29th day of December, A.D. 1860, in the city of Nashville, in said State, the said West H. Humphreys then being a citizen of the United States, and owing allegiance thereto, and then and there being judge of the district court of the United States for the several districts of said State, at a public meeting, on the day and year last aforesaid, held in said city of Nashville, and in the hearing of divers persons then there present, did endeavor by public speech to incite revolt and rebellion within said State against the Constitution and Government of the United States, and did then and there publicly declare that it was the right of the people of said State, by an ordinance of secession, to absolve themselves from all allegiance to the Government of the United States, the Constitution and laws thereof.

ART. 2. That, in further disregard of his duties as a citizen of the United States, and unmindful of the solemn obligations of his office as judge of the district court of the United States for the several districts of the State of Tennessee, and that he held his said office, by the Constitution of the United States, during good behavior only, with intent to abuse the high trust reposed in him as such judge, and to subvert the lawful authority and Government of the United States within said State, the said West H. Humphreys, then being judge of the district court of the United States, as aforesaid, to wit, in the year of our Lord 1861, in said State of Tennessee, did, together with other evil-minded persons within said State, openly and unlawfully support, advocate, and agree to an act commonly called an ordinance of secession, declaring the State of Tennessee independent of the Government of the United States, and no longer within the jurisdiction thereof.

ART. 3. That in the years of our Lord 1861 and 1862, within the United States, and in said State of Tennessee, the said West H. Humphreys, then owing allegiance to the United States of America, and then being district judge of the United States, as aforesaid, did then and there, to wit: within said State, unlawfully, and in conjunction with other persons, organize armed rebellion against the United States and levy war against them.

ART. 4. That on the 1st day of August, A.D. 1861, and on divers other days since that time, within said State of Tennessee, the said West H. Humphreys,

then being judge of the district court of the United States, as aforesaid; and J. C. Ramsay, and Jefferson Davis, and others, did unlawfully conspire together "to oppose by force the authority of the Government of the United States," contrary to his duty as such judge and to the laws of the United States.

ART. 5. That said West H. Humphreys, with intent to prevent the due administration of the laws of the United States within said State of Tennessee, and to aid and abet the overthrow of "the authority of the Government of the United States" within said State, has, in gross disregard of his duty as judge of the district court of the United States, as aforesaid, and in violation of the laws of the United States, neglected and refused to hold the district court of the United States, as by law he was required to do, within the several districts of the State of Tennessee, ever since the 1st day of July, A.D. 1861.

ART. 6. That the said West H. Humphreys, in the year of our Lord 1861, within the State of Tennessee, and with intent to subvert the authority of the Government of the United States, to hinder and delay the due execution of the laws of the United States, and to oppress and injure citizens of the United States, did unlawfully act as judge of an illegally constituted tribunal within said State, called the district court of the Confederate States of America, and as judge of said tribunal last named said West H. Humphreys, with the intent aforesaid, then and there assumed and exercised powers unlawful and unjust, to wit, in causing one Perez Dickinson, a citizen of said State, to be unlawfully arrested and brought before him, as judge of said alleged court of said Confederate States of America, and required him to swear allegiance to the pretended government of said Confederate States of America; and upon the refusal of said Dickinson so to do, the said Humphreys, as judge of said illegal tribunal, did unlawfully, and with the intent to oppress said Dickinson, require and receive of him a bond, conditioned that while he should remain within said State he would keep the peace, and as such judge of said illegal tribunal, and without authority of law, said Humphreys there and then decreed that said Dickinson should leave said State.

2. In decreeing within said State, and as judge of said illegal tribunal, the confiscation to the use of said Confederate States of America of property of citizens of the United States, and especially of property of one Andrew Johnson and one John Catron.

3. In causing, as judge of said illegal tribunal, to be unlawfully arrested and imprisoned within said State citizens of the United States because of their fidelity to their obligations as citizens of the United States, and because of their rejection of, and their resistance to, the unjust and assumed authority of said Confederate States of America.

ART. 7. That said West H. Humphreys, judge of the district court of the United States as aforesaid, assuming to act as judge of said tribunal known as the district court of the Confederate States of America, did, in the year of our Lord 1861, without lawful authority, and with intent to injure one William G. Brownlow, a citizen of the United States, cause said Brownlow to be unlawfully arrested and imprisoned within said State in violation of the rights of said Brownlow as a citizen of the United States, and of the duties of said Humphreys as a district judge of the United States.

And the House of Representatives, by protestation, saving to themselves the liberty of exhibiting at any time hereafter any further articles, or other accusation or impeachment against the said West H. Humphreys, and also of replying to his answers which he shall make unto the articles herein preferred against him, and of offering proof to the same and every part thereof, and to all and every other article, accusation, or impeachment which shall be exhibited by them as the case shall require, do demand that the said West H. Humphreys may be put to answer the high crimes and misdemeanors herein charged against him, and that such proceedings, examinations, trials, and judgments may be thereupon had and given as may be agreeable to law and justice.

GALUSHA A. GROW,
Speaker House of Representatives.

Attest:
EMERSON ETHERIDGE,
Clerk House of Representatives.

Mr. Bingham delivered the articles to the Secretary, who handed them to the Vice-President.

The VICE-PRESIDENT. The Chair informs the managers on the part of the House of Representatives that the Senate will take proper order upon the impeachment preferred, of which notice will be furnished to the House of Representatives.

The managers thereupon retired.

2391. Humphreys' impeachment, continued.

Form of resolution directing the issue of a writ of summons to Judge Humphreys, and fixing the return day.

The House was informed by message of the issuance of a writ of summons to Judge Humphreys.

Mr. Foster then offered in the high court of impeachment the following, which was agreed to:

Resolved, That the Secretary be directed to issue a summons, in the usual form, to West H. Humphreys, judge of the district court of the United States for the districts of Tennessee, to answer a certain article of impeachment exhibited against him by the House of Representatives on this day, and that the said summons be returnable here on Monday, the 9th day of June next, and be served by the Sergeant-at-Arms, or some person deputed by him, at least ten days before the return day thereof.

Ordered, That the Secretary lay this resolution before the House of Representatives.

Then the court, on motion of Mr. Foster, adjourned until Monday, June 9, at 1 o'clock p. m.

In the House it does not appear that the managers reported after they had presented the articles of impeachment in the Senate.

On May 23 [18] in the House a message from the Senate informed the House that the issuance of a summons had been directed.

2392. Humphreys' impeachment, continued.

On the day set for the appearance of Judge Humphreys the House in Committee of the Whole House attended its managers.

Forms observed by the House attending the Humphreys trial as a Committee of the whole (footnote).

Forms of oath, proclamation, and ceremonies at the calling of Judge Humphreys to appear and answer articles of impeachment.

On June 9,[19] in the high court of impeachment, the Vice-President having administered the prescribed oath to certain Senators, and the court having been opened by proclamation, it was—

Ordered, That the Secretary inform the House of Representatives that the Senate is now sitting as a high court of impeachment for the trial of West H. Humphreys, and that seats are provided for the accommodation of the Members of the House in the Senate Chamber.

The message having been delivered, it was then resolved by the House as follows: [20]

Resolved, That the House will this day, and at such hour as the Senate shall appoint, resolve itself into a Committee of the Whole House, and attend in the Senate on the trial of the impeachment of West H. Humphreys, judge of the district court of the United States for the several districts of Tennessee.

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[18] House Journal, p. 731.
[19] Senate Impeachment Journal, pp. 893, 894; Globe, pp. 2617, 2618.
[20] House Journal, p. 821; Globe, p. 2621.

Accordingly the House resolved itself into a Committee of the Whole House, Mr. E. B. Washburne, of Illinois, being chairman, and proceeded to the Senate Chamber.[21]

Previous to the arrival of the House the Senators took seats on a platform prepared on the right and left of the Vice-President, leaving the body of the Hall for the House of Representatives.

The managers and Representatives having arrived, the following occurred:

The VICE-PRESIDENT. The Sergeant-at-Arms will make proclamation opening the court.

The SERGEANT-AT-ARMS. Oyez! Oyez! Oyez! All persons are commanded to keep silence, on pain of imprisonment, while the Senate of the United States is sitting as a court of impeachment on the case of West H. Humphreys, judge of the district court of the United States for the several districts of Tennessee.

The Sergeant-at-Arms handed his return to the Vice-President.

The VICE-PRESIDENT. The return of the officer will be read by the Secretary.

The Secretary read, as follows:

UNITED STATES OF AMERICA, *City of Washington, ss:*

I, George T. Brown, Sergeant-at-Arms of the Senate of the United States, in obedience to the within and foregoing writ of summons and precept to me directed, did proceed to the usual place of residence of the within-named West H. Humphreys, in the vicinity of Nashville, in the State of Tennessee, on the 29th day of May, A.D. 1862, and then and there made diligent inquiry for the said West H. Humphreys, but he could not be found. I further certify, that on the same day and year, and at the usual place of residence of the said West H. Humphreys, in the vicinity of Nashville, in the State of Tennessee, I did then and there leave true and attested copies of the within and foregoing writ of summons and precept.

GEORGE T. BROWN,
Sergeant-at-Arms of the Senate.

JUNE 9, 1862.

The VICE-PRESIDENT. The Secretary will administer the oath to the Sergeant-at-Arms touching the truth of his return.

The Secretary administered the oath to the Sergeant-at-Arms, as follows:

"George T. Brown, Sergeant-at-Arms of the Senate of the United States, do solemnly swear that the return made and subscribed by me upon the process issued on the 22d day of May last, by the Senate of the United States against several H. Humpherys, judge of the district court of the United States for the several districts of Tennessee, is truly made, and that I have performed said services as therein described. So help me God.

The VICE-PRESIDENT. The Sergeant-at-Arms will make proclamation for the appearance of West H. Humphreys.

The SERGEANT-AT-ARMS. Oyez! Oyez! Oyez! West H. Humphreys, judge of the district court of the United States for the several districts of Tennessee, come forward and answer the articles of impeachment exhibited against you by the House of Representatives of the United States.

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[21] The Globe (p. 2617) has the following as to the order: "The form in which it appears on such occasions displaces its high functionary, the Speaker, its Sergeant-at-Arms, and the emblem of its authority—the mace.

"The chairman, supported by Emerson Etheridge, esq., the Clerk, and Ira Goodnow, esq., the Doorkeeper, were conducted to seats in the center aisle, in front of the Vice-President; the managers on the part of the House of Representatives, Messrs. Bingham, Pendleton, Dunlap, and Train, took the seats which they previously occupied in the right section of the central area; that on the left, with similar accommodations, was provided for the judge impeached and his counsel, if they should appear. The Members of the House occupied the body of the Senate Chamber."

2393. Humphreys' impeachment continued.

Judge Humphreys did not appear, in person or by attorney, to answer the articles of impeachment.

Judge Humphreys not appearing, the case was continued on motion of the managers, to enable the production of testimony.

Judge Humphreys having failed to appear to answer the articles of impeachment, the court directed publication of a proclamation for him to appear.

In the Humphreys impeachment it was first provided that the subpoenas should be served by the Sergeant-at-Arms or his deputy.

Form of report of Chairman of the Committee of the Whole on returning from the Humphreys trial.

Whereupon, West H. Humphreys not appearing in person, or by counsel, to answer the said articles of impeachment, the following occurred:

Mr. Manager BINGHAM (after a pause). On behalf of the managers of the House of Representatives, I move the continuance of this cause until the 26th day of June, 1862, in order to obtain the attendance of witnesses necessary to the prosecution of the impeachment.

The VICE-PRESIDENT. Senators, the following motion is submitted for the decision of the court: On behalf of the managers of the House of Representatives, Mr. Bingham moves that further proceedings in the impeachment of West H. Humphreys, be postponed until Thursday, the 26th day of June, 1862.

The roll being called, there appeared, yeas 35, nays 4. So the motion was agreed to.

The Vice-President then informed the managers that of such other proceedings as should be taken by the Senate in the case of the impeachment of West H. Humphreys, the House of Representatives should be duly notified.

Thereupon the managers, attended by the House of Representatives, withdrew and having returned into their own Hall, the Committee of the Whole House rose,[22] and the Speaker having resumed the Chair, Mr. Washburne reported—

that the committee had, according to order, attended the trial by the Senate of the said impeachment, when the Senate postponed the further consideration of the case until Thursday, the 26th instant.

Meanwhile, in the high court of impeachment, on motion of Mr. Foster, and by a vote of yeas 36, nays 0, the following was agreed to:[23]

Ordered, That this high court of impeachment stand adjourned till the 26th day of June next, at 12 o'clock, meridian; and as the said West H. Humphreys has failed to make his appearance to answer the said articles of impeachment, though duly summoned, it is further ordered that proclamation for his appearance on that day be made by publishing this order in the National Intelligencer, National Republican, and Evening Star, newspapers printed in the city of Washington, for at least ten days successively, before said 26th day of June, instant, and also in the Nashville Union, a newspaper published in the city of Nashville, State of Tennessee, on at least five several days before said 26th day of June, instant.

And further, on motion of Mr. Foster, and in order to obviate the difficulty which might arise from there being no marshal of the United States in certain districts where it might be necessary to send subpoenas, it was further

[22] House Journal, p. 821; Globe, p. 2621.
[23] Senate Impeachment Journal, p. 894; Globe, pp. 2617, 2618.

Ordered, That subpoenas may be issued by the Secretary of the Senate, according to the rules [24] of proceedings of the Senate, when acting as a court of impeachment, and directed to the Sergeant-at-Arms of the Senate, or his deputy, as well as to the marshal of the district of ———.

The court then adjourned to Thursday, June 26, at 12 o'clock, meridian.

On June 10 [25] a message was received in the House giving information of the resolutions adopted by the court after the House had retired, and of the date to which the court had adjourned.

2394. Humphreys's impeachment, continued.

Judge Humphreys's having failed to appear in answer both to the summons and proclamation, the Presiding Officer announced that the managers might proceed in support of the articles.

Form of proclamation for appearance of Judge Humphreys, and the proof thereof on the day set for appearance.

In the absence of the Vice-President the President pro tempore took the oath and presided at the Humphreys trial.

At the beginning of the Humphreys trial the returns on the subpoenas were read and the names of the witnesses called.

A witness unable to attend the Humphreys trial was excused by the court.

On June 26,[26] when the high court of impeachment again opened, the Vice-President was absent and the President pro tempore [27] of the Senate was in the chair. At once the Secretary administered to him the prescribed oath. The court was then opened by proclamation as follows by the Sergeant-at-Arms:

Oyez! Oyez! Oyez! Silence is commanded on pain of imprisonment while the Senate of the United States is sitting as a high court of impeachment for the trial of West H. Humphreys, judge of the district court of the United States for the several districts of Tennessee.

On motion of Mr. Foster—

Ordered, That the Secretary inform the House of Representatives that the Senate is in its Chamber and ready to proceed on the trial of the impeachment of West H. Humphreys, judge of the district court of the United States for the several districts of Tennessee, and that seats are provided for the accommodation of the Members.

This message being received in the House [28] that body resolved itself into a Committee of the Whole House and proceeded to the Senate. When they arrived the Sergeant-at-Arms of the Senate appeared before the bar and announced: [29]

The honorable the House of Representatives of the United States.

The Members then entered and took the seats assigned them, the chairman of the Committee of the Whole House occupying a seat in the aisle in front of the President pro tempore, and the Clerk of the House having a seat near him. The managers on the part of the House were conducted to seats assigned to them in the area in front of the Secretary's desk.

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[24] The rules governing impeachments, adopted at the trial of Judge Chase and followed without readoption in the trial of Judge Peck and in this trial, provided that subpoenas should in every case be directed to the marshal of the districts wherein the witness might reside.
[25] House Journal, p. 832.
[26] Senate Impeachment Journal, p. 895; Globe, p. 2942.
[27] Solomon Foot, of Vermont, President pro tempore.
[28] House Journal, p. 940.
[29] Senate Impeachment Journal, p. 895; Globe, p. 2942.

By direction of the President pro tempore, the Secretary read the return made by the Sergeant-at-Arms on the 9th instant and already read in the high court on that day. The Secretary also read the proclamation made by order of the court on the 9th and published in certain newspapers. This proclamation [30] was as follows:

The Senate of the United States of America, as the court of impeachment, sitting on the case of West H. Humphreys, judge of the district court of the United States for the several districts of the State of Tennessee.

MONDAY, JUNE 9, 1862.

Ordered, That this high court of impeachment stands adjourned till the 26th day of June, instant, at 12 o'clock meridian; and, as the said West H. Humphreys has failed to make his appearance to answer the said articles of impeachment, though duly summoned, it is further ordered that proclamation for his appearance on that day be made by publishing this order in the National Intelligencer, National Republican, and Evening Star newspapers, printed in the city of Washington, for at least ten days, successively, before said 26th day of June, instant, and also in the Nashville Union newspaper, printed in the city of Nashville, in the State of Tennessee, at least five several days before said 26th day of June, instant.

Attest: J. W. FORNEY,
Secretary of the Senate.

A question being raised as to the proof of the proclamation, the production of copies of the several papers in which it was published was considered sufficient.

Then the following proceedings occurred:

The PRESIDENT pro tempore. The Sergeant-at-Arms will now make proclamation for the appearance of the accused.

The SERGEANT-AT-ARMS. Oyez! Oyez! Oyez! West H. Humphreys, judge of the district court of the United States for the several districts of Tennessee, come forward and answer the articles of impeachment exhibited against you by the House of Representatives of the United States.

No response being made,

The PRESIDENT pro tempore. The accused West H. Humphreys being in default, not appearing in pursuance of the summons or proclamation, the managers on the part of the United States House of Representatives are now at liberty to proceed in support of the articles of impeachment exhibited against him.

Mr. BINGHAM. Mr. President, on behalf of the managers for the House of Representatives, I ask that the returns of the Sergeant-at-Arms to the subpoenas issued for witnesses in support of this impeachment may be reported, and the names of the witnesses called over and those present recorded.

The Secretary then read the returns on the subpoenas, and the names of the witnesses were called on motion of Mr. Manager Bingham. The witnesses were assigned seats on the left of the chair, in the rear of the seats usually occupied by Senators.

Among the witnesses called was Andrew Johnson, who failed to respond. Mr. Bingham, of the managers, stated that Mr. Johnson was detained by his duties as governor of Tennessee, and moved that he be excused from obeying the process of the court. This motion was unanimously agreed to.

2395. Humphreys' impeachment, continued.

In the Humphreys trial, with no representative for the respondent, witnesses were not cross-examined.

The respondent not being represented in the Humphreys trial, the managers, without argument, demanded judgment.

[30] Journal, pp. 895, 896; Globe, p. 2943.

In the absence of representation of respondent in the Humphreys trial, the Senators insisted on the rules of evidence.

Mr. Train then opened the case for the managers, outlining at not great length what it was proposed to prove.

Mr. Bingham, for the managers, then proceeded to offer evidence, documentary and oral, witnesses being sworn, in accordance with the rule, by the Secretary.

The witnesses were then examined by the managers.[31] There was no cross-examination, as there was not appearance for Judge Humphreys. At the close of each witness's testimony the President pro tempore announced that any Senator might propose a question by reducing it to writing and having it read by the Secretary. But no questions were proposed.

Twice objection was made by Senators to questions put by the managers, as eliciting testimony inadmissible as evidence, but either the question or the objection was withdrawn without a decision by the court.[32]

At the conclusion of the testimony Mr. Bingham stated that the managers did not deem it necessary to introduce further testimony or to submit argument; and he respectfully demanded of the court, in the name of all the people of the United States, a judgment of guilty, in manner and form as prescribed by the Constitution of the United States.

2396. Humphreys' impeachment continued.

The decision of the court on the articles in the Humphreys case was guilty as to a portion of the articles.

Form of question on verdict of the court in the Humphreys trial.

Various Senators were excused from voting on the judgment in the Humphreys case.

The presiding officer ruled that testimony might not be read during the voting on the articles impeaching Judge Humphreys.

By unanimous consent, in the Humphreys trial a Senator was permitted to vote after the decision on the articles had been declared.

Then, by direction of the President pro tempore, the articles of impeachment were read one by one, and at the conclusion of the reading of each article the President pro tempore took the opinion of the members of the court,[33] respectively, in the form following:

Mr. Senator ———, how say you? Is the accused, West H. Humphreys, guilty or not guilty of the high crimes and misdemeanors as charged in this article of impeachment?

And the Senators having answered, the President declared West H. Humphreys guilty or not guilty of the charge, according as two-thirds voted him guilty or failed to do so.

Very frequently a Senator would give a brief explanation of his reason for his vote, and several Senators were by vote excused from voting on a particular article, reasons in each case being assigned as absence when the testimony was given or inability to hear the testimony.

[31] Globe, pp. 2944–2949.
[32] Globe, p. 2946.
[33] Senate Impeachment Journal, pp. 897–903; Globe, pp. 2949, 2950.

In voting on the second specification of the sixth article Mr. Preston King, of New York, asked that the testimony in support of the specification be referred to.

The President pro tempore [34] said:

That proceeding is entirely out of order at this stage.

The sixth article containing several specifications, a vote was taken separately on each one at the suggestion of a Senator and by direction of the President pro tempore.

The vote was as follows:

	Guilty.	*Not Guilty.*
Article 1	39	0
Article 2	36	1
Article 3	33	4
Article 4	28	10
Article 5	39	0
Article 6, specification 1	36	1
Article 6, specification 2	12	24
Article 6, specification 3	35	1
Article 7	35	1

Mr. James H. Lane, of Kansas, was by unanimous consent permitted to record his vote after the results had been announced and declared.[35]

On motion of Mr. Foster it was—

Ordered, That the court take a recess until 4 o'clock p.m., at which hour the court will proceed to pronounce judgment in the case of West H. Humphreys, judge of the district court of the United States for the eastern, middle, and western districts of Tennessee.

2397. Humphreys' impeachment, continued.

The court declined to consider in secret session the question of final judgment in the Humphreys case.

Having found Judge Humphreys guilty, the court proceeded to pronounce judgment of removal and disqualification.

The presiding officer held that the question on removal and disqualification was divisible.

Debate as to whether or not the Constitution requires both removal and disqualification on conviction by impeachment.

Form of judgment pronounced by the presiding officer in the Humphreys trial.

Judgment being pronounced in the Humphreys case, the court adjourned without delay.

The judgment of the court in the Humphreys trial was communicated to the House by the report of the chairman of the Committee of the Whole.

The Senate ordered an attested copy of the court's decision in the Humphreys case to be sent to the President of the United States.

The high court met again at 4 p.m., and the House was informed by message that the court was ready to pronounce judgment and requested the attendance of the House of Representatives.[36]

Before the arrival of the Members of the House Mr. Edgar Cowan, of Pennsylvania, suggested [37] a short secret session; but Mr. John P.

[34] Solomon Foot, of Vermont, President pro tempore.
[35] Globe, p. 2951.
[36] House Journal, p. 943.
[37] Globe, p. 2951.

Hale, of New Hampshire, suggested that the rule required the doors to be kept open. Mr. Cowan suggested that the rule referred only to the trial and not to proceedings relating to the verdict.

The President pro tempore said he would entertain a motion for a secret session, but Mr. Cowan did not insist on it.

The House of Representatives having entered the Chamber, Mr. Foster offered [38] the following as an interrogation to be put to each member of the court in order that judgment might be perfected.

Is the court of the opinion that West H. Humphreys be removed from the office of judge of the district court of the United States for the district of Tennessee?

To this Mr. Lyman Trumbull, of Illinois, offered an amendment as follows:

Add thereto: "and be disqualified to hold and enjoy any office of honor, trust, or profit under the United States."

Mr. Trumbull quoted the Constitution to show that both removal from office and disqualification should be the punishment.

Mr. Foster explained that the question proposed was in exactly the form used in the case of Judge Pickering, and that it was the only question propounded in rendering that judgment.

After debate, Mr. Trumbull's amendment was agreed to, yeas 27, nays 10.

Thereupon, Mr. Garrett Davis, of Kentucky, asked for a division of the question.

Upon this demand there was debate. Mr. Trumbull said:

I have very serious doubts whether it is a double question; whether the whole is not one judgment. "Judgment in cases of impeachment shall not extend further than to removal from office and disqualification to hold and enjoy any office of honor, trust, or profit under the United States." I am not sure but that when the Constitution says it shall not extend further than that, it necessarily follows that it shall extend that far. It is not in the alternative, and I am by no means satisfied that that consequence does not necessarily follow the conviction. It is a limitation. As is well suggested by my friend from Pennsylvania [Mr. Wilmot], could you impose that latter part without the former? Could you decide that he should be disqualified to hold and enjoy any office of honor, trust, or profit? If each proposition is independent, it must be able to stand by itself without affecting any other. I am by no means satisfied that these are independent propositions. It seems to me that altogether the safer way is to take the question on them together.

Mr. Jacob Collamer, of Vermont, said:

Mr. President, I take it the test of the divisibility of a question depends upon whether there can be a vote left after it is divided, let the first be decided as it may. That is the criterion: that, if after you have voted "yea" or "nay" upon the first article of division, there is still a question to be decided if the decision be either way. Now, in this case, suppose the proposition to be that this man be deprived of office, and that he be rendered ineligible, and it is divided, and the vote shall be that he be not deprived of his office; is there anything left? There would be nothing left to vote on, because the rendering him ineligible hereafter is only a consequence of the first, and rests in judicial discretion whether we put it on or not. It is not, in my apprehension, divisible, because a vote in one way on the first branch would render it impossible to get along with the second.

Mr. O. H. Browning, of Illinois, said:

We have the authority of an adjudicated case of the action of the Senate, in which they found a judge guilty upon impeachment and entered against him a judgment of ouster from his office; going no further. I apprehend it was competent for them to do that. They were not bound to attach to it the other con-

[38] Senate Impeachment Journal, pp. 903, 904; Globe, pp. 2951–2953.

sequence that may be attached to it under the Constitution, of disqualification forever thereafter to hold office. It may frequently occur—it occurred in that case, it may occur again—that a majority of the Senators would feel it their duty to vote for his ouster from office, and would not feel it their duty to vote for his disqualification forever thereafter to hold any other office under the Government, however unimportant. If you are compelled to put the question, and the whole question, as one question—to put it all together—men who are unwilling to vote to disqualify him forever, disfranchise him forever, will be constrained to vote that he be ousted from office, and also to vote for another proposition, which in their judgments would be unjust. That would follow inevitably; and after you had taken the question on them jointly, I apprehend you could not return and divide them, and take the propositions separately, so as to say whether he should be ousted from office.

The President pro tempore [39] said:

In the judgment of the Chair these are separate and divisible propositions. * * * From the authority of the Pickering case the Chair is obliged to say that it is a divisible proposition.

The question was then taken on the first proposition, and it was determined in the affirmative, yeas 38, nays 0.

On the second branch of the question there appeared, yeas 36, nays 0.

The President pro tempore thereupon pronounced the judgment of the court, as follows:

This court, therefore, do order and decree, and it is hereby adjudged: That West H. Humphreys, judge of the district court of the United States for the eastern, middle, and western districts of Tennessee, be and he is removed from his said office; and that he be and is disqualified to hold and enjoy any office of honor, trust, or profit, under the United States.

Then, on motion of Mr. Foster, the court adjourned without day.

On the same day, the Committee of the Whole House having returned to Representatives Hall, the Committee of the Whole rose, and the Speaker having resumed the chair, Mr. E. B. Washburne, of Illinois, the Chairman, reported—

that the committee had, according to order, attended the trial by the Senate of the said impeachment; and that the said West H. Humphreys, judge of the district court of the United States for the several districts of Tennessee, had been found guilty by the Senate of the matter whereof he stood charged by the House of Representatives, as contained in its articles of impeachment exhibited against him.[40]

In the Senate, on June 27,[41] on motion of Mr. Foster, it was,

Ordered, That the Secretary lay before the President of the United States an attested copy of the judgment of the Senate as the high court of impeachment in the case of West H. Humphreys.

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[39] Solomon Foot, of Vermont, President pro tempore.
[40] House Journal, pp. 943, 944.
[41] Senate Journal, p. 718; Globe, p. 2957.

The First Attempts To Impeach the President*

1. Refusal of the House to impeach President Tyler. Section 2398.
2. First proposition to impeach President Johnson. Section 2399.
3. Investigation of charges made by a Member. Sections 2400–2402.
4. Proceedings and report of investigating committee. Section 2403.
5. Usurpation of power as an impeachable offense. Section 2404.
6. Nature of the power of impeachment elaborately discussed. Sections 2405, 2406.
7. House decides not to impeach. Section 2407.

2398. The House refused in 1843 to impeach John Tyler, President of the United States, on charges preferred by a Member.

A proposition to impeach a civil officer of the United States is received in the House as a question of privilege.

Form of impeachment of a civil officer by a Member on the floor of the House.

On January 10, 1843,[1] Mr. John M. Botts, of Virginia, proposed the following:

I do impeach John Tyler, Vice-President, acting as President of the United States, of the following high crimes and misdemeanors:

First. I charge him with gross usurpation of power and violation of law, in attempting to exercise a controlling influence over the accounting officers of the Treasury Department, by ordering the payment of accounts of long standing that had been by them rejected for want to legal authority to pay, and threatening them with expulsion from office unless his orders were obeyed; by virtue of which threat thousands were drawn from the Public Treasury without the authority of law.

Second. I charge him with a wicked and corrupt abuse of the power of appointment to and removal from office: First, in displacing those who were competent and faithful in the discharge of their public duties, only because they were supposed to entertain a political preference for another; and, secondly, in bestowing them on creatures of his own will, alike regardless of the public welfare and his duty to the country.

Third. I charge him with the high crime and misdemeanor of aiding to excite a disorganizing and revolutionary spirit in the country, by placing on the records of the State Department his objections to a law as carrying no constitutional obligation with it; whereby the several States of this Union were invited to disregard and disobey a law of Congress which he himself had sanctioned and sworn to see faithfully executed, from which nothing but disorder, confusion, and anarchy can follow.

Fourth. I charge him with being guilty of a high misdemeanor, in retaining men in office for months after they have been rejected by the Senate as unworthy, incompetent, and unfaithful, with an utter defiance of the public will and total indifference to the public interests.

Fifth. I charge him with the high crime and misdemeanor of withholding his assent to laws indispensable to the just operations of government, which involved

*Hind's Precedents, vol. 3, p. 821 (1907).
[1] Third session Twenty-seventh Congress, Journal, pp. 157–163; Globe, pp. 144–146.

no constitutional difficulty on his part; of depriving the Government of all legal means of revenue, and of assuming to himself the whole power of taxation, and of collecting duties of the people without the authority or sanction of law.

Sixth. I charge him with an arbitrary, despotic, and corrupt abuse of the veto power, to gratify his personal and political resentments against the Senate of the United States for a constitutional exercise of their prerogative in the rejection of his nominees to office, with such evident marks of inconsistency and duplicity as leave no room to doubt his disregard of the interests of the people and his duty to the country.

Seventh. I charge him with gross official misconduct, in having been guilty of a shameless duplicity, equivocation, and falsehood with his late Cabinet and Congress, which led to idle legislation and useless public expense, and by which he has brought such dishonor on himself as to disqualify him from administering the Government with advantage, honor, or virtue, and for which alone he would deserve to be removed from office.

Eighth. I charge him with an illegal and unconstitutional exercise of power, in instituting a commission to investigate past transactions under a former Administration of the custom-house in New York, under the pretense of seeing the laws faithfully executed; with having arrested the investigation at a moment when the inquiry was to be made as to the manner in which those laws were executed under his own Administration; with having directed or sanctioned the appropriation of large sums of the public revenue to the compensation of officers of his own creation, without the authority of law, which, if sanctioned, would place the entire revenues of the country at his disposal.

Ninth. I charge him with the high misdemeanor of having withheld from the Representatives of the people information called for and declared to be necessary to the investigation of stupendous frauds and abuses alleged to have been committed by agents of the Government, both upon individuals and the Government itself, whereby he himself became accessory to these frauds.

Mr. Botts also submitted this resolution, for the action of the House:

Resolved, That a committee of nine members be appointed, with instructions diligently to inquire into the truth of the preceding charges preferred against John Tyler, and to report to this House the testimony taken to establish said charges, together with their opinion whether the said John Tyler hath so acted in his official capacity as to require the interposition of the constitutional power of this House; and that the committee have power to send for persons and papers.

Mr. Botts stated in his place as a Member that he was himself able to prove every charge made, and he not only asked but demanded the opportunity to do so.

The Speaker[3] having decided that the charges involved a question of privilege, the House proceeded to consideration of the resolution.

Mr. Cave Johnson, of Tennessee, moved that the proposition lie on the table. This motion was disagreed to, yeas 104, nays 119.

On the question of agreeing to the resolution, there appeared yeas 84, nays 127. So the resolution was disagreed to.

2399. The first attempt to impeach Andrew Johnson, President of the United States.

The impeachment of President Johnson was first proposed indirectly through general investigations.

On December 17, 1866,[2] Mr. James M. Ashley, of Ohio, moved that the rules be suspended so as to enable him to report from the Committee on Territories[4] the following resolution:

Resolved, That a select committee to consist of seven Members of this House be appointed by the Speaker, whose duty it shall be to inquire whether any acts have been done by any officer of the Government of the United States which in contemplation of the Constitution are high crimes or misdemeanors, and whether said acts were designed or calculated to overthrow, subvert, or corrupt

[3] John White, of Kentucky, Speaker.
[2] Second session Thirty-ninth Congress, Journal, p. 89; Globe, p. 154.
[4] At that time reports could not be made at any time.

the Government of the United States, or any department thereof, and that said committee have power to send for persons and papers and to administer the customary oath to witnesses, and they have leave to report by bill or otherwise.

In the brief debate permitted objection was made to such a general inquest on all the officers of the United States. On the vote there appeared yeas 90, nays 49. So the rules were not suspended.

On January 7, 1867,[5] in the morning hour for the presentation of resolutions,[6] Mr. Benjamin F. Loan, of Missouri, submitted this resolution:

Resolved, That for the purpose of securing the fruits of the victories gained on the part of the Republic during the late war, waged by rebels and traitors against the life of the nation, and of giving effect to the will of the people as expressed at the polls during the recent elections by a majority numbering in the aggregate more than 400,000 votes, it is the imperative duty of the Thirty-ninth Congress to take without delay such action as will accomplish the following objects:

1. The impeachment of the officer now exercising the functions pertaining to the office of President of the United States of America, and his removal from said office upon his conviction, in due form of law, of the high crimes and misdemeanors of which he is manifestly and notoriously guilty, and which render it unsafe longer to permit him to exercise the powers he has unlawfully assumed.

2. To provide for the faithful and efficient administration of the executive department of the Government within the limits prescribed by law.

3. To provide effective means for immediately reorganizing civil government in those States lately in rebellion, excepting Tennessee, and for restoring them to their practical relations with the Government upon a basis of loyalty and justice; and to this end.

4. To secure by the direct intervention of Federal authority the right of franchise alike, without regard to color, to all classes of loyal citizens residing within those sections of the Republic which were lately in rebellion.

After some discussion this resolution was, under the requirements of a rule of the House, referred to the Committee on Reconstruction.

Immediately thereafter Mr. John R. Kelso, of Missouri, offered as a new proposition the first portion of the resolution, having stricken out all of subdivisions 3 and 4.

Mr. Thomas T. Davis, of New York, moved to lay the resolution on the table, and the motion was disagreed to, yeas 40, nays 104. The question was then put on ordering the previous question, when the morning hour expired, and the House proceeded to other business.

2400. The first attempt to impeach President Johnson, continued.

On January 7, 1867, President Johnson was formally impeached in the House on the responsibility of a Member.

The House voted to investigate the conduct of President Johnson on the strength of charges made by a Member on his own responsibility only.

A Member having impeached the President and presented a resolution of investigation the Speaker admitted it as a question of privilege.

In the first attempt to impeach President Johnson the investigation was made by the Judiciary Committee.

On the same day, January 7,[7] Mr. James M. Ashley, of Ohio, rising in his place, declared:

On my responsibility as a Representative, and in the presence of this House, and before the American people, I charge Andrew Johnson, Vice-President and

[5] Journal, pp. 118, 119; Globe, pp. 319–321.
[6] This order of business does not now exist.
[7] Journal, pp. 121–124; Globe, pp. 320, 321.

acting President of the United States, with the commission of acts which, in contemplation of the Constitution, are high crimes and misdemeanors. I therefore submit the following—

which was presented as a question of privilege:

I do impeach Andrew Johnson, Vice-President and acting President of the United States, of high crimes and misdemeanors.

I charge him with a usurpation of power and violation of law:

In that he has corruptly used the appointing power.

In that he has corruptly used the pardoning power.

In that he has corruptly used the veto power.

In that he has corruptly disposed of public property of the United States.

In that he has corruptly interfered in elections, and committed acts which, in contemplation of the Constitution, are high crimes and misdemeanors: Therefore,

Be it resolved, That the Committee on the Judiciary be, and they are hereby, authorized to inquire into the official conduct of Andrew Johnson, Vice-President of the United States, discharging the powers and duties of the office of President of the United States, and to report to this House whether, in their opinion, the said Andrew Johnson, while in said office, has been guilty of acts which were designed or calculated to overthrow, subvert, or corrupt the Government of the United States, or any department or officer thereof; and whether the said Andrew Johnson has been guilty of any act, or has conspired with others to do acts, which, in contemplation of the Constitution, are high crimes or misdemeanors, requiring the interposition of the constitutional power of this House; and that said committee have power to send for persons and papers and to administer the customary oath to witnesses.

A question of order being raised, the Speaker [8] held that the resolution presented a question of privilege.

A motion by Mr. Rufus P. Spalding, of Ohio, that the resolution be laid on the table, was disagreed to—yeas 39, nays 106.

Then the previous question was ordered, and a motion to reconsider the vote whereby it was ordered was laid on the table by a vote of yeas 95, nays 47.

Then the question being put: "Will the House agree to the proposition submitted by Mr. James M. Ashley?" there appeared yeas 108, nays 39. So the resolution was agreed to.

On January 14,[9] Mr. Loan's resolution was debated, Mr. Loan, in a speech at length, using language interpreted to be a charge that President Johnson was guilty of complicity in the murder of President Lincoln, and further charging him with participation in a conspiracy to capture the Government in the interest of the late participants in the secession movement. On January 28 and February 4 the resolution was further considered, the debate on the later days being principally on a motion made by Mr. Thomas A. Jenckes, of Rhode Island, that the resolution be referred to the Committee on the Judiciary, which was already considering the subject.

This motion was agreed to, although it was urged in opposition that there was much business before the Judiciary Committee, and that the matter would be expedited by reference to a select committee.

2401. The first attempt to impeach President Johnson, continued.

The Thirty-ninth Congress having expired during investigation of President Johnson's conduct, the House in the next Congress directed the Judiciary Committee to resume the investigation.

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[8] Schuyler Colfax, of Indiana, Speaker. The Speaker cited as a precedent the decision made in the Twenty-seventh Congress on a point of order made by Mr. Horace Everett, of Vermont.

[9] Journal, pp. 163, 277, 320; Globe, pp. 443–446, 806–808, 991.

A resolution directing the Judiciary Committee to resume an investigation with a view to an impeachment was held to be privileged.

On February 28,[10] Mr. James F. Wilson, of Iowa, chairman of the Judiciary Committee, submitted a report which in effect stated that considerable testimony had been taken, but that it would be impracticable to conclude the subject during the then existing Congress; and expressed the opinion that the evidence indicated the desirability of a further prosecution of the case. This report was signed by eight members of the committee. Mr. Andrew J. Rogers, of New Jersey, submitted minority views, in which he declared "that the most of the testimony that has been taken is of a secondary character, and such as would not be admitted in a court of justice," and advised discontinuance of the proceedings.

On March 2 [11] the report was laid on the table and ordered printed.

At the beginning of the next Congress, on March 7, 1867,[12] Mr. James M. Ashley, of Ohio, as a question of privilege, submitted a preamble and resolution, which, after modification, were as follows:

Whereas the House of Representatives of the Thirty-ninth Congress adopted on the 7th of January, 1867, a resolution authorizing an inquiry into certain charges preferred against the President of the United States; and

Whereas the Judiciary Committee, to whom said resolution and charges were referred, with authority to investigate the same, were unable for want of time to complete said investigation before the expiration of the Thirty-ninth Congress; and

Whereas in the report submitted by said Judiciary Committee on the 2d of March, they declare that the evidence taken is of such a character as to justify and demand a continuation of the investigation by this Congress: Therefore, be it

Resolved by the House of Representatives, That the Judiciary Committee when appointed be, and they are hereby, instructed to continue the investigation authorization in said resolution of January 7, 1867, and that they have power to send for person and papers, and to administer the customary oath to witnesses; and that the committee have authority to sit during the sessions of the House, and during any recess which Congress or this House may take.

Resolved, That the Speaker of the House be requested to appoint the Committee on the Judiciary forthwith, and that the committee so appointed be directed to take charge of the testimony taken by the committee of the last Congress; and that said committee have power to appoint a clerk at a compensation not to exceed $6 per day, and employ the necessary stenographer.

Resolved further, That the Clerk of the House of Representatives be directed to pay, out of the contingent fund of the House, on the order of the Committee on the Judiciary, such sum or sums of money as may be required to enable the said committee to prosecute the investigation above directed, and such other investigations as it may be ordered to make.

Mr. Samuel J. Randall, of Pennsylvania, having raised a question as to the presentation of the resolution, the Speaker [13] said:

The Chair has entertained the resolution as a question of privilege, as it has reference to proceedings for the impeachment of the President of the United States.[14]

A motion by Mr. William S. Holman, of Indiana, that the resolutions be laid on the table was disagreed to, yeas 33, nays 119; and then after debate, largely as to the political expediency of reviving the pro-

[10] House Report No. 31; Globe p. 1754.
[11] Journal, p. 585; Globe, p. 1754.
[12] First session Fortieth Congress, Journal, pp. 19–21; Globe, pp. 18–25.
[13] Schuyler Colfax, of Indiana, Speaker.
[14] It is to be noticed that several nonprivileged matters are contained in the resolutions, which under the present practice would destroy the privilege—notably the provisions for a clerk for payments from the contingent fund.

ceedings, the preamble and resolutions were agreed to by the House, without division.

Throughout this session of Congress, which continued with intermissions until November 30, various resolutions were offered [15] with the object of hastening the work of the Judiciary Committee or of procuring the printing of the testimony. On March 29 a resolution requesting the committee to report within a certain time was agreed to.

2402. The first attempt to impeach President Johnson, continued.

A verbal report as to progress made by a committee in an impeachment investigation was offered as privileged.

A proposition to instruct a committee to investigate new charges in an impeachment case was held to be privileged.

On July 10,[16] Mr. James F. Wilson, of Iowa, claiming the floor for a question of privilege, reported verbally from the Judiciary Committee, by direction of that committee, that they expected to be able to report on or after October 16. He also stated that as the case now stood five members of the committee were of the opinion that such high crimes and misdemeanors had not been developed as to call for the exercise of the impeachment power on the part of the House. The remaining four members of the committee took the opposite view.

On July 17, 1867,[17] Mr. John Covode, of Pennsylvania, claiming the floor for a question of privilege, offered the following preamble and resolution:

Whereas Andrew Johnson, President of the United States, did, upon the 4th day of July, 1867, at the request of the counsel of John H. Surratt, caused to be issued to Stephen F. Cameron, of the rebel army, and one of the most notorious violators of the laws of war, a full pardon for all his crimes, in order that his credibility might be increased as a witness to aid in the exculpation of said Surratt from his participation in the murder of Mr. Lincoln, thus showing his sympathy with the men who murdered the President: Therefore, be it

Resolved, That the Committee on the Judiciary be instructed to inquire into the foregoing charge, and report the evidence to the House in the first week of its next session, together with the testimony already taken in the impeachment case.

Mr. Benjamin M. Boyer, of Pennsylvania, raised a question as to the privilege of the resolution.

The Speaker [18] said:

It does unquestionably, in the opinion of the Chair, present a question of the very highest privilege.

The resolution was then agreed to; but the preamble was amended by striking out all after the word "whereas" and inserting the words: "It is reported that a pardon has been issued by the President to Stephen F. Cameron," and as amended was agreed to.

2403. The first attempt to impeach President Johnson, continued.

The first proposition to impeach President Johnson was reported from a committee divided as to fact and law.

In the first attempt to impeach President Johnson the committee reported the testimony and also majority and minority arguments.

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[15] Journal, pp. 146, 189, 211, 213, 220, 248; Globe, pp. 446, 452, 592, 656, 657, 720, 725, 762, 765, 766, 778, 779.
[16] Globe, p. 565.
[17] Journal, pp. 220, 221; Globe, p. 697.
[18] Schuyler Colfax, of Indiana, Speaker.

The first investigation of President Johnson's conduct was conducted ex parte and in executive session.

It does not appear that President Johnson sought to be represented before the committee making the first investigation.

Instance wherein a Member of the House not a member of the committee was permitted to examine a witness.

In the first investigation of the conduct of President Johnson the committee relaxed the strict rules of evidence.

On November 25 [19] Mr. George S. Boutwell, of Massachusetts from the Committee on the Judiciary, submitted the report of the majority of that committee, signed by five of the members, while Mr. James F. Wilson, of Iowa, presented minority views signed by himself and Mr. Frederick E. Woodbridge, of Vermont. Also Mr. Samuel S. Marshall, of Illinois, presented other minority views, signed by himself and Mr. Charles A. Eldridge, of Wisconsin.

On motion of Mr. Boutwell,

Ordered, That the said testimony and reports be printed (the report of the majority and the views of the minorities to be printed together), and that the further consideration of the subject be postponed until Wednesday, the 4th day of December next.

The report of the committee presents the testimony in full. It appears that the examination was conducted ex parte, there being no one present to cross-examine witnesses on behalf of the President, nor does it appear that any testimony was introduced at his suggestion or sought to be introduced. The witnesses were examined generally by the chairman or other members of the committee. In one instance [20] Mr. Benjamin F. Butler, a Member of the House, but not a member of the committee, was permitted to examine a witness; but his examination was in no sense an appearance in behalf of the President, but rather the reverse. In the minority views [21] presented by Mr. Marshall the investigation is spoken of as "a secret, ex parte one."

As to the nature of the testimony taken in the course of the investigation, the majority say [22] that they—

have spared no pains to make their investigations as complete as possible, not only in the explorations of the public archives, but in following every indication that seemed to promise any additional light upon the great subjects of inquiry.

And in the minority views submitted by Mr. Wilson it is stated: [23]

A great deal of matter contained in the volume of testimony reported to the House is of no value whatever. Much of it is mere hearsay, opinions of witnesses, and no little amount of it utterly irrelevant to the case. Comparatively a small amount of it could be used on a trial of this case before the Senate.

It seems to have been assumed in the committee that this was the proper course, since in the minority views presented by Mr. Marshall it is stated: [24]

In what we have said of the character of evidence taken before us, and the means used to procure it, we must not be understood as reflecting upon the action of the committee or any member thereof. Such an interpretation of our remarks would do great injustice to us and to them. Whether such latitude

[19] Journal, p. 265; Globe, pp. 791, 792; House Report No. 7, First session Fortieth Congress. Although presented by Mr. Boutwell, this report was prepared principally by Mr. Thomas Williams, of Pennsylvania.
[20] See p. 56 of the testimony.
[21] See p. 110 of the report.
[22] See p. 1 of the report.
[23] See p. 104 of the report.
[24] See p. 110 of the report.

should have been given in the examination of witnesses we will not now inquire. In an investigation before a committee it would be difficult and perhaps impossible to confine the evidence to such as would be deemed admissible before a court of justice. Indeed, it may be questioned whether it would be proper so to restrict it, and it is perhaps better, even for the President, that those who were managing the prosecution from the outside were permitted to present anything that they might call or consider evidence.

The majority of the committee embodied their conclusion in this resolution:

Resolved, That Andrew Johnson, President of the United States, be impeached of high crimes and misdemeanors.

The minority, taking issue, were united in recommending a resolution as follows:

Resolved, That the Committee on the Judiciary be discharged from the further consideration of the proposed impeachment of the President of the United States, and that the subject be laid upon the table.

The fact that all the minority did not unite in submitting views did not arise from any disagreement as to essential facts or law, but merely as to a difference as to whether or not the conduct of the President should be criticised as improper, although not impeachable.

2404. The first attempt to impeach President Johnson, continued.

The first attempt to impeach President Johnson was based on the salient charge of usurpation of power, with many specifications.

The discussion of the committee touched two main branches (1) as to the facts, and (2) as to the law.

1. As to the facts.

In moving the impeachment Mr. Ashley had specified six offenses. The majority of the committee found in general that the evidence sustained these charges, and say that "the great salient point of accusation, standing out in the foreground, and challenging the attention of the country, is usurpation of power." The majority specify as follows:

1. That the President of the United States, assuming it to be his duty to execute the constitutional guaranty, has undertaken to provide new governments for the rebellious States without the consent or cooperation of the legislative power, and upon such terms as were agreeable to his own pleasure, and then to force them into the Union against the will of Congress and the people of the loyal States, by the authority and patronage of his high office.

2. That to effect this object he has created offices unknown to the law, and appointed to them without the advice and consent of the Senate, men who were notoriously disqualified to take the test oath, at salaries fixed by his own mere will, and paid those salaries, along with the expenses of his work, out of the funds of the War Department, in clear violation of law.

3. That to pay the expenses of the said organizations, he has also authorized his pretended officers to appropriate the property of the Government, and to levy taxes from the conquered people.

4. That he has surrendered, without equivalent, to the rebel stockholders of southern railroads captured by our arms, not only the roads themselves, but the rolling stock and machinery captured along with them, and even roads constructed or renovated at an enormous outlay by the Government of the United States itself.

5. That he has undertaken, without authority of law, to sell and transfer to the same parties, at a private valuation, and on a long credit, without any security whatever, an enormous amount of rolling stock and machinery, purchased by and belonging to the United States, and after repeated defaults on the part of the purchasers has postponed the debt due to the Government in order to enable them to pay the claims of other creditors, along with arrears of interest on a large amount of bonds of the companies guaranteed by the State of Tennessee, of which he himself was a large holder at the time.

6. That he has not only restored to rebel owners large amounts of cotton and other abandoned property that had been seized by the agents of the Treasury, but has presumed to pay back the proceeds of actual sales made thereof at his own will and pleasure, in utter contempt of the law, directing the same to be paid into the Treasury, and the parties aggrieved to seek their remedy in the courts, and in manifest violation of the true spirit and meaning of that clause of the Constitution of the United States which declares that "no money shall be drawn from the Treasury but in consequence of appropriations made by law."

7. That he has abused the pardoning power conferred on him by the Constitution, to the great detriment of the public, in releasing, pending the condition of war, the most active and formidable of the leaders of the rebellion, with a view to the restoration of their property and means of influence, and to secure their services in the furtherance of his policy; and, further, in substantially delegating that power for the same objects to his provisional governors.

8. That he has further abused this power in the wholesale pardon, in a single instance, of 193 deserters, with restoration of their justly forfeited claims upon the Government for arrears of pay, without proper inquiry or sufficient evidence.

9. That he has not only refused to enforce laws passed by Congress for suppression of the rebellion, and the punishment of those who gave it comfort and support, by directing proceedings against delinquents and their property, but has absolutely obstructed the course of public justice by either prohibiting the initiation of legal proceedings for that purpose, or where already commenced, by staying the same indefinitely, or ordering absolutely the discontinuance thereof.

10. That he has further obstructed the course of public justice, by not only releasing from imprisonment an important state prisoner, in the person of Clement C. Clay, charged among other things, as asserted by himself in answer to a resolution of the Senate (Ex. Doc., Thirty-ninth Congress, No. 7), "with treason, with complicity in the murder of Mr. Lincoln, and with organizing bands of pirates, robbers, and murderers in Canada, to burn the cities and ravage the commercial coasts of the United States on the British frontier," but has even forbidden his arrest in proceedings instituted against him for treason and conspiracy, in the State of Alabama, and ordered his property, when seized for confiscation by the district attorney of the United States, to be restored.

11. That he has abused the appointing power lodged in him by the Constitution:

"1. In the removal, on system, and to the great prejudice of the public service, of large numbers of meritorious public officers, for no other reason than because they refused to indorse his claim of the right to reorganize and restore the rebel States on conditions of his own, and because they favored the jurisdiction and authority of Congress on the premises.

"2. In reappointing in repeated instances, after the adjournment of the Senate, persons who had been nominated by him and rejected by that body as unfit for the place for which they had been so recommended."

12. That he has exercised the dispensing power over the laws, by commissioning revenue officers and others unknown to the law, who were notoriously disqualified by their participation in the rebellion from taking the oath of office required by the act of Congress of July 2, 1862, allowing them to enter upon and exercise the duties appertaining to their respective offices, and paying to them salaries for their services therein.

13. That he has exercised the veto power conferred on him by the Constitution, in its systemmatic application to all the important measures of Congress looking to the reorganization and restoration of the rebel States, in accordance with a public declaration that he "would veto all its measures whenever they came to him," and without other reasons than a determination to prevent the exercise of the undoubted power and jurisdiction of Congress over a question that was cognizable exclusively by them.

14. That he has brought the patronage of his office into conflict with the freedom of elections by allowing and encouraging his official retainers to travel over the country, attending political conventions and addressing the people, instead of attending to the duties which they were paid to perform, while they were receiving high salaries in consideration thereof.

15. That he has exerted all the influence of his position to prevent the people of the rebellious States from accepting the terms offered to them by Congress, and neutralized to a large extent the effects of the national victory by impressing them with the opinion that the Congress of the United States was bloodthirsty and implacable and that their only hope was in adhering to him.

16. That, in addition to the oppression and bloodshed that have everywhere resulted from his undue tenderness and transparent partiality for traitors, he

has encouraged the murder of loyal citizens in New Orleans by a Confederate mob pretending to act as a police, by hireling correspondence with its leaders, denouncing the exercise of the constitutional right of a political convention to assemble peacefully in that city as an act of treason proper to be suppressed by violence, and commanding the military to assist instead of preventing the execution of the avowed purpose of dispersing them.

17. That he has been guilty of acts calculated, if not intended, to subvert the Government of the United States by denying that the Thirty-ninth Congress was a constitutional body and fostering a spirit of disaffection and disobedience to the law and rebellion against its authority by endeavoring, in public speeches, to bring it into odium and contempt.

The minority of the committee generally dissent from the conclusions of the majority as to the facts. After reviewing the six specifications alleged by Mr. Ashley, they find from a review of the evidence that the acts of the President bear a very different construction from that given by the majority. Messrs. Wilson and Woodbridge admit that many of his acts have been wrong politically, saying:

In approaching a conclusion we do not fail to recognize two standpoints from which this case may be reviewed: The legal and the political. Viewing it from the former, the case upon the law and the testimony fails; viewing it from the latter, the case is a success.

They then go on to state generally that the President

has disappointed the hopes and expectations of those who placed him in power. He has betrayed their confidence and joined hands with their enemies. * * * Judge him politically, we must condemn him. But the day of political impeachments would be a sad one for this country.

But Messrs. Marshall and Eldridge dissent from all criticism of the President, and confine themselves to the simple finding that on the law and the facts he may not be impeached.

2405. The first attempt to impeach President Johnson, continued.

Whether or not an offense must be indictable under a statute in order to come within the impeaching power was discussed fully in the first attempt to impeach President Johnson.

Discussion of the nature of the impeaching power with reference to American and English precedents.

2. As to the law.

On this point the majority, composed of Messrs. Boutwell; Francis Thomas, of Maryland; Thomas Williams, of Pennsylvania; William Lawrence, of Ohio, and John C. Churchill, of New York, advocate one view, and the united minority a radically different one.

The majority first review the English authorities as set forth in May's work and the utterances of Cushing, Story, and Rawle to show that the purpose of impeachment in modern times is the punishment of high crimes and misdemeanors, chiefly of an official or political character, which are either beyond the reach of the law or which no other authority in the State but the supreme legislative power is competent to prosecute. The Federalist is also quoted to show that such offenses are of a nature which may be denominated political, as they relate chiefly to injuries done immediately to the society itself. The question then arises as to whether the terms of the United States Constitution are such as to change the view which has been taken in England. The majority say in this connection:

The fourth section of its second article provides that "the President, Vice-President, and all civil officers of the United States shall be removed from office on impeachment for and conviction of high crimes and misdemeanors."

It therefore names but two offenses specifically, and they are not charged here. Do the facts involved fall, then, within the general description of "other high crimes and misdemeanors," or are they excluded by the enumeration?

It is insisted, for the first time, we think, that they do not come within the meaning of the language used, because, although all confessedly in the popular sense the highest and gravest of misdemeanors, and many of them in the technical and common-law signification of the terms, indictable as such in England, and perhaps in most of the older States, they are neither crimes nor misdemeanors here, because it has been held with much diversity of opinion on the bench, and more at the bar, that there is no jurisdiction in the courts of the United States to punish criminally except where an act has been made indictable by statute, which, as the committee are constrained to think, is not a necessary logical result, even if the doctrine were incontrovertible and to be considered as no longer open to discussion in the courts. It would not follow, as they suppose, that what was undoubtedly a crime or misdemeanor at the common law, in view of the framers of the Constitution who sat under it and used its language and recurred so often to its principles, had become any the less a crime before the highest court for the purposes of impeachment because another tribunal, having no jurisdiction at all over the subject, may have decided that it is no longer cognizable before them, even if it were essential, as there is no authority to show, that it should be a true crime within the meaning of the common law. There is a law of Parliament, which is a part of the common law, and by which only this question must be determined.

The objection has the merit at least of being a novel as well as a subtle one; well enough, perhaps, for the range of a criminal court, but too subtle by far for those canons of interpretation that are supposed to rule in the construction of the fundamental law of a great state. If it be a sound one, then there is no remedy in the Constitution but for the specific offenses of treason and bribery, as there was no such thing as what it describes as "high crimes or misdemeanors" then known to the laws of the United States, and the Government must perish whenever it is attacked from a quarter that could have been foreseen. But could the statesmen who framed the Constitution have perpetrated so grave a blunder as this? Did they intend, instead of anchoring that power to the rock by a precision that should fix it there, and leave nothing open to construction, to leave it all afloaat for future Congresses to say what offenses should be from time to time impeachable? Did they, when dealing with a question so mighty as the safety of the state, use words without a meaning, except what might be thereafter given to them by an ephemeral legislature or invented by an uncertain and not always consistent court? Or did they stand in the august presence and under the not uncertain light of the common law of England, which they had claimed as their birthright, speaking the language, with a thorough understanding of its import, of the sages and statesmen who had illustrated its principles? Are their oracles to be read as they would have been in England or would be now in any of its colonies past or present or are their solemn utterances to be measured by a language that they did not know? They committed no such error, and the suggestion that they did is one that does not seem to antedate the case to which it is at present applied.

To ascertain the meaning of the terms in question there are but three possible sources to which the explorer can recur, and they are the Constitution itself, the statutes, and the parliamentary practice, or the common law of which it is a part. The Constitution, however, goes no further, as already shown, than to declare the two political offenses of treason and bribery to be "high crimes and misdemeanors," and as such impeachable, while no statute has ever attempted it. Nor does it by any means follow that where an offense has been made so punishable as a crime the right to impeach is a corollary. It is not every offense that by the Constitution is made impeachable. It must be not a crime or misdemeanor only, but a "high" one, within the meaning of the law of Parliament. There are, moreover, as suggested by Judge Story in his Commentaries, many offenses of great enormity which are made punishable by statute only when committed in a particular place. What is to be said of them? Are they impeachable if committed under one jurisdiction, and not so if perpetrated under another? There are, too, many others of a purely political character, which have been held again and again to be impeachable, that are not even named in our statute books, and many more may be imagined in the long future for which it would be impossible for human sagacity or perspicuity to provide. There is no alternative, then, left, unless the remedy is to fail altogether, except to resort to the parliamentary practice and

the common law, or leave the whole subject in the discretion of the Senate, which would be inadmissible, of course, in a government of law.

The argument asserts that the offense must be an indictable one by statute to authorize an impeachment. It is not even admitted, however, that this high and radical and only effective remedy for official delinquencies—and in this country, at least, it is no more than that—is to be confined to those offenses which are known by these terms, within the technical meaning that has been assigned to them. In such a case as this no narrow interpretation can be allowed to defeat the object of the law. A constitution of government is always to be construed in a broad, catholic sense, in order to suppress the possible mischief and advance the remedy. Those who maintain this doctrine strangely forget that there is a parliamentary sense, which conforms to the popular one, and is as much a common-law sense as the one on which they rely. The object of the law is not to punish crime. That duty is assigned to other tribunals. The purpose here is only to remove the officer whose public conduct has been such as to disqualify him for the proper discharge of his functions, or to show that the safety of the state—which is always the supreme law—requires that he should be deposed. It refers not so much to moral conduct as to official relations—not, indeed, to moral conduct at all, except so far as it may bear on the performance of official duty. The judgment is not fine or imprisonment, as it may be in England, but only removal from office and disqualification for the future. One of the very objects of this extraordinary tribunal, as has been shown already and will be further enforced hereafter, is to reach those very cases of official delinquency against which no human foresight could provide and which the ordinary tribunals are inadequate to punish. No ingenuity of invention, no fertility of resource, can hedge round a high public officer by boundaries which the greater ingenuity of fraud or wickedness may not be able to pass by sap or scale. If a President, it may be that he may prove impracticable. He may ignore the law, and even wage war on the power that is intrusted with the making of it. He may nullify its acts by misconstruing or disregarding them or denying their authority. He may be guilty of offenses which are in their very nature calculated to subvert the Government—all which things Andrew Johnson is shown clearly to have done. And yet these things, although high misdemeanors against the state, and fraught with peril to its life, may not be indictable as crimes. But will anybody say that the Constitution affords no remedy—that the arch offender must be borne with, and the state must die—merely because Congress has failed to provide, not the same, but a different punishment for the same offense? The cases in England show that this is not law there, as it is not reason, which is said to be the life of the law. The cases here, though all of offenses that were not statutory crimes or misdemeanors, have been so few as to leave this question open, to be decided hereafter upon those great reasons of state that lie at the foundation of the law of Parliament, which is the rule that must govern ultimately here.

The report then goes on to quote from the works of Story and Curtis in support of the view just advanced, and to the effect that, as said by Story, "the offenses to which the power of impeachment has been and is ordinarily applied as a remedy are of a political character," "growing out of personal misconduct, or gross neglect or usurpation, or habitual disregard of the public interests in the discharge of the duties of political office;" and, as said by Curtis, that "although an impeachment may involve an inquiry whether a crime against any positive law has been committed, yet it is not necessarily a trial for a crime."

Further the report quotes the following from Judge Story:

The Congress of the United States has itself unhesitatingly adopted the conclusion that no previous statute is necessary to authorize an impeachment for any official misconduct, and the rules of proceeding and the rules of evidence, as well as the principles of decision, have been uniformly regulated by the known doctrines of the common law and parliamentary usage * * * In the few cases of impeachment that had theretofore been tried no one of the charges had rested on any statutable misdemeanor.

The report then says:

When he wrote the cases had been only three. In the first, which was that of Blount, in 1798, where the charge was of a conspiracy to invade the territories of a friendly power, although there was no decision on the merits, the impeach-

able character of the offense was affirmed by an almost unanimous vote of the Senate, expelling the delinquent from that body as having been guilty of a high misdemeanor in the very language of the Constitution. The second (Pickering's), in which a conviction took place, was against a judge of a district court and purely for official misconduct. The third (Chase's) was against a judge of the Supreme Court of the United States, and was also a charge of official misconduct, but terminated in an acquittal. It is a noteworthy fact, however, that in the last-named case (the only one in which the point was raised) it was conceded by the answer that a civil officer was impeachable for "corruption, or some high crime or misdemeanor, consisting in some act done or committed in violation of a law commanding or forbidding it." Two other cases have occurred since that time. The first, that of Judge Peck, in December, 1830, was for punishing a refractory barrister for contempt, as for "an arbitrary, unjust, and oppressive arrest and sentence, with intent to injure and oppress under cover of law." The case was clearly not of an indictable offense under any statute of the United States, but, though defended by the very ablest counsel (Messrs. Wirt and Meredith), it did not seem to have occurred to them that the offense charged was not impeachable within the meaning of the Constitution. The other, that of Judge Humphreys, at the commencement of the rebellion, was upon charges of disloyal acts and utterances, some of which clearly did not set forth offenses indictable by statute of the United States, and yet upon all those charges, with one exception only, he was convicted and removed.

It is only necessary to add that the conclusion of Judge Story upon the whole case is that "it seems to be the settled doctrine of the high court of impeachment that, though the common law can not be the foundation of a jurisdiction not given by the Constitution or laws, that jurisdiction, when given, attaches, and is to be exercised according to the rules of the common law, and that what are and what are not 'high crimes and misdemeanors' is to be ascertained by a recurrence to that great basis of American jurisprudence." And he adds to this that "the power of the House to punish contempts, which are breaches of privilege not defined by positive law, has been upheld on the same ground; for if the House had no jurisdiction to punish until the acts had been prevously ascertained and defined by positive law, it is clear that the process of arrest would be illegal."

And this, it is hoped, will dispose forever of the novel objection that is now interposed in the path of the nation's justice in the defense of its greatest offender, and in a case that has no parallel in enormity in the parliamentary history of England. It is scarcely necessary to repeat that the charges, resting mainly upon record evidence, are not only of usurption and abuse of admitted power, but of a contempt of law and of the legislative power that transcends anything in the annals of either the Tudors or the Stuarts.

It may be answered, however, as it has been, that all this was with the best intent, and that positive corruption must be shown to make the act impeachable. The President alleges a necessity, in one case, of dispensing with the laws in consequence of the absence of Congress. The Attorney-General insists that it was not the true policy of the country to enforce the laws against the rebels, and he accordingly refuses to do it. The Secretary of the Treasury holds the same opinion also as to the subject of captured and abandoned property, and he returns the proceeds, as the President returns the property itself.

An old but homely proverb says that the place most dreaded by the wicked is paved with good intentions. If such intentions, or even a supposed necessity, could excuse the violation of the law, no transgressor would ever be punished, and no tyrant fail to show that what he had done was with the best designs and for the purpose of saving the constitution of the state. If Andrew Johnson can plead that he gave away or sold the public property to rebels to promote their commerce, or that he dispensed with the test oath only to conciliate the disaffected, or collect the revenue, because of the absence of that Congress which he had refused to convene, the self-willed James II might even with a better grace have asserted that he had dispensed with the religious test in the interests of universal toleration. By way, however, of disposing of this apology, it may not be amiss to cite a few authorities:

"The rule is, that if a man intends to do what he is conscious the law—which every one is conclusively presumed to know—forbids, there need not be any other evil intention. (Bish. Crim. Law, sec. 428; 11 S. and R., 325.) It is of no avail to him that he means at the same time an ultimate good." (Ibid.)

"When the law imposes a prohibition it is not left to the discretion of the citizen to comply or not. He is bound to do everything in his power to avoid an infringement of it. The necessity which will excuse him for a breach must be

instant and imminent. It must be such as to leave him without hope by ordinary means to comply with the requisitions of the law." (Fir. Story, I; 1 Gall., 150 S. P.; 3 Wheat, 39; 1 Bish., sec. 449.)

"Whenever the law, statutory or common, casts on one a duty of a public nature, any neglect of the duty or act done in violation of it is indictable." (1 Bish., sec. 389–537.)

The only remaining question is whether, in view of all these facts, it will be the duty of this House to call the President to answer before the Senate, or whether any consideration of mere public or party expediency, on either side of the House, ought to be allowed to prevail on them to let the accused go free.

2406. The first attempt to impeach President Johnson, continued.

In the first attempt to impeach President Johnson, the minority of the Judiciary Committee held that an indictable offense must be charged.

Elaborate discussion of meaning of the words "high crimes and misdemeanors."

American and English precedents were reviewed carefully by the minority of the Judiciary Committee in the first attempt to impeach President Johnson.

The minority views take issue with the argument of the majority, beginning the argument as follows:

The Constitution of the United States declares that "the House of Representatives * * * shall have the sole power of impeachment." What is the nature and extent of this power? Is it as boundless as it is exclusive? Having the sole power to impeach, may the House of Representatives lawfully exercise it whenever and for whatever a majority of the body may determine? Is it a lawless power, controlled by no rules, guided by no reason, and made active only by the likes or dislikes of those to whom it is intrusted? Have civil officers of the United States nothing to insure them against an exercise of this power except an adjustment of their opinions and official conduct to the standard set up by the dominant party in the House of Representatives? Happily for the nation this power is not without its constitutional boundaries, and is not above the law. When we examine the Constitution to ascertain in what cases the power of impeachment may be exercised—for what acts civil officers may be impeached—we are informed that—

"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." (Art. II, sec. 2.)

In these cases only can the power of impeachment be lawfully used. It would seem to be difficult to mistake the import of this plain provision of the fundamental law of the land; and yet it is not free from conflicting interpretations. This conflict does not arise upon the terms "treason" and "bribery," for they are too well understood and too clearly defined in the Constitution and the laws of the land to admit of any disputation concerning them. They are both crimes of a high grade and punishable upon indictment in the courts of the United States. They are offenses against the public weal, with just and adequate penalties prescribed for them by the law of the nation. There is no difficulty in ascertaining the meaning of the Constitution in so far as it relates to these crimes. Whatever conflict of opinion has arisen respecting the extent of the power of impeachment finds its origin in the terms "other high crimes and misdemeanors." These terms, it has been claimed, give a latitude to the power reaching far beyond the field of indictable offenses. This doctrine is denied. Here arises the only doubt concerning the jurisdiction of the impeaching power of the House of Representatives.

The fact that the framers of the Constitution selected by name two indictable crimes as proper cases of impeachment would seem to go far toward establishing as the true construction of the terms "high crimes and misdemeanors" that all other offenses for which impeachment will lie must also be indictable. Having fettered the House of Representatives by naming two well-defined crimes of the highest grade, it is not to be presumed that the same hands which did it clothed the House with the right to ramble through all grades of crimes and misdemeanors, all instances of improper official conduct and improprieties of

official life, grave and unimportant, harmful and harmless, alike. It is unreasonable to say that the men who framed our Constitution, after undertaking to place a limitation on the power of impeachment, ended their effort by throwing away all restraints upon its exercise and placing it entirely within the keeping of those upon whom it was intended to confer only a limited power. There is something more stable than the whims, caprices, and passions of a majority established as a restraint upon this power by the Constitution. The House of Representatives may impeach a civil officer, but it must be done according to law. It must be for some offense known to the law and not created by the fancy of the Members of the House. As was very pertinently remarked by Hopkinson on the trial of Chase, "The power of impeachment is with the House of Representatives, but only for impeachable offenses. They are to proceed against the offense, but not to create the offense and make any act criminal and impeachable at their will and pleasure. What is an offense is a question to be decided by the Constitution and the law, not by the opinion of a single branch of the legislature; and when the offense thus described by the Constitution or the law has been committed, then, and not till then, has the House of Representatives power to impeach the offender."

A civil officer may be impeached for a high crime. What is a crime? It is such a violation of some known law as will render the offender liable to be prosecuted and punished. "Though all willful violations of rights come under the generic name of wrongs, only certain of those made penal are called crimes." (Encyc. Brit. vol. xiii, 275.) The offense must be a violation of the law of the sovereignty which seeks to punish the offender; for no act is a crime in any sovereignty except such as is made so by its own law. In England no act is a crime save such as is so declared either by the written or unwritten law of the Kingdom, and therefore only crimes by the law of England are indictable in England. Crimes are defined and punished by law—by the law of the sovereignty against which the crime is committed—and nothing is a crime which is not thus defined and punished. "Municipal law" (which, among its multiplicity of offices, defines and punishes crimes) "is a rule of action prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong." (1 Blackstone, 44.) Nothing is a crime which is not a breach of this command or prohibition as carries with it a prescribed penalty. Hence Blackstone said: "All laws should be, therefore, made to commence in futuro." The citizen must be notified of what acts are crimes, and he can not be lawfully punished for any others. The reasonableness of this rule was appreciated, and its enforcement provided for, by the convention which framed the Constitution of the United States, when they placed in that instrument the declaration that "no * * * ex post facto law shall be passed." No act which as not a crime at the time of its commission can be made so by subsequent legislative or judicial action; and this doctrine is as binding on the House of Representatives when exercising its powers of impeachment as when employed in ordinary criminal legislation.

All that has been said herein concerning the term "crimes" may be applied with equal force to the term "misdemeanors" as used in the Constitution. The latter term in no wise extends the jurisdiction of the House of Representatives beyond the range of indictable offenses. Indeed, the terms "crime" and "misdemeanor" are, in their general sense, synonymous, both being such violations of law as expose the persons committing them to some prescribed punishment; and, although it can not be claimed that all crimes are misdemeanors, it may be properly said that all misdemeanors are crimes.

In elaboration of its discussion of misdemeanors as crimes the minority views quote Blackstone's Commentaries and Hale's Pleas of the Crown, concluding:

Thus it appears that the terms "crime" and "misdemeanor" merely indicate the different degrees of offenses against law—crime marking the felonious degree, misdemeanor denoting "all offenses inferior to felony." Both indicate indictable offenses. They are terms of well-established legal signification. There is nothing uncertain about them. The framers of the Constitution used these terms as terms of art, and we have no authority for expounding them beyond their true technical limits.

The views then go on to examine provisions of the Constitution to show that—

When the Senate is organized * * * as a high court of impeachment, it is simply a court of special criminal jurisdiction—nothing more, nothing less. It is bound by the rules which bind other courts. It is as much restrained by law as any other criminal court. It is not a tribunal above the law and without rule to guide it.

The views quote Burke, Blackstone, and Woodeson to show that this view is in accordance with the character of the House of Lords sitting as a court of impeachment, and continue:

If the Senate sitting as a high court of impeachment is not to be bound by the laws which bind other courts, why require the Senators to be put on oath or affirmation? If this court may declare anything a high crime or misdemeanor which may be presented as such by the House of Representatives, and pronounce judgment against a civil officer thereon, why swear the members of the court at all? The oath is not a solemn mockery. It is prescribed for some good purpose. What is it? The form of oath adopted by the Senate in Chase's case affords a very satisfactory answer, and it is, therefore, here quoted, as follows: "You solemnly swear or affirm, that in all things appertaining to the trial of the impeachment of ——— ———, you will do impartial justice according to the Constitution and laws of the United States." (Chase's Trial, vol. 1, p. 12.) This oath is very comprehensive. It covers the charge, the evidence, and all the rules thereof; the decisions upon all questions arising during the progress of the trial, and the final judgment. In all these several respects the members of the court are to be guided by the Constitution and laws of the United States. They can try upon no charges other than treason, bribery, or other high crimes and misdemeanors; and the offense charged must be known to the Constitution, or to the laws of the United States. The rules of evidence under and in pursuance of which crimes may be proved upon indictment in the courts of the United States are to be observed. The judgment "shall not extend further than a removal from office and disqualification to hold and enjoy any office of honor, trust, or profit under the United States." The office of the oath is to insure a strict observance of these requirements of the Constitution and the laws. This seems clear without further reference to other provisions of the Constitution; but it is proper that we should look at all of its clauses bearing upon the question under discussion.

The Constitution having created a court for the trial of impeachments, prescribed its jurisdiction and placed a limitation on its power to pronounce judgment, then declares that "the party convicted shall nevertheless be liable and subject to indictment, trial, judgment, and punishment, according to law." It would seem difficult, indeed, to misunderstand this language. A civil officer convicted on impeachment is, notwithstanding such conviction, still liable to a prosecution for the same offense in the courts of ordinary criminal jurisdiction. How can this be if his offense be not an indictable crime? The court of impeachment can not apply the usual statutory punishment. It can not go beyond removal from, and disqualification to hold, office under the United States. The enforcement of other penalties for the same criminal conduct is left to the criminal courts of the country, after conviction upon indictment. Is not this substantially a constitutional direction to the court of impeachment not to convict a civil officer of any crime or misdemeanor for which an indictment will not lie? This view of the question was very forcibly stated by Mr. Martin, in his argument in Chase's case, in these words: "The very clause in the Constitution, of itself, shows that it was intended the persons impeached and removed from office might still be indicted and punished for the same offense, else the provision would have been not only nugatory but a reflection on the enlightened body who framed the Constitution; since no person ever could have dreamed that a conviction on impeachment and a removal from office, in consequence, for one offense, could prevent the same person from being indicted and punished for another and different offense." (Chase's Trial, vol. 2, p. 137.) How can the force of this argument be avoided? Wherein does it lack the support of sound reason and good sense? But it does not rest merely upon the clauses of the Constitution above quoted; others, yet to be noticed, give it much additional strength, and these will now be examined.

The section of the Constitution securing the trial by jury reads as follows: "The trial of all crimes, except in cases of impeachment, shall be by jury." (Sec. 2, art. 3.) Can it be successfully claimed that the word "crimes," as here used, is

less comprehensive than it is where it occurs in section 4 of article 2? If not, then the crimes for which a civil officer may be impeached are the subjects of indictment or presentment; for such only can be tried by a jury. Any act which is a crime within the meaning of the last-named section is also a crime within the intent of the former, although the converse of this proposition is not true, as it is not every crime which a jury may try that will render a civil officer committing it liable to impeachment. For the latter purpose the crime must "have reference to public character and official duty." (Rawle on the Constitution, 204.) The plain inference to be drawn from the section is "that cases of impeachment are cases of trials for crimes."

Again, in that part of the Constitution which clothes the President with the power to grant pardons, it is said, "He shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment." (Art. 2, sec. 2.) What is the meaning of the term "offenses?" It can not mean less than such acts as render offenders liable to punishment, else why is a pardon necessary, or even desirable? No one needs a pardon who has not committed a crime. A pardon shields from or relieves of punishment. Punishment follows trial and conviction. Trial and conviction for crime can be had only for a violation of an existing law declaring the act done a crime. The term offenses, then, means crimes, in which, of course, is included misdemeanors. High crimes and misdemeanors are subject to two jurisdictions—first, in the ordinary criminal courts of the country; second, in the high court of impeachment. The same party, for the same acts, may be on trial in both tribunals at the same time. If convicted in both cases the President may pardon the criminal and relieve him of the consequences resulting from a conviction by the first-named jurisdiction, but the Constitution forbids his interference with the last. The grant of power and the exceptions are both in the same clause of the same section, and the fact that they are thus intimately associated shows that they relate to the same subjects—indictable offenses.

The views refer in this connection to a fact recorded in the Chase trial as significant:

Eight articles were preferred against him by the House of Representatives. It seems to have been admitted that all of the articles except the fifth charged him with criminal conduct. In regard to the fifth, his counsel made the point that it did not "charge in express terms some criminal intent on the respondent." The proof was as clear upon this point as it was upon the remaining seven. Thirty-four Senators voted on the several articles, and while the votes on seven of them ranged from 4 to 19 for conviction, every Senator answered "not guilty" on the fifth. It is fair to conclude, in view of the proof submitted in proof of the several articles, that the members of the court approved the position taken by the counsel of Chase on the trial.

The minority next examine the precedents, denying that either in this country or in England did they sustain the contention of the majority.

(*a*) As to precedents in this country.

The views discuss first the Blount case, saying of the charges that "they were undoubtedly regarded as indictable offenses;" but the court did not pass upon them, deciding that Blount was not a civil officer, and hence not within the jurisdiction of the court.

The Pickering case is next discussed, and after setting forth the charges the views take up the issue of insanity raised by Pickering's son, and say:

This issue was a grave and pertinent one, and yet the court, after deciding to entertain it, and proceeding to its trial, finally disposed of the case as though no such issue had been raised. This conduct of the court is both remarkable and discreditable; but not more so than its final action on the question of the guilt or innocence of the accused. Pickering was impeached for high crimes and misdemeanors. If convicted at all, the Constitution required that it should be for high crimes and misdemeanors, as there were no charges of treason or bribery in the case. In order that the guilt or innocence of the respondent should be directly passed upon by the court, without any improper evasion of its real and legal merits, Senator White moved that the "following question be put to each Member

upon each article of impeachment, viz, Is John Pickering, district judge of the district of New Hampshire, guilty of high crimes and misdemeanors upon the charges contained in the ——— article of impeachment, or not guilty?" The mover stated that he had borrowed the form of the question from the one used in the case of Warren Hastings. The question was fair in form, and presented the identical issue which the court was about to decide; but it did not suit the purposes of those who were determined to convict, and it was rejected by a vote of yeas 10, nays 18. Thereupon Senator Anderson moved the following form, viz, "Is John Pickering, district judge of the district of New Hampshire, guilty as charged in the ——— article of the impeachment exhibited against him by the House of Representatives?" This form was adopted by yeas 18, nays 9. (Ibid., 364.) So the court, after entertaining the plea of insanity and neglecting to decide it, on the foregoing evasive and unmeaning question, convicted Pickering on each article, and removed him from office; but this end was reached by a strict party vote. Senator Dayton said of the form of the question and the reason of its adoption: "They were simply to be allowed to vote whether Judge Pickering was guilty as charged—that is, guilty of the facts charged in each article—aye or no. If voted guilty of the facts, the sentence was to follow, without any previous question whether those facts amounted to a high crime or misdemeanor. The latent reason of this course was too obvious. There were members who were disposed to give sentence of removal against this unhappy judge upon the ground of the facts alleged and proved who could not, however, conscientiously vote that they amounted to high crimes and misdemeanors, especially when committed by a man proved at the very time to be insane, and to have been so ever since, even to the present moment." (Ibid., 365.) If this rule is to be followed, any civil officer may be impeached, convicted, and removed from office for acts entirely proper and strictly lawful. Who can wonder that members of the court denounced the whole proceeding as "a mere mockery of trial?" Surely the case reflects no credit on the Senate which tried it, and in one short year the members of the body seem to have arrived at the same conclusion; for, on the trial of Judge Chase, the form of the question adopted to be propounded to each member of the court was as follows, viz, "Mr. ———, how say you; is the respondent, Samuel Chase, guilty or not guilty of a high crime or misdemeanor, as charged in the ——— article of impeachment?" (Ibid., 2d sess., 8th Con., 664.) It is to be hoped that no one will ever quote the Pickering case as an authority to guide the House in presenting, or the Senate in trying, a case of impeachment. It decided nothing except that party prejudice can secure the conviction of an officer impeached in spite of law and evidence.

The case against Judge Chase is next reviewed at length:

The next case carried to the Senate by the House of Representatives has gone into history as one "without sufficient foundation in fact or law." (Hildreth's History of the United States, Vol. V, 254.) The case of Samuel Chase, a judge of the Supreme Court of the United States, is now referred to. Chase was impeached for high crimes and misdemeanors in eight articles. It is not necessary to set out the substance of these articles. One of them was founded in his conduct at the trial of John Fries for treason, before the circuit court of the United States at Philadelphia, in April and May, 1800—more than four years before his impeachment. Five of them were based on his conduct at the trial of James Thompson Callender "for printing and publishing, against the form of the act of Congress, a false, scandalous, and malicious libel," etc., "against John Adams, then President of the United States," etc. The remaining two rested on his charge to the grand jury in and for the district of Maryland, in May, 1803, and his refusal to discharge the grand jury in and for the district of Delaware, in June, 1900. The articles portrayed the conduct of Judge Chase in as offensive a manner as the committee could commend. The bitterness of Randolph appeared in every article, and the enemies of the accused felt confident of his conviction.

Chase answered minutely and elaborately to the several articles, and filed against each the following plea, viz: "And the said Samuel Chase, for plea to the said article of impeachment, saith that he is not guilty of any high crime or misdemeanor, as in and by said first article is alleged; and this he prays may be inquired of by this honorable court in such manner as law and justice shall seem to them to require." (Ibid., 117.) This was the issue on which the case went to trial. The result was the acquittal of Chase on each article.

This result was not owing to a failure of the evidence produced to support the facts alleged; for, so far as at least four of the articles are concerned, the allegations were supported in almost every particular; and had the same form of question been used on the conclusion of the trial as was adopted in the Pickering case, Chase doubtless would have been convicted. The questions propounded in both cases have already been quoted, and a mere glance at them will show how Pickering was convicted and Chase acquitted.

If this case establishes anything, it is that an impeachment can not be supported by any act which falls short of an indictable crime or misdemeanor. This point was urged by the able counsel for Chase with great ability and pertinacity; and the force with which it was presented drove the managers of the House of Representatives to seek shelter under that clause of the Constitution which says: "The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior." (Manager Nicholson's speech, ibid., 597.) This provision, respecting the tenure of the judicial office, it was claimed, would authorize the impeachment of a judge for misbehavior which would not support an indictment. The court did not approve this position, and very properly, for as the Constitution provides that civil officers may be impeached for high crimes or misdemeanors, and nothing is known to the law as a high crime or misdemeanor which is not indictable, of course an impeachment for anything else would be improper.

If the position assumed by the managers in the Chase case, that a judge may be impeached for mere misbehavior in office not amounting to an indictable offense, because such conduct is a breach of the tenure by which the judicial office is held, is correct, what would be its effect on the case which this committee now have in hand? If resort must be had to the clause of the Constitution which prescribes the tenure of the judicial office to justify an impeachment of a judge on account of conduct not known to the law as a crime, does it not reach too far to serve the purposes of those who would impeach the President of the United States because of acts for which he may not be indicted? The President holds his office by a different tenure. The Constitution says: "The executive power shall be vested in a President of the United States of America. He shall hold his office during the term of four years." (Art. 2, sec. 1.) This provision of the Constitution stands firmly in the way of those persons who would tone down the term misdemeanor below the indictable standard by resorting to the clause fixing the judicial tenure. Judges hold their respective offices during good behavior; the President holds for a definite time—four years. If, therefore, the argument proves anything in the former case, it proves too much for the latter. If a judge may be impeached for nonindictable conduct, because he holds his office during good behavior, it follows logically that an officer who holds for a term of years can not be so impeached. This exposes the fallacy of the entire argument.

The case of Judge Peck is commented on only so far as to record that the court sustained the respondent's contention that his conduct was proper, lawful, and right.

As to the case of Judge Humphries, the views say:

Humphries was convicted, as it was right he should be. He was charged with a crime against the known law of the land; he was a traitor against the Government of the United States.

(*b*) As to the English precedents.

At the outset of this branch of the inquiry, the minority say:

Cases can doubtless be found wherein Parliament has exercised this high power in a most extraordinary manner and convicted persons upon charges not indictable. The power of Parliament over the subject is far greater than that which the two Houses of Congress can exercise over the citizen. * * * In times of high party excitement this power has been in some cases most shamefully and oppressively exercised.

Then follows a review of some of these cases, concluding:

Individual resentment, partisan prejudice and excitement, and desire for revenge, instigated very many of the English impeachment cases. This is very well illustrated in the speech of Lord Carnarvon on the trial of the Earl of Danby—a speech that forms one of the footprints in the history of parliamentary impeach-

ments which should ever remind the people of this nation that great caution should be used in the selection of English precedents. Carnarvon said: "My lords, I understand but little of Latin, but a good deal of English, and not a little of English history, from which I have learned the mischiefs of such kind of prosecutions as these, and the ill fate of the prosecutors. I could bring many instances, and those ancient; but, my lords, I shall go no further than the latter end of Queen Elizabeth's reign, at which time the Earl of Essex was run down by Sir Walter Raleigh. My Lord Bacon, he ran down Sir Walter Raleigh, and your lordships know what became of my Lord Bacon. The Duke of Buckingham, he ran down my Lord Bacon, and your lordships know what happened to the Duke of Buckingham. Sir Thomas Wentworth, afterwards Earl of Stafford, ran down the Duke of Buckingham, and you all know what became of him. Sir Harry Vane, he ran down the Earl of Stafford, and your lordships know what became of Sir Harry Vane. Chancellor Hyde (Lord Clarendon) ran down Sir Harry Vane, and your lordships know what became of the chancellor. Sir Thomas Osborn, now Earl of Danby, ran down Chancellor Hyde; but what will come of the Earl of Danby your lordships best can tell. But let me see that man that dare run the Earl of Danby down, and we shall soon see what will become of him." (11 Howell, S. T., 632, 633.)

Did chance weld the chain which so closely holds these names together in the history of parliamentary impeachment? Was it not rather the natural product of misused power? The officer or party who misuses power may be considered fortunate indeed if the wheel of fortune returns no retribution.

The minority then go on to discuss the "well-considered cases of parliamentary impeachments," those of the Earl of Macclesfield, Warren Hastings, and of Viscount Melville, and to deduce therefrom support for the view which they take. In their opinion these cases should be followed, and they say:

The idea that the House of Representatives may impeach a civil officer of the United States for any and every act for which a parliamentary precedent can be found is too preposterous to be seriously considered.

The minority views then take up the remaining branch of the question:

If only indictable crimes and misdemeanors are impeachable, by what law must they be ascertained? Must it be by the law of the United States, of the States, the common law, or by any or all of these?

In the case of the United States *v.* Hudson and Goodwin (7 Cranch, 32) it was held that "the legislative authority must first make an act a crime, affix a punishment to it, and declare the court that shall have jurisdiction of the offense" before the courts of the United States can exercise jurisdiction over it. This doctrine was affirmed by the case of the United States *v.* Coolidge et al. (1 Wheaton, 415), and Chief Justice Marshall, in delivering the opinion of the court in Ex parte Ballman and Swartwout (4 Cranch, 95), said: "Courts which originate in the common law possess a jurisdiction which must be regulated by the common law until some statute shall change their established principles; but courts which are created by written law, and whose jurisdiction is defined by written law can not transcend that jurisdiction." And it was in following these cases that Justice McLean held, in the United States *v.* Lancaster (2 McLean's R., 433), that "the Federal Government has no jurisdiction of offenses at common law. Even in civil cases the Federal Government follows the rule of the common law as adopted by the States, respectively. It can exercise no criminal jurisdiction which is not given by statute, nor punish any act, criminally, except as the statute provides." The same doctrine is followed in 1 Wash. C. C. R., 84; 2 Brock, 90; 1 Wood and Minot, 401; 3 Howard, 103; 12 Peters, 654; 4 Dallas, 10, and note; 1 Kent's Com., 354; Sedgwick on Statutory and Constitutional Law, 17; and Wharton, in reviewing this question, says: "However this may be on the merits, the line of recent decisions puts it beyond doubt that the Federal courts will not take jurisdiction over any crimes which have not been placed directly under their control by act of Congress." (Am. Criminal Law, 174.)

Are these authorities founded in reason? If they are, why should they not be followed by the high court of impeachment, as well as other courts of the United States? The principle on which they proceed is that nothing is a crime against the United States which has not been declared so to be by the sovereignty of the

Republic; that only the laws of the United States can be enforced in the courts of the United States; that the United States do what other civilized and Christian governments do—enforce their own laws, for such only are rules of conduct prescribed for their own citizens. This seems to be reasonable; and if it is so, it would be dicult to find an excuse, or form a pretext, for not applying it to the tribunal intrusted with the jurisdiction to try cases of impeachment.

But it is claimed that the high court of impeachment is exempt from this jurisdictional limitation by the terms of the Constitution itself; that the Constitution establishes the courts, confers its jurisdiction, and includes within it common-law crimes, inasmuch as it says: "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." This, it is said, opens the broad field of the common law for the ascertainment of offenses for the commission of which civil officers may be impeached; that the terms treason, bribery, and other high-crimes and misdemeanors are common-law terms, and are to be understood in the sense given them by the common law; that, as used in the Constitution, their import is the same as at common law. Is this true to the extent stated? Suppose the impeachment is to be for treason and some common-law treason is attempted to be set up, what would be the result? The Constitution says: "Treason against the United States shall consist only in levying war against them or in adhering to their enemies, giving them aid and comfort." This puts an end to all attempts to impeach a civil officer of the United States for treason at common law. Then the term treason, as used in the Constitution, although it be a common-law term, is shorn of its common-law signification.

But it may be said that the term "bribery" is not defined in the Constitution, and therefore a civil officer may be impeached for bribery at common law. If this be true, why is it true? Bribery was, at the time the Constitution was formed, a crime known not only to the common law, but also to the laws of each of the thirteen States participating in the organization of the Government of the United States. It was selected by name because it affected the administration of the affairs of the Government in all of its departments—executive, legislative, and judicial—as treason touched the very life of the nation. Being thus selected by name, recourse may be had to the common law to ascertain the constituent elements of the crime thus named. "Courts may properly resort to the common law to aid in giving construction to words used in the Constitution" (3 Wheaton, 610; 1 Wood. and Minot, 448); and as the Constitution used the word bribery, resort can be had to the common law to determine its meaning. Thus, the framers of the Constitution placed within the jurisdiction of the high court of impeachment the two crimes which peculiarly affect the life and well-being of the nation—both being specifically named.

How it it with other offenses? The Constitution says: "or other high crimes and misdemeanors." What other high crimes and misdemeanors? To what extent can the common law aid us in answering this question? If we go to the common law to find what a crime is, we discover that it is some act or omission in violation of law which may be punished in the mode prescribed by law. This is the general significance of the term crime at common law. It is not a naming of a specific offense. If the Constitution had named murder, arson, burglary, larceny, or any other crime by its title the common law could have sided us in arriving at its meaning, for all these, and a multitude of others, are crimes at common law. After wandering over the entire field of common-law crimes, how are we to tell those which will support an impeachment? Learned writers assert that those offenses which may be committed by any person—such as murder, burglary, robbery, etc.—are not the subjects of impeachment. (Rawle on the Constitution, 204.) But these are all crimes, high crimes, and they meet us at every step in our gropings among the winding passages of the common law engaged in vain endeavors to determine what the Constitution means by the terms of high crimes and misdemeanors. Can any mode of escape from this perplexity be devised except that which shall affirm that the phrase "or other high crimes and misdemeanors" means such other high crimes and misdemeanors as may be declared by the lawmaking power of the United States? It is unreasonable to conclude that a civil officer can be impeached only for some crime or misdemeanor named by the Constitution or laws of the United States? This is the course pursued toward the citizen in private life. Why should greater uncertainty attend the public officer?

It will not do to answer these suggestions by stating hypothetical cases and affirming that an officer who should do this, that, or another thing ought to be impeached, and that it would be unsafe for the nation to permit such conduct to pass unchallenged and unpunished. The obvious answer to all this is that everything which ought to be made a crime can be made so by legislation. The power is ample and the machinery perfect for all such work. If they are not used, the fault may not lie at the door of the delinquent officer. The statement of a supposed case of itself proves that a remedy may be provided. The remedy is to prohibit the doing of the thing supposed, and declaring its commission a crime. A case can not be stated which will not suggest its own remedy. Every difficulty may be surmounted by appropriate legislation; and the question may very well be asked, What right has the House of Representatives and the Senate of the United States to sleep on their undisputed legislative powers and then resort to the common law of England for the punishment of civil officers, when no civil court of the United States can punish a citizen or foreigner for any crime from the highest to the lowest degree, except it be first prescribed by an act of Congress? The decisions of the courts of the United States that they have jurisdiction of no crimes not found in the statutes of Congress give great force to the statement of Mr. Rawle in his work on the Constitution, that "The doctrine that there is no law of crimes except that founded in statutes, renders impeachment a nullity in all cases except the two expressly mentioned in the Constitution—treason and bribery—until Congress shall pass laws declaring what shall constitute the other high crimes and misdemeanors." (P. 265.)

Rawle combatted the doctrine of the decisions referred to, and this it is which gives peculiar force to the language just quoted from him; for he had accepted the doctrine of the decision in the case of the United States *v.* Hudson and Goodwin, it is perfectly evident that he would have declared the impeaching power inoperative, except so far as it relates to treason and bribery, until Congress, by legislation, should give it vitality.

Story also combatted this doctrine and denied the correctness of the decisions upon which it is based. It was this which gave direction to those parts of his Commentaries on the Constitution so freely quoted by those who claim that the power of impeachment is unlimited. He cites approvingly the works of Rawle above quoted. (Sec. 796.) He affirmed that the courts of the United States have jurisdiction of common-law crimes; but the decisions are against him. He states in his Commentaries on the Constitution that impeachments will lie for non-indictable offenses; but the authorities which he cites are against him. He cites Rawle; but it has already appeared how that author surrenders the entire position. He quotes 2 Woodeson, Lecture 40, but in this very lecture Woodeson says: "Impeachments, as we have seen, are founded and proceed upon the laws in being. A more extraordinary course is sometimes adopted. New and occasional laws have been passed for the punishment of offenders. Such ordinances are called bills of attainder and bills of pains and penalties." (2 Woodeson, 620.)

Offenses known to the laws in being are indictable; and the Congress of the United States may not resort to bills of attainder and bills of pains and penalties; these are forbidden by the Constitution. But to what laws must the offenses be known? To the law of the sovereignty against which they are alleged to have been committed.

Is there any foundation on which to rest a contrary doctrine? May not the case be stated as a syllogism thus: No officer is subject to the impeaching power for the commission of an act which is not indictable; common-law crimes are not indictable in the courts of the United States; ergo, common-law crimes will not sustain an impeachment by the House of Representatives of the United States?

The case of the United States *v.* Hudson and Goodwin was decided by the Supreme Court of the United States in February, 1812, and its doctrine has been adhered to from that day to the present time. It is of some importance to remember this date, as it is subsequent to the impeachment of Blount, Pickering, and Chase, which may account for the failure to raise the question in those cases: "Can a civil officer be impeached for an offense which is not indictable under the laws and in the courts of the United States?" It was not necessary to raise it in the Peck case, for his defense, as has already been stated, was a justification of his conduct, while the Humphreys case was founded on statutory offenses, and no defense was made.

2407. The first attempt to impeach President Johnson, continued.

The first attempt to impeach President Johnson continued over a recess of the Congress.

In the first imquiry the House decided not to impeach President Johnson.

At the time of the impeachment of President Johnson it was conceded that he was entitled to exercise the duties of the office until convicted by the Senate.

Reference to argument of Senator Charles Sumner that President Johnson should be suspended during impeachment proceedings.

An instance where the power of obstruction by dilatory motions was used to compel a direct vote on an issue.

On December 6, 1867,[25] at the next session of Congress, the House took up for consideration the resolution proposed by the majority of the committee:

Resolved, That Andrew Johnson, President of the United States, be impeached of high crimes and misdemeanors.

The debate was confined to two speeches, one by Mr. Boutwell in favor of the resolution and one by Mr. Wilson against it.[26] While the speakers discussed both the law and the facts, Mr. Boutwell laid greatest stress on the law, as he conceded that—

If the theory of the law submitted by the minority of the committee be in the judgment of this House a true theory, then the majority have no case whatever.

It appears also that some question had been raised as to the effect of impeachment on the duties of the office of President, and Mr. Boutwell said:

After much deliberation I can not doubt the soundness of the opinion that the President, even when impeached by this House, is still entitled to his office until he has been convicted by the Senate.[27]

At the close of his speech, Mr. Wilson moved to lay the resolution on the table. As the effect of this motion was to prevent debate and also a direct vote on the issue, dilatory proceedings were begun by those favoring impeachment and continued until December 7, when Mr. Wilson withdrew his motion to lay on the table as a compromise step and thus conceded to the obstructors their demand for a direct vote.

On the question on the resolution, "Will the House agree thereto?" there appeared—yeas 57, nays 108.[28]

So the first attempt to impeach the President failed.

Although debate was not permitted generally when the resolution was under consideration, Members availed themselves of the freedom of debate in Committee of the Whole House on the state of the Union, and on December 13 [29] the subject was discussed at length by several Members.

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[25] Second session Fortieth Congress, Journal, pp. 42, 44–54; Globe, pp. 61, 65–68.
[26] See Appendix of Globe, pp. 54, 62.
[27] Globe, appendix, p. 54. This view was sustained by the event. The House impeached President Johnson on February 24, 1868, and the trial ended May 26, 1868. During that time he continued in the ordinary performance of his duties, as is shown by his communications to the House. (See House Journal, pp. 515, 572, 655, second session Fortieth Congress.) On March 5, 1868 (second session Fortieth Congress, Globe, pp. 1676, 1677), Mr. Charles Sumner, of Massachusetts, in the Senate made an interesting and elaborate argument to show that it was the intention of the framers of the Constitution that the President should be suspended during impeachment proceedings.
[28] Journal, p. 53; Globe, p. 68.
[29] Globe, pp. 172–193.

The Impeachment and Trial of the President*

2408. The impeachment and trial of Andrew Johnson, President of the United States.

The impeachment of President Johnson was set in motion by a resolution authorizing a general investigation as to the execution of the laws.

The House referred to the Committee on Reconstruction the evidence taken by the Judiciary Committee in the first attempt to impeach President Johnson.

A proposition to impeach President Johnson was held to be privileged, although at this session a similar resolution had been considered and negatived.

Secretary Stanton communicated directly to the House the fact of the President's attempt to remove him.

The first attempt to impeach Andrew Johnson, President of the United States, failed on December 7, 1867.[1] Thereafter the subject was debated at length on December 13 [2] in the Committee of the Whole House on the state of the Union, but not with any proposition for action pending, and rather with reference to the questions of law and fact raised in the preceding discussions.

*Hinds' Precedents, vol. 3, p. 844 (1907).
[1] Second session Fortieth Congress, Journal, p. 53; Globe, p. 68.
[2] Globe, pp. 172–193.

On January 22, 1868,[3] Mr. Rufus P. Spalding, of Ohio, moved that the rules be suspended in order that he might present the following resolution:

Resolved, That the Committee on Reconstruction be authorized to inquire what combinations have been made or attempted to be made to obstruct the due execution of the laws, and to that end the committee have power to send for persons and papers and to examine witnesses on oath, and report to this House what action, if any, they may deem necessary, and that said committee have leave to report at any time.

The motion was agreed to, yeas 103, nays 37; and the resolution being before the House, motions to lay it on the table, to fix the day to which the House should stand adjourned, and to adjourn were successively disagreed to. Then, under operation of the previous question, the resolution was agreed to, yeas 99, nays 31.

On February 10[4] Mr. Thaddeus Stevens, of Pennsylvania, by unanimous consent, submitted the following resolution; which was agreed to by the House:

Resolved, That the evidence taken on impeachment by the Committee on the Judiciary,[5] be referred to the Committee on Reconstruction, and that the committee have leave to report at any time.

On February 21[6] the Speaker laid before the House the following communication:

WAR DEPARTMENT,
Washington City, February 21, 1868.

SIR: General Thomas has just delivered to me a copy of the inclosed order, which you will please communicate to the House of Representatives.

E. M. STANTON, *Secretary of War.*

EXECUTIVE MANSION,
Washington, D.C., February 21, 1868.

To Hon. Edwin M. Stanton, Washington, D.C.

Hon. SCHUYLER COLFAX,
Speaker House of Representatives.

SIR: By virtue of the power and authority vested in me, as President, by the Constitution and laws of the United States, you are hereby removed from office as Secretary for the Department of War, and your functions as such will terminate upon the receipt of this communication.

You will transfer to Bvt. Maj. Gen. Lorenzo Thomas, Adjutant-General of the Army, who has this day been authorized and empowered to act as Secretary of War ad interim, all records, books, papers, and other public property now in your custody and charge.

Respectfully yours,

ANDREW JOHNSON.

Mr. Elihu B. Washburne, of Illinois, moved that the communication be referred to the Committee on Reconstruction. This motion was agreed to without division, although there were suggestions that the letter should go to the Judiciary Committee or to a select committee.

On the same day, and thereafter,[7] Mr. John Covode, of Pennsylvania, rising to a question of privilege, presented this resolution:

Resolved, That Andrew Johnson, President of the United States, be impeached of high crimes and misdemeanors.

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[3] Journal, pp. 259–262; Globe, pp. 784, 785.
[4] Journal, p. 330; Globe, p. 1087.
[5] It was on this evidence that the first attempt to impeach had been made.
[6] Journal, p. 382; Globe, pp. 1326, 1327.
[7] Journal, p. 385; Globe, pp. 1329, 1330.

Mr. Fernando Wood, of New York, having objected, the Speaker[8] said:

It is a privileged question.

Then, on motion of Mr. George S. Boutwell, of Massachusetts, the resolution was referred to the Committee on Reconstruction.

2409. President Johnson's impeachment, continued.

The second and successful proposition to impeach President Johnson was reported from the Committee on Reconstruction.

The second investigation of the conduct of President Johnson was ex parte.

The full report justifying the proposition to impeach President Johnson.

On February 22[9] Mr. Thaddeus Stevens, of Pennsylvania, presented from the Committee on Reconstruction the following report:

That in addition to the papers referred to the committee, the committee find that the President, on the 21st day of February, 1868, signed and issued a commission or letter of authority to one Lorenzo Thomas, directing and authorizing said Thomas to act as Secretary of War ad interim, and to take possession of the books, records, and papers, and other public property in the War Department, of which the following is a copy:

EXECUTIVE MANSION,
Washington, February 21, 1868.

SIR: Hon. Edwin M. Stanton having been this day removed from office as Secretary for the Department of War, you are hereby authorized and empowered to act as Secretary of War ad interim, and will immediately enter upon the discharge of the duties pertaining to that office. Mr. Stanton has been instructed to transfer to you all the records, books, papers, and other public property now in his custody and charge.

Respectfully yours,

ANDREW JOHNSON.

To Brevet Maj. Gen. Lorenzo Thomas,
Adjutant-General of the United States Army; Washington, D.C.
Official copy respectfully furnished to Hon. Edwin M. Stanton.

L. THOMAS,
Secretary of War ad interim.

Upon the evidence collected by the committee, which is herewith presented, and in virtue of the powers with which they have been invested by the House, they are of the opinion that Andrew Johnson, President of the United States, be impeached of high crimes and misdemeanors. They therefore recommend to the House the adoption of the accompanying resolution.

Resolved, That Andrew Johnson, President of the United States, be impeached of high crimes and misdemeanors in office.

This report was signed by Messrs. Stevens, George S. Boutwell, of Massachusetts, John A. Bingham, of Ohio, C. T. Hulburd, of New York, John F. Farnsworth, of Illinois, F. C. Beaman, of Michigan, and H. E. Paine, of Wisconsin. There were no minority views, Mr. James Brooks, of New York, who dissented, stating that he had not had the time to prepare them. Mr. James B. Beck, of Kentucky, also a member of the committee, dissented.

2410. President Johonson's impeachment, continued.

The committee reporting the second proposition to impeach President Johnson disagreed as to the grounds thereof.

The question whether impeachment must be confined to indictable offenses was in issue as to the second report favoring impeachment of President Johnson.

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[8] Schuyler Colfax, of Indiana, Speaker.
[9] Journal, p. 390; Globe, p. 1336.

Argument of Mr. Thaddeus Stevens that impeachment is a purely political proceeding.

The resolution was debated at length on February 22 and 24.[10] It appears from this debate that the specific act most relied upon by the committee was violation of the law known as the tenure-of-office act,[11] and which provided in its first section:

That every person holding any civil office to which he has been appointed by and with the advice and consent of the Senate, and every person who shall hereafter be appointed to any office, and shall become duly qualified to act therein, is, and shall be, entitled to hold such office until a successor shall have been in like manner appointed and duly qualified, except as herein otherwise provided: *Provided*, That the Secretaries of State, of the Treasury, of War, of the Navy, and of the Interior, the Postmaster-General, and the Attorney General shall hold their offices respectively for and during the term of the President by whom they have been appointed, and for one month thereafter, subject to removal by and with the advice and consent of the Senate.

And in its sixth section:

That every removal, appointment, or employment made, had, or exercised contrary to the provisions of this act, and the making, signing, sealing, countersigning, or issuing of any commission or letter of authority for or in respect to any such appointment or employment, shall be deemed and are hereby declared to be high misdemeanors, and upon trial and conviction thereof every person guilty thereof shall be punished by a fine not exceeding $10,000, or by imprisonment not exceeding five years, or both said punishments, in the discretion of the court.

It was urged generally that the removal of Mr. Stanton and the appointment of General Thomas ad interim constituted specific violations of this law. Members of the House who had by their votes assisted in defeating the first attempt at impeachment, supported the pending resolution on the ground that it was based on an offense indictable under Federal law. Thus, Mr. James F. Wilson, of Iowa, who had submitted the minority views on which the defeat of the former attempt was based, said [12] in this case:

The considerations which weighed upon my mind and molded my conduct in the case with which the Committee on the Judiciary of this House was charged are not to be found in the present case. The logic of the former case is made plain, not to say perfect, by its sequence in the present one. The President was working to an end suspected by others, known to himself. His then means were not known to the law as crimes or misdemeanors, either at common law or by statute, and we so pronounced. He mistook our judgment for cowardice, and worked on until he has presented to us, as a sequence, a high misdemeanor known to the law and defined by statute.

Others who had voted against impeachment in the former instance expressed similar views. Mr. Thaddeus Stevens, of Pennsylvania, in closing the debate,[13] indicated, however, that he did not consider the case as narrowed to this point alone:

The charges, so far as I shall discuss them, are few and distinct. Andrew Johnson is charged with attempting to usurp the powers of other branches of the Government; with attempting to obstruct and resist the execution of the law; with misprision of bribery; and with the open violation of laws which declare his acts misdemeanors and subject him to fine and imprisonment; and with removing from office the Secretary of War during the session of the Senate without the advice or consent of the Senate; and with violating the sixth section of the act entitled "An act regulating the tenure of certain civil offices." There are other offenses charged in the papers referred to the committee which I may consider more by themselves.

[10] Globe, pp. 1336, 1360, 1382, 1393.
[11] Act of March 2, 1867, 14 Stat. L., p. 430.
[12] Globe, pp. 1386, 1387.
[13] Globe, p. 1399.

In order to sustain impeachment under our Constitution I do not hold that it is necessary to prove a crime as an indictable offense, or any act malum in se. I agree with the distinguished gentleman from Pennsylvania, on the other side of the House, who holds this to be a purely political proceeding. It is intended as a remedy for malfeasance in office and to prevent the continuance thereof. Beyond that, it is not intended as a personal punishment for past offenses or for future example.

Impeachment under our Constitution is very different from impeachment under the English law. The framers of our Constitution did not rely for safety upon the avenging dagger of a Brutus, but provided peaceful remedies which should prevent that necessity. England had two systems of jurisprudence—one for the trial and punishment of common offenders, and one for the trial of men in higher stations, whom it was found difficult to convict before the ordinary tribunals. This latter proceeding was by impeachment or by bills of attainder, generally practiced to punish official malefactors, but the system soon degenerated into political and personal persecution, and men were tried, condemned, and executed by this court from malignant motives. Such was the condition of the English laws when our Constitution was framed, and the convention determined to provide against the abuse of that high power, so that revenge and punishment should not be inflicted upon political or personal enemies. Here the whole punishment was made to consist in removal from office, and bills of attainder were wholly prohibited. We are to treat this question, then, as wholly political, in which, if an officer of the Government abuse his trust or attempt to pervert it to improper purposes, whatever might be his motives, he becomes subject to impeachment and removal from office. The offense being indictable does not prevent impeachment, but is not necessary to sustain it. (See Story's Commentaries, Curtis on the Constitution, Madison, and others.) Such is the opinion of our elementary writers, nor can any case of impeachment tried in this country be found where any attempt was made to prove the offense criminal and indictable.

2411. President Johnson's impeachment, continued.

Discussion as to whether President Johnson was justified in attempting to test the constitutionality of the tenure-of-office law.

It was urged against the proposed resolution that the tenure-of-office act was unconstitutional, and therefore that the President had committed no specific violation of law. This view was set forth [14] most forcibly by Mr. James B. Beck, of Kentucky, a member of the Committee on Reconstruction:

All questions growing out of the combinations and conspiracies lately charged upon the President were ruled by the Reconstruction Committee to be insufficient and were not brought before this House. And the sole question now before us is, Is there anything in this last act of the President removing Mr. Stanton and appointing Adjutant-General Thomas Secretary of War ad interim to justify his impeachment by this House?

I maintain that the President of the United States is in duty bound to test the legality of every law which he thinks interferes with his rights and powers as the Chief Magistrate of this nation. Whenever he has powers conferred upon him by the Constitution of the United States, and an act of Congress undertakes to deprive him of those powers or any of them, he would be false to his trust as the Chief Executive of this nation, false to the interests of the people whom he represents, if he did not by every means in his power seek to test the constitutionality of that law, and to take whatever steps were necessary and proper to have it tested by the highest tribunal in the land, and to ascertain whether he has a right under the Constitution to do what he claims the right to do, or whether Congress has the right to deprive him of the powers which he claims have been vested in him by the Constitution of the United States, and that is all that he proposes to do in this case.

Now, if that is the object, and the only object, of the President, as I contend the facts show, then I can hardly bring myself to believe that any set of sane men can seriously entertain the opinion that in anything the President has done in the

[14] Globe, pp. 1849–1851.

removal of Mr. Stanton he has been guilty of either a high crime or misdemeanor. But "whom the gods wish to destroy they first make mad," and if ever a party was stricken with judicial madness and blindness the action of this party now proves that they are the victims of it.

That the President should be considered guilty of a high crime or misdemeanor for desiring and attempting to bring to the test of judicial decision one of the powers with which he considers that the Constitution has clothed him, and of which power an act of Congress has attempted to divest him, and that, too, in regard to an officer who agrees with him in regard to that constitutional power, seems to me an idea too preposterous to be entertained outside of a lunatic asylum.

The humblest citizen has the undoubted right to try judicially his constitutional rights. In regard to an officer whose office is created by the Constitution it is not only the right but the official duty of the President to bring to the test of judicial decision every power of which Congress endeavors to deprive him and which he believes is vested in him by the Constitution. He can not obey the Constitution nor faithfully fulfill his oath of office without vindicating in a legal, orderly, and judicial mode those powers. A void act of Congress is no excuse before a court or even before the bar of enlightened public opinion for a failure to attempt in a constitutional, legal, and orderly manner to fulfill his constitutional duties. If, therefore, the President is guilty of a crime, that crime consists in his believing that the tenure-of-office bill is unconstitutional or that it does not apply to the case of Mr. Stanton; for if he does so believe it is a duty he can not, without violating his oath, decline to bring to the test of judicial decision whenever the duties of his office require him to remove an officer under his constitutional authority.

Mr. Beck then quoted Madison, Story, and Kent, and cited the attitude of Mr. Stanton himself, at the time the President declined to approve the tenure-of-office act, to show that by the Constitution the right to remove executive officers was vested solely in the President, and that he could not be deprived of this power by an act of Congress.

In opposition to this view it was urged,[25] in the first place, that on the day before this report was made in the House the Senate had solemnly passed on the question of prerogative by agreeing to the following:

Whereas the Senate have read and considered the communication of the President, stating that he had removed Edwin M. Stanton, Secretary of War, and had designated the Adjutant-General of the Army to act as Secretary of War ad interim: Therefore,

Resolved by the Senate of the United States, That under the Constitution and laws of the United States the President has no power to remove the Secretary of War and designate any other officer to perform the duties of that officer ad interim.

Further, it was urged:[26]

The Constitution does not make him a judge of the law, but an executor thereof, and he is bound to execute that which the law-making power decrees to be the law of the land. Whatever may be his opinion of the law as a mere individual member of the national family, he is bound to yield it to that higher duty which the Constitution imposes on him as an officer of the state. If his conscience forbid, he may resign the trust, but he has no right to retain the power of a public officer and subordinate that to the judgment of a mere individual member of the community or nation which has clothed him with executive power for the enforcement of its laws. As an individual he may be justified in an assumption of the risks attendant upon a disobedience of the law; as a public officer no such plea can be properly entered in his behalf, for he is not only sworn to execute the law, but he also possesses the right of resignation. If his conscience will not permit him to execute a given law, he may resign his trust, and leave to his successor the performance of a duty which his judgment, as an individual, will not surrender to his obligations as a public officer. A willingness to submit to the penalty prescribed for the violation of a law may, to some extent, excuse disobedience on the part of a private citizen, and at the same time avail nothing to the public officer. The latter may at any time, by resignation, become a private citizen, but the former can not become a public

[25] Globe, p. 1841.
[26] By Mr. James F. Wilson, of Iowa, Globe, p. 1887.

officer in this country except by the suffrages of his fellow-citizens. If he accepts the result of their suffrages, he merges his individuality into that official creature which binds itself by an oath as an executive officer to do that which, as a mere individual, he may not believe to be just, right, or constitutional. Such an acceptance removes him from the sphere of the right of private judgment to the plane of the public officer, and binds him to observe the law, his judgment as an individual to the contrary notwithstanding.

The Constitution invests the President with executive power in order that he may "take care that the laws be faithfully executed." Every abuse of this power, whether it be by an improper exercise of it or by neglect or refusal to exercise it at all, is a breach of official duty. But it is not every breach of official duty that can be charged as a crime or misdemeanor against the delinquent officer. Whatever doubt may have arisen in other cases of the criminal character of the official conduct involved in them, the one we are now considering presents no basis on which to rest a doubt. Deliberately, not to say defiantly, the President has violated a penal statute of the United States, and has thereby committed a high misdemeanor which the law says "shall be punished by a fine not exceeding $10,000, or by imprisonment not exceeding five years, or both said punishments, in the discretion of the court." (Act of March 2, 1847, sec. 6.) All of the circumstances attendant upon this case show that the President's action was deliberate and willful. * * *

Mr. Speaker, it has been urged in this debate that the President's sole object is to secure a judgment of the courts as to the constitutionality of the act regulating the tenure of certain civil offices. Such an intent will not justify the commission of a high crime or misdemeanor. Suppose the courts should hold the act to be constitutional, would the fact that his intent was to have that question decided be a good plea to an indictment for a violation of its provisions? Who is so insane as to assert so preposterous a proposition? Whoever acts in the way and for the purpose suggested does it at his peril. The work belongs to the President in this case, not to the law. This plea in his defense demonstrates that his action was not the result of inadvertence or of mistaken judgment, and that it is the fruit of cool calculation and deliberate purpose. He committed a high misdemeanor in order to secure a judgment of the court.

2412. President Johnson's impeachment, continued.

On the report from the Committee on Reconstruction the House voted the impeachment of President Johnson.

Forms of resolutions directing the carrying of the impeachment of President Johnson to the Senate.

The House authorized a committee of seven to prepare articles impeaching President Johnson, with power to compel testimony.

The impeachment of President Johnson was carried to the Senate by a committee of two.

The Speaker appointed the committee to carry the impeachment of President Johnson to the Senate from those favoring impeachment and from the majority party.

The Speaker appointed the committee to draw articles impeaching President Johnson from those favoring impeachment and from the majority party.

After full debate, on February 24,[17] the question was taken on the resolution proposed by the committee, "Will the House agree thereto?" and there appeared yeas 128, nays 47.

So the House determined upon the impeachment of the President.

Immediately thereafter Mr. Thaddeus Stevens proposed the following:

Resolved, That a committee of two be appointed to go to the Senate and at the bar thereof, in the name of the House of Representatives and of all the people of the United States, to impeach Andrew Johnson, President of the United States, of high crimes and misdemeanors in office, and acquaint the Senate that the House

[17] Journal, p. 392; Globe, p. 1400.
[18] Journal, pp. 393, 396; Globe, pp. 1400–1402.
[19] Senate Journal, p. 217; Globe, p. 1403.

of Representatives will in due time exhibit particular articles of impeachment against him and make good the same; and that the committee do demand that the Senate take order for the appearance of the said Andrew Johnson to answer to said impeachment.

2. *Resolved*, That a committee of seven be appointed to prepare and report articles of impeachment against Andrew Johnson, President of the United States, with power to send for persons, papers, and records, and to take testimony under oath.

After an attempted obstruction had been prevented by the adoption, under suspension of the rules, of an order preventing dilatory motions, the House agreed to the resolutions by a vote of yeas 124, nays 42.[18]

The Speaker announced as the committee under the first resolution Messrs. Thaddeus Stevens, of Pennsylvania, and John A. Bingham, of Ohio. Both were members of the Committee on Reconstruction and had signed the report, and both belonged to the majority party in the House.

As the committee under the second resolution the Speaker announced Messrs. George S. Boutwell, of Massachusetts, Thaddeus Stevens, of Pennsylavnia, John A. Bingham, of Ohio, James F. Wilson, of Iowa, John A. Logan, of Illinois, George W. Julian, of Indiana, and Hamilton Ward, of New York. All of these belonged to the majority party in the House and had voted for the impeachment. The first three were members of the Committee on Reconstruction.

2413. President Johnson's impeachment, continued.

The ceremonies of presenting the impeachment of President Johnson at the bar of the Senate.

A message was sent to inform the Senate that a committee would present the impeachment of President Johnson.

Form of declaration by the Chairman of the House committee in presenting the impeachment of President Johnson in the Senate.

The message of the House impeaching President Johnson was referred to a committee of seven Senators appointed by the Chair.

The Senate received the message impeaching President Johnson in its legislative capacity and not as a court.

The committee having impeached President Johnson, returned to the House and reported orally in the usual form.

On February 25,[19] in the Senate, the Clerk of the House delivered a message in form as follows:

Mr. President, I have been directed to inform the Senate that the House of Representatives has passed the following resolution:

"*Resolved*, That a committee of two be appointed to go to the Senate and at the bar thereof, in the name of the House of Representatives and of all the people of the United States, to impeach Andrew Johnson, President of the United States, of high crimes and misdemeanors in office, and acquaint the Senate that the House of Representatives will in due time exhibit particular articles of impeachment against him and make good the same; and that the committee do demand that the Senate take order for the appearance of said Andrew Johnson to answer to said impeachment."

And that the House has appointed Mr. Thaddeus Stevens and Mr. John A. Bingham such committee.

Soon thereafter [20] the Sergeant-at-Arms announced a committee from the House of Representatives, Mr. Thaddeus Stevens and Mr. John A. Bingham, who appeared at the bar of the Senate, when the following occurred:

Mr. STEVENS. Mr. President——

The PRESIDENT pro tempore.[21] The committee from the House of Representatives.

Mr. STEVENS. Mr. President, in obedience to the order of the House of Representatives, we appear before you, and in the name of the House of Representatives and of all the people of the United States we do impeach Andrew Johnson, President of the United States, of high crimes and misdemeanors in office; and we further inform the Senate that the House of Representatives will in due time exhibit particular articles of impeachment against him and make good the same; and in their name we demand that the Senate take order for the appearance of the said Andrew Johnson to answer said impeachment.

The PRESIDENT pro tempore. The Senate will take order in the premises.

The committee of the House thereupon withdrew.

Thereupon Mr. Jacob M. Howard, of Michigan, proposed a resolution as follows:

Resolved, That the message of the House of Representatives relating to the impeachment of Andrew Johnson, President of the United States, be referred to a select committee of seven, to consider and report thereon.

Mr. James A. Bayard, of Delaware, objected that the Senate in its legislative capacity might not act on a question of impeachment, and that it should form itself into a court of impeachment before adopting the resolution. In answer to this it was stated that this was a mere preliminary proceeding, and that the procedure followed the precedent of the trial of Judge Peck.

After the resolution had been amended, on the suggestion of Mr. Roscoe Conkling, of New York, and in accordance with the precedent in the trial of Judge Humphreys, by adding after the word "seven" the words "to be appointed by the Chair," the resolution was agreed to.

The President pro tempore thereupon appointed Messrs. Howard, Lyman Trumbull, of Illinois, Roscoe Conkling, of New York, George F. Edmunds, of Vermont, Oliver P. Morton, of Indiana, Stephen C. Pomeroy, of Kansas, and Reverdy Johnson, of Maryland.

On the same day [22] the committee from the House, having returned from the Senate, reported orally at the bar of the House through Mr. Stevens, the chairman, as follows:

Mr. Speaker, in obedience to the order of the House, we proceeded to the bar of the Senate, and in the name of this body and of all the people of the United States we impeached, as we were directed to do, Andrew Johnson, President of the United States, of high crimes and misdemeanors in office, and we demanded that the Senate should take order to make him appear before that body to answer for the same, and announced that the House would soon present articles of impeachment and make them good; to which the response was, "Order shall be taken."

2414. President Johnson's impeachment, continued.

To prevent dilatory tactics the House adopted, under suspension of the rules, a special order for consideration of the articles impeaching President Johnson.

Form of resolution in which the Senate took order for the impeachment of President Johnson.

[20] Journal of Senate, p. 217; Globe, pp. 1405, 1406.
[21] Benjamin F. Wade, of Ohio, President pro tempore.
[22] House Journal, p. 405; Globe, p. 1421.

For the trial of President Johnson the Senate readopted most of the existing rules, with amendments and additions.

On February 25,[23] in the House, Mr. Elihu B. Washburne, of Illinois, offered, under suspension of the rules, the following:

Resolved, That the rules be suspended, and that it is hereby ordered as follows: "When the committee to prepare articles of impeachment of the President of the United States report the said articles the House shall immediately resolve itself into the Committee of the Whole thereon that speeches in committee shall be limited to fifteen minutes each, which debate shall continue till the next legislative day after the report, to the exclusion of all other business except the reading of the Journal; that at 3 o'clock on the afternoon of said second day the fifteen-minute debate shall cease, and the committee shall then proceed to consider and vote upon amendments that may be offered under the five-minute rule of debate, but no merely pro forma amendment shall be entertained; that at 4 o'clock on the afternoon of said second day the committee shall rise and report their action to the House, which shall immediately and without dilatory motions vote thereon: that if the articles of impeachment are agreed on the House shall then immediately and without dilatory motions elect by ballot seven managers to conduct said impeachment on the part of the House; and that during the pendency of resolutions in the House relative to said impeachment thereafter no dilatory motions shall be received except one motion on each day that the House do now adjourn."

This resolution, which was intended to prevent obstructive action on the part of the minority, was agreed to, yeas 106, nays 37.

On the same day,[24] by a vote of yeas 105, nays 36, the House agreed to the following, on motion of Mr. George S. Boutwell, of Massachusetts:

Resolved, That the committee appointed to prepare and report articles of impeachment against Andrew Johnson, President of the United States, have leave to sit during the sessions of the House.

Resolved further, That the Committee on Reconstruction be authorized to sit during the sessions of the House.

On February 26,[25] in the Senate, Mr. Howard, from the select committee, reported the following resolution; which was agreed to, and of which the House was duly notified:

Whereas the House of Representatives, on the 25th day of the present month, by two of their members, Messrs. Thaddeus Stevens and John A. Bingham, at the bar of the Senate, impeached Andrew Johnson, President of the United States, of high crimes and misdemeanors in office, and informed the Senate that the House of Representatives will in due time exhibit particular articles of impeachment against him and make good the same, and likewise demanded that the Senate take order for the appearance of said Andrew Johnson to answer to the said impeachment: Therefore,

Resolved, That the Senate will take proper order thereon, of which due notice shall be given to the House of Representatives.

On February 28,[26] in the Senate, Mr. Howard, from the select committee, presented a report "prescribing certain rules of proceeding for the Senate when sitting as a high court of impeachment." The rules comprised the rules of the Chase trial, with some modifications in minor details, and also several new rules. The Senate considered the report on February 29 and March 2,[27] and after amending the rules agreed to them.

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[23] Journal, pp. 407, 408; Globe, pp. 1425, 1426.
[24] Journal, p. 410; Globe, p. 1427.
[25] Senate Journal, p. 222; House Journal, p. 418; Globe, pp. 1431, 1453.
[26] Senate Journal, pp. 230, 231; Globe, pp. 1486, 1515; Senate Report No. 59.
[27] Senate Journal, pp. 236–252; Globe, pp.. 1515–1535, 1568–1603.

2415. President Johnson's impeachment, continued.

The articles impeaching President Johnson were considered in Committee of the Whole.

At the time of President Johnson's impeachment it was agreed that he should be described as President and not as Acting President.

On February 29,[28] in the House, Mr. George S. Boutwell, of Massachusetts, from the committee appointed to prepare articles of impeachment, submitted their report, which was at once considered in Committee of the Whole in accordance with the special order. At the outset Mr. Boutwell said:[29]

In considering and preparing these articles the committee met with a difficulty in the outset which it becomes me to present to the Committee of the Whole House in the beginning of this discussion. That difficulty is this: What should be the description, so far as the office is concerned, in which Andrew Johnson should be arraigned for these misdemeanors; whether as President of the United States or as Vice-President of the United States upon whom the powers and duties of the office of President had devolved.

After such consideration as the committee were able to give to this matter during the period of time assigned to the consideration of this subject they are, I believe I may say, unanimously of opinion that the manner of description used in the articles we have reported is that manner of description on which we shall be compelled to rely. Without undertaking at this moment to advise the House finally as to what they ought to do upon this branch of the subject, I will venture to suggest this consideration, derived from the Constitution: That it is only when the President is on trial before the Senate that the Chief Justice of the Supreme Court of the United States is to preside. Therefore it follows that a different court must be organized for the trial of the Vice-President from that authorized by the Constitution to try the President.

Later, on March 2,[30] Mr. John A. Bingham, of Ohio, said:

I desire to say, Mr. Chairman, to the House this question was considered by the committee, and I was not aware when the report was made there was a member of that committee who entertained the slightest doubt on the subject that Andrew Johnson is President of the United States. I desire to say that he must be impeached, if he be impeached at all, either distinctively as President of the United States or as Vice-President of the United States. I desire to say, further, that in both capacities he can not be impeached at the same time and on the same trial, for the reason that the court, as was well said by the chairman of the committee, is differently constituted by the terms of the Constitution to try the President of the United States. The Chief Justice of the United States must, by the terms of the Constitution, preside if the President be tried; the Chief Justice shall not preside if the Vice-President be tried.

Again, Andrew Johnson is estopped by record in five hundred instances from denying that he is President of the United States. The Senate of the United States is estopped; the House of Representatives is estopped. Your Constitution declares that no bill shall be a law until it be presented to the President for his approval or disapproval. If he be not President, if the people have no President, then you can pass no law. If he be President, then let him be called President on your record.

Mr. Luke P. Poland, of Vermont, said:

We have had some Congressional history to which I call the attention of the House. In all that has been said upon the subject I have heard no allusion to the settlement of this question in Congress. The first instance of the accession of Vice-President to the office of President was that of John Tyler on the death of President Harrison, in 1841. Before the first message of Mr. Tyler was

[28] House Journal, pp. 433, 437; Globe, pp. 1542–1558.
[29] Globe, p. 1544.
[30] Globe, p. 1615.

sent in at the special session, as it was called, in 1841 the following proceedings took place in the House:

"Mr. Wise offered the usual resolution for the appointment of a committee on the part of the House to join such committee as might be appointed by the Senate to wait on the President of the United States and inform him that a quorum of the two Houses had assembled, and that Congress was ready to proceed to business.

"Mr. McKeon moved to amend the resolution by striking out the word 'President' and inserting the words 'Vice-President, now exercising the office of President.'"

After considerable debate the vote was taken in the House, and the amendment was rejected. The yeas and nays do not seem to have been taken.

When the message was sent to the Senate the same question was raised there. A similar amendment was offered to a similar resolution. There was more debate than in the House, participated in by Mr. Huntington, Mr. Allen, Mr. Tappan, Mr. Walker, and Mr. Calhoun. The yeas and nays were taken on this amendment in the Senate, and were as follows:

"Yeas—Messrs. Allen, Benton, Henderson, Linn, McRoberts, Tappan, Williams, and Wright—8.

"Nays—Messrs. Archer, Barrow, Bates, Bayard, Berrien, Buchanan, Calhoun, Choate, Clay of Kentucky, Clayton, Dixon Evans, Fulton, Graham, Huntington, Kerr, King, Mangum, Merrick, Miller, Moorehead, Nicholson, Pierce, Porter, Prentiss, Preston, Rives, Sevier, Simmons, Smith of Indiana, Southard, Sturgeon, Tallmadge, Walker, White, Woodbridge, Woodbury, and Young—38."

So that the question seems to have been settled by a vote of both Houses at that time, and during the whole administration, nearly four years of President Tyler and three years of President Fillmore, and now almost three years of President Johnson, this question has been regarded as settled by the decision of Congress in 1841.

As appears in the articles of impeachment, this reasoning was conclusive.

2416. President Johnson's impeachment, continued.

As reported from the committee, the articles impeaching President Johnson were confined to a few acts chiefly concerning Secretary Stanton.

Although the charges in the articles impeaching President Johnson were at first narrowed to a few charges, there was a protest against the theory that only an indictable offense was impeachable.

A statement as to the sentiments of the House on the nature of the power of impeachment during the first and second attempts to impeach President Johnson.

In the case of the Johnson impeachment, the question "Will the House agree thereto?" was put as to each article after they had been open to amendment.

The first or headline paragraph and the last or reservation clause were agreed to after the articles impeaching the President had been agreed to.

Mr. Boutwell stated that in the articles as reported the committee had confined themselves to the matters brought forward in the present proceedings, and had not gone into that broad field of general charges on which the first attempt at impeachment had failed. In the course of the debate, however, Mr. William Lawrence, of Ohio, argued again that the President might be impeached for other than indictable offenses, and said in the course of his remarks:[31]

I have taken some pains to ascertain the opinions of members of this House, and I think there are but few, even among those who voted against the impeach-

[31] Globe, pp. 1549, 1550.

ment of the President in December last, who entertain the idea or now hold that he must be guilty of an offense indictable either by the common or statute law to render him liable to impeachment. Such a doctrine is at variance with the whole theory and practice in cases of impeachment.

On March 2 [32] the articles were discussed at length, amended somewhat, and agreed to. In the Committee of the Whole a committee amendment in the nature of a substitute was agreed to. When the articles were reported to the House this substitute was agreed to, and then, on each article, beginning with Article 1, the question was put: "Will the House agree thereto?" And on the nine articles the result was:

	Yeas	Nays
Article 1	127	42
Article 2	124	41
Article 3	124	40
Article 4	117	40
Article 5	127	42
Article 6	127	42
Article 7	127	42
Article 8	127	42
Article 9	108	41

Then, by unanimous consent, the first and last paragraphs were agreed to, as follows: [33]

Articles exhibited by the House of Representatives of the United States, in the name of themselves and all the people of the United States, against Andrew Johnson, President of the United States, in maintenance and support of their impeachment against him for high crimes and misdemeanors in office.

* * * * * * *

And the House of Representatives, by protestation, saving to themselves the liberty of exhibiting at any time hereafter any further articles or other accusation or impeachment against the said Andrew Johnson, President of the United States, and also of replying to his answers which he shall make unto the articles herein preferred against him, and of offering proof to the same and every part thereof, and to all and every other article, accusation, or impeachment which shall be exhibited by them, as the case shall require, do demand that the said Andrew Johnson may be put to answer the high crimes and misdemeanors in office herein charged against him, and that such proceedings, examinations, trials, and judgments may be thereupon had and given as may be agreeable to law and justice.

2417. President Johnson's impeachment, continued.

The managers of the Johnson impeachment were chosen by ballot.

The Speaker appointed four tellers to count the ballots for managers of the Johnson impeachment.

Mr. Speaker Colfax tendered to several members of the minority a place as one of the tellers to count the ballots for managers of the Johnson impeachment.

Members of the minority declining to serve as tellers to count the ballots for managers of the Johnson impeachment, the Speaker appointed all from the majority party.

In the balloting for managers of the Johnson impeachment nominations were made before the vote.

[32] House Journal, pp. 439–450; Globe, pp. 1603–1618.
[33] House Journal, p. 450; Globe, p. 1618.

Mr. Speaker Colfax held that when managers of an impeachment were elected by ballot the managers, and not the House, chose the chairman.

Usage of the House in the selection of chairman of the managers of an impeachment. (Footnote.)

The House excused one Member from voting on the ballot for managers of the Johnson impeachment, but refused to excuse others.

It appears that the minority party generally refrained from participating in the ballot for managers of the Johnson impeachment.

Forms of resolutions providing for carrying to the Senate the articles impeaching President Johnson and notifying the Senate thereof.

Then, under the order, the House proceeded [34] to choose, by ballot, seven managers to conduct the impeachment.

The Speaker appointed as tellers Messrs. Luke P. Poland, of Vermont, Rufus P. Spalding, of Ohio; Thomas A. Jenckes, of Rhode Island; and Samuel S. Marshall, of Illinois. All of these but Mr. Marshall were of the number voting for the articles of impeachment. Mr. Marshall, at his request, was excused, and Mr. Samuel J. Randall, of Pennsylvania, was appointed, but he asked to be excused, on the ground that he did not wish in any way to participate in the proceedings. Mr. William E. Niblack, of Indiana, further said that the minority party did not intend to vote for managers.

The Speaker,[35] understanding the minority did not wish to be represented, appointed Mr. Austin Blair, of Michigan, as fourth teller.

Mr. Luke P. Poland, of Vermont, nominated the following for managers:

Thaddeus Stevens, of Pennsylvania; Benjamin F. Butler, of Massachusetts; John A. Bingham, of Ohio; George S. Boutwell, of Massachusetts; James F. Wilson of Iowa; Thomas Williams, of Pennsylvania; John A. Logan, of Illinois.

Mr. John A. Peters, of Maine, rising to a parliamentary inquiry, asked if the order in which the names were presented would determine who should be chairman.

The Speaker said:

The Chair can not answer that question. It is a matter that does not affect the House of Representatives. The managers are to present themselves at the bar of the Senate. They can settle that matter among themselves.

Mr. Halbert E. Pine, of Wisconsin, then asked:

Suppose members should designate on their ballots their choice for chairman, would the gentleman having the greatest number of votes as such be the chairman?

The Speaker said:

The Chair would not declare any such result, because it is not in accordance with the usage for the House to select a chairman. In the case of the impeachment of Judge Chase, in which Mr. John Randolph was the leading manager, the House did not select him as such; he was simply selected by the managers themselves, they deeming it proper to have him act as their spokesman.[36]

[34] House Journal, pp. 450, 451; Globe, pp. 1618, 1619.
[35] Schuyler Colfax, of Indiana, Speaker.
[36] In trial of Judge Humphreys, where the managers were appointed by the Speaker, the first named acted as chairman. In the Belknap trial the managers were chosen by resolution, and the principle was recognized that the first named should be chairman.

Mr. Michael C. Kerr, of Indiana, on his request, was excused from voting. Then, a proposition to excuse all who wished to be excused was objected to, the Chair declining to entertain it except by unanimous consent.

Thereupon, Mr. Samuel J. Randall, of Pennsylvania, said:

The members on this side do not wish to vote, as they are in favor of no part of this proceeding, and I know of no way by which they can be forced to vote. Therefore there is no necessity for excusing them.

The ballot resulted as follows:

Whole number of votes, 118; necessary to a choice, 60; of which—

John A. Bingham received	114	G. W. Scofield	3
George S. Boutwell	113	Luke P. Poland	3
James F. Wilson	112	G. S. Orth	2
Benjamin F. Butler	108	John A. Peters	1
Thomas Williams	107	Austin Blair	1
John A. Logan	106	J. C. Churchill	1
Thaddeus Stevens	105	J. F. Benjamin	1
Thomas A. Jenckes	22	C. Upson	1

The Speaker thereupon announced the names of the seven elected.

Then, on motion of Mr. Boutwell, the following resolutions were agreed to:

Resolved, That a message be sent to the Senate to inform them that this House have appointed managers to conduct the impeachment against the President of the United States, and have directed the said managers to carry to the Senate the articles agreed upon by this House, to be exhibited in maintenance of their impeachment against said Andrew Johnson, and that the Clerk of the House do go with said message.

Resolved, That the articles agreed to by this House, to be exhibited in the name of themselves and of all the people of the United States against Andrew Johnson, President of the United States, in maintenance of their impeachment against him of high crimes and misdemeanors in office, be carried to the Senate by the managers appointed to conduct said impeachment.

2418. President Johnson's impeachment, continued.

It was held in the Johnson impeachment that the managers or any Member of the House might propose an additional article as a question of privilege.

After the House had agreed to articles impeaching President Johnson the managers reported two additional articles, which were also agreed to.

On the tenth and eleventh articles in the Johnson impeachment the House, after debate, concluded to impeach for other than indictable offenses.

On March 3,[37] in the House, Mr. Benjamin F. Butler, of Massachusetts, from the managers and by their instruction, reported an additional article of impeachment. This article Mr. Butler had previously offered as an amendment,[38] but it had been rejected in Committee of the Whole by a vote of ayes 45, noes 56, on a statement of Mr. James F. Wilson, of Iowa, that the committee appointed to frame articles had already considered it and determined against it. The article proposed (which subsequently became Article X of the articles as presented in the Senate) charged the President with bringing his office into contempt by his utterances.

[37] House Journal, pp. 461–464; Globe, pp. 1638–1642.
[38] Globe, pp. 1615, 1616.

Mr. William S. Holman, of Indiana, made the point of order that this was an amendment to a proposition not before the House:

The Speaker [39] said:

The Chair rules, as he has ruled in all such cases, that this is a privileged question. And the Chair will also refer to the following paragraph of the original report adopted by the House yesterday:

"And the House of Representatives by protestation, savings to themselves the liberty of exhibiting at any time hereafter any further articles or other accusation or impeachment against the said Andrew Johnson," etc.

Mr. Charles A. Eldridge, of Wisconsin, made the further point of order that the managers might not report additional articles. Their functions were different from those of the committee appointed to prepare articles

The Speaker ruled:

The Chair overrules the point of order on two grounds. In the first place, the usage of the House has been, in all cases of impeachment, that the replication made by the person accused should be referred to the managers, to which the managers prepare a reply and submit it to the House before it is sent to the Senate. This follows precisely the language of the report adopted by the House on yesterday. * * * The second ground is this: That any Member of the House of Representatives, whether one of the board of managers or not, can, as a question of privilege, propose additional articles of impeachment. The Chair makes his ruling so broad in order to cover the entire case. Such article of impeachment may come with more formality from the board of managers, or from a committee specially appointed for the purpose. But the Member from Wisconsin [Mr. Eldridge], if he sees proper to do so, or any other Member, can propose articles of impeachment against any officer of the Government.

Mr. Butler explained the purpose of the article, saying that it followed the precedent of the eighth article of those preferred against Judge Chase, which received more votes in favor of conviction than any other.

Mr. Frederick E. Woodbridge, of Vermont, who had joined with Mr. James F. Wilson, of Iowa, in arguing that impeachment might be had only for indictable offenses, and whose views had been followed by the House in the first attempt at impeachment, now said: [40]

I wish simply to say now, in order that the gentleman from Massachusetts [Mr. Butler] may answer the objection, that I am opposed to this article for two reasons. The first is that if the President of the United States is put on his trial under this specification it will take a long time, almost equal, perhaps if the counsel desire it, to the Warren Hastings trial, which, I believe, was about seven years. For that, if for no other reason, I should be opposed to this article.

The other reason is that there is no offense charged under which a conviction can be had: The article concludes as follows:

"Which said utterances, declarations, threats, and harangues, highly censurable in any, and peculiarly indecent and unbecoming in the Chief Magistrate of the United States, by means whereof said Andrew Johnson has brought the high office of the President of the United States into contempt, ridicule, and disgrace, to the great scandal of all good citizens, whereby said Andrew Johnson, President of the United States, did commit, and was then and there guilty of, a high misdemeanor in office."

Now, sir, there are under the Constitution but two offenses under which a conviction can be had, namely: High crimes and misdemeanors. Neither of these is charged in this article. It is not a crime or misdemeanor in the President to bring himself into public obloquy before the people by reason of his improper speech. It is not a crime for him to make remarks when "swinging round the circle" or elsewhere, that may be distasteful to the Congress of the United States or that may be very improper. I have yet to learn that the President of the United

[39] Schuyler Colfax, of Indiana, Speaker. Globe, p. 1638.
[40] Globe, pp. 1640, 1641.

States, or any civil officer, can be impeached, except for a high crime or misdemeanor. The gentleman will not pretend that he has set forth either in this article. He only states that the President had brought himself into public disgrace by reason of public speeches which he made before the country. Now, all I ask of my friend is that he will so frame his article that at least the Senate, sitting as a high court of impeachment, may entertain it as being properly charged.

To this Mr. Butler replied:

What is the proposition of those gentlemen who insist that the President can be impeached for those acts only which are indictable as crimes under some statute? * * * Now, what is this proposition? The proposition is this, that for the lowest degree of indictable crime, to wit: An assault and battery, or, as a friend suggests, selling liquor without license, the President of the United States may be impeached, but he can not be impeached when he usurps the liberties of the people, because there is no indictment under any statute against that. He may be impeached for selling liquor without a license, but he can not be impeached if he gets into an open barouche with two abandoned women, one on each side of him, roaring drunk, and rides up and down Pennsylvania avenue, because there is no statute that I know of against that. He can not be impeached for any violation of public decency which does not happen to be an indictable crime. He can not be impeached for debasing his high office. The statement of this proposition is its best refutation. Here let me say to my friend from Vermont that I have not charged in this article that the President has brought himself into ridicule and contempt. If he had only done that I should have been quite willing to let him go unpunished [laughter], but I do say that he brought the high office which he fills—no, which he occupies—into sovereign disgrace, ridicule, and contempt, so that it is hardly respectable for a decent man to fill hereafter; and is not that an impeachable misdemeanor? I do not stand upon this point on the weight of authority of my own words alone. I stand upon the authority of one of the best lawyers that ever sat upon the bench, Judge Story, of the Supreme Court of the United States, who uses these words to define what is impeachable:

"It is a proceeding, probably the fairest that could be devised, by which the people, through the action of that branch of the Government which most directly and fully represents themselves, call in question the fitness of their public officers, and dismiss them if unfit." (Story on the Constitution, sec. 810.)

Now, is there any one in this House, or outside of this House anywhere in the country, who would vote that Andrew Johnson is a "fit" man to be President of the United States? Who will say "ay" to that anywhere? This article has been drawn exactly within the precedent of Judge Chase's case. Of all the great lawyers who defended Judge Chase—and he had one, Mr. Wirt, who argued two days in succession for him—no one ventured to say to the Senate that that article, if proved, was not a misdemeanor within the provisions of the Constitution.

Mr. James F. Wilson, of Iowa, stated that he was the only one of the managers who opposed the article. He did so because he believed the offense not impeachable and because the article would prolong the trial.

The question being taken on the article, it was agreed to, yeas 87, nays 43. Both Messrs. Woodbridge and Wilson voted against it.

Mr. Bingham, by the unanimous instruction of the managers, presented another article, which was agreed to, yeas 108, nays 82,[41] and which became Article XI.

2419. President Johnson's impeachment, continued.

The House gave to the managers appointed for the Johnson trial the power to send for persons and papers.

The articles of impeachment of President Johnson having been amended, the House gave a new direction for carrying them to the Senate.

[41] House Journal, pp. 464, 465; Globe, p. 1642.

The message from the House announcing that articles of impeachment would be presented against President Johnson contained the names of the managers.

The Senate having informed the House of its readiness to receive the managers with the articles impeaching President Johnson, the House as Committee of the Whole attended its managers to the Senate.

Then Mr. Bingham offered the following resolutions:

Resolved, That the articles agreed to by the House this day, together with those adopted by the House on yesterday, to be exhibited in the name of the House of Representatives and of all the people of the United States against Andrew Johnson, President of the United States, in maintenance of their impeachment against him for high crimes and misdemeanors in office, be carried to the Senate by the managers appointed to conduct said impeachment.

Resolved, That the managers on the part of the House, in the matter of the impeachment of the President, be, and hereby are, authorized to appoint a clerk and a messenger, to be paid for their services at the usual rates during the time that they are employed, and that the managers have power to send for persons and papers.

Mr. James Brooks, of New York, questioned the propriety of giving to the managers the power to send for persons and papers; but the resolutions were agreed to by the House, yeas 96, nays 27.[42]

On March 3,[43] in the Senate, the following message was received from the House by its Clerk:

Mr. President, I am directed to inform the Senate that the House of Representatives has appointed Mr. John A. Bingham, of Ohio; Mr. George S. Boutwell, of Massachusetts; Mr. James F. Wilson, of Iowa; Mr. B. F. Butler, of Massachusetts; Mr. J. A. Logan, of Illinois; Mr. Thomas Williams, of Pennsylvania, and Mr. Thaddeus Stevens, of Pennsylvania, managers to conduct the impeachment against Andrew Johnson, President of the United States, and has directed the said managers to carry to the Senate the articles of impeachment agreed upon by the House, to be exhibited in maintenance of their impeachment against the said Andrew Johnson.

Thereupon Mr. Jacob M. Howard, of Michigan, offered the following, which was agreed to:

Ordered, That the Secretary of the Senate inform the House of Representatives that the Senate is ready to receive the managers appointed by the House of Representatives to carry to the Senate articles of impeachment against Andrew Johnson, President of the United States.

On March 4,[44] in the House, Mr. Bingham presented this resolution, which was agreed to:

Resolved, That the House resolve itself into the Committee of the Whole and attend the managers appointed by the House to the Senate to present, by its managers, the articles of impeachment exhibited by the House against Andrew Johnson, President of the United States.

Thereupon the Speaker said:

In the absence of the senior Member of the House, Mr. Washburne, of Illinois, the gentleman from Massachusetts, Mr. Dawes, will please take the chair in Committee of the Whole. The Committee of the Whole, preceded by its chairman, who will be supported by the Clerk and Doorkeeper, will follow the managers to the Senate Chamber.

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[42] House Journal, p. 466; Globe, pp. 1642, 1643.
[43] Senate Journal, pp. 254, 255; Globe, p. 1622.
[44] House Journal, p. 470; Globe, p. 1661.

Accordingly, at 1 o'clock p.m., the House, as in the Committee of the Whole preceded by its chairman, Mr. Dawes, who was supported by the Clerk and Doorkeeper of the House, followed the managers of the House to the Senate Chamber

2420. President Johnson's impeachment, continued.

The ceremonies of presenting the articles impeaching President Johnson at the bar of the Senate.

At the presentation of the articles impeaching President Johnson the Speaker was, by order of the Senate, escorted to a seat beside the President pro tempore.

Form of declaration of the chairman of the managers of their readiness to present to the Senate the articles impeaching President Johnson.

The articles impeaching President Johnson.

The articles impeaching President Johnson were read by the chairman of the managers and delivered at the table of the Secretary.

The articles impeaching President Johnson were signed by the Speaker and attested by the Clerk.

The report to the House of the presentation of articles impeaching President Johnson was made by the chairman of the Committee of the Whole.

Mr. Speaker Colfax held that the managers of an impeachment were not a committee. (Footnote.)

The articles impeaching President Johnson were received by the Senate with the President pro tempore presiding.

In the Senate Chamber,[45] when the managers [46] appeared at the bar, their presence was announced by the Sergeant-at-Arms of the Senate.

The President pro tempore [47] (for the Senate had not yet organized for the trial) said:

The managers of the impeachment will advance within the bar and take the seats provided for them.

The managers did this.

Thereupon, at the suggestion of Mr. Thomas A. Hendricks, of Indiana, a Senator, a seat was provided for the Speaker of the House by the side of the President of the Senate, and the Speaker was escorted by Mr. James W. Grimes, of Iowa, a Senator, to a seat at the right of the President pro tempore.

Mr. Manager Bingham then said:

Mr. President, the managers of the House of Representatives, by order of the House, are ready at the bar of the Senate, whenever it may please the Senate to hear them, to present articles of impeachment and in maintenance of the impeachment preferred against Andrew Johnson, President of the United States, by the House of Representatives.

The President pro tempore said:

The Sergeant-at-Arms will make proclamation.

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[45] Senate Journal, pp. 260–268; Globe, pp. 1647–1649.

[46] The managers are not a committee, Mr. Speaker Colfax said: "The managers have been called a board of managers. Their official title is simply managers. They are not a committee." Globe, p. 1660.

[47] Benjamin F. Wade of Ohio, President pro tempore.

The Sergeant-at-Arms proclaimed:

Hear ye, hear ye, hear ye. All persons are commanded to keep silence, on pain of imprisonment, while the House of Representatives is exhibiting to the Senate of the United States articles of impeachment against Andrew Johnson, President of the United States.

The managers then rose and remained standing, with the exception of Mr. Stevens, who was physically unable to do so, while Mr. Manager Bingham read the articles of impeachment, as follows:

Articles exhibited by the House of Representatives of the United States, in the name of themselves and all the people of the United States, against Andrew Johnson, President of the United States, in maintenance and support of their impeachment against him for high crimes and misdemeanors in office.

ARTICLE I.

That said Andrew Johnson, President of the United States, on the 21st day of February, in the year of our Lord 1868, at Washington, in the District of Columbia, unmindful of the high duties of his office, of his oath of office, and of the requirement of the Constitution that he should take care that the laws be faithfully executed, did unlawfully, and in violation of the Constitution and laws of the United States, issue an order in writing for the removal of Edwin M. Stanton from the office of Secretary for the Department of War, said Edwin M. Stanton having been theretofore duly appointed and commissioned, by and with the advice and consent of the Senate of the United States, as such Secretary and said Andrew Johnson, President of the United States, on the 12th day of August, in the year of our Lord 1867, and during the recess of said Senate, having suspended by his order Edwin M. Stanton from said office, and within twenty days after the first day of the next meeting of said Senate—that is to say, on the 12th day of December, in the year last aforesaid—having reported to said Senate such suspension, with the evidence and reasons for his action in the case and the name of the person designated to perform the duties of such office temporarily until the next meeting of the Senate, and said Senate thereafterwards, on the 13th day of January, in the year of our Lord 1868, having duly considered the evidence and reasons reported by said Andrew Johnson for said suspension, and having refused to concur in said suspension, whereby and by force of the provisions of an act entitled "An act regulating the tenure of certain civil offices," passed March 2, 1867, said Edwin M. Stanton did forthwith resume the functions of his office, whereof the said Andrew Johnson had then and there due notice, and said Edwin M. Stanton, by reason of the premises, on said 21st day of February, being lawfully entitled to hold said office of Secretary of the Department of War, which said order for the removal of said Edwin M. Stanton is, in substance, as follows, that is to say:

"EXECUTIVE MANSION,
"*Washington, D.C., February 21, 1868.*

"SIR: By virtue of the power and authority vested in me as President by the Constitution and laws of the United States you are hereby removed from office as Secretary for the Department of War, and your functions as such will terminate upon receipts of this communication.

"You will transfer to Brevet Maj. Gen. Lorenzo Thomas, Adjutant-General of the Army, who has this day been authorized and empowered to act as Secretary of War ad interim, all records, books, papers, and other public property now in your custody and charge.

"Respectfully, yours,

ANDREW JOHNSON.

"*Hon. Edwin M. Stanton, Washington, D.C.*"

Which order was unlawfully issued with intent then and there to violate the act entitled "An act regulating the tenure of certain civil offices," passed March 2, 1867; and with the further intent, contrary to the provisions of said act, in violation thereof, and contrary to the provisions of the Constitution of the United States, and without the advice and consent of the Senate of the United States, the said Senate then and there being in session, to remove said Edwin M. Stanton from the office of Secretary of the Department of War, the said Edwin M. Stanton being then and there Secretary of War, and being then and there in the

due and lawful execution and discharge of the duties of said office, whereby said Andrew Johnson, President of the United States, did then and there commit, and was guilty of a high misdemeanor in office.

ARTICLE II.

That on said 21st day of February, in the year of our Lord 1868, at Washington, in the District of Columbia, said Andrew Johnson, President of the United States, unmindful of the high duties of his office, of his oath of office, and in violation of the Constitution of the United States, and contrary to the provisions of an act entitled "An act regulating the tenure of certain civil offices," passed March 2, 1867, without the advice and consent of the Senate of the United States, said Senate then and there being in session, and without authority of law, did, with intent to violate the Constitution of the United States and the act aforesaid, issue and deliver to one Lorenzo Thomas a letter of authority, in substance as follows, that is to say:

"EXECUTIVE MANSION,

"*Washington, D. C., February 21, 1868.*

"SIR: Hon. Edwin M. Stanton having been this day removed from office as Secretary for the Department of War, you are hereby authorized and empowered to act as Secretary of War ad interim, and will immediately enter upon the discharge of the duties pertaining to that office.

"Mr. Stanton has been instructed to transfer to you all the records, books, papers, and other public property now in his custody and charge.

"Respectfully yours,

ANDREW JOHNSON.

"*To Brevet Maj. Gen. Lorenzo Thomas,*

"*Adjutant-General United States Army, Washington, D. C.*"

Then and there being no vacancy in said office of Secretary for the Department of War, whereby said Andrew Johnson, President of the United States, did then and there commit, and was guilty of a high misdemeanor in office.

ARTICLE III.

That said Andrew Johnson, President of the United States, on the 21st day of February, in the year of our Lord 1868, at Washington, in the District of Columbia, did commit and was guilty of a high misdemeanor in office in this, that, without the authority of law, while the Senate of the United States was then and there in session, he did appoint one Lorenzo Thomas to be Secretary for the Department of War ad interim, without the advice and consent of the Senate and with intent to violate the Constitution of the United States, no vacancy having happened in said office of Secretary for the Department of War during the recess of the Senate, and no vacancy existing in said office at the time, and which said appointment, so made by said Andrew Johnson, of said Lorenzo Thomas, is in substance as follows, that is to say:

"EXECUTIVE MANSION,

"*Washington, D. C., February 21, 1868.*

"SIR: Hon. Edwin M. Stanton having been this day removed from office as Secretary for the Department of War, you are hereby authorized and empowered to act as Secretary of War ad interim, and will immediately enter upon the discharge of the duties pertaining to that office.

"Mr. Stanton has been instructed to transfer to you all the records, books, papers, and other public property now in his custody and charge.

"Respectfully, yours, ANDREW JOHNSON.

"*To Brevet Maj. Gen. Lorenzo Thomas,*

"*Adjutant-General United States Army, Washington, D. C.*"

ARTICLE IV.

That said Andrew Johnson, President of the United States, unmindful of the high duties of his office and of his oath of office, in violation of the Constitution and laws of the United States, on the 21st day of February, in the year of our Lord 1868, at Washington, in the District of Columbia, did unlawfully conspire with one Lorenzo Thomas, and with other persons to the House of Representatives unknown, with intent, by intimidation and threats, unlawfully to hinder and prevent Edwin M. Stanton, then and there the Secretary for the Department of War, duly appointed under the laws of the United States, from holding said

office of Secretary for the Department of War, contrary to and in violation of the Constitution of the United States and of the provisions of an act entitled "An act to define and punish certain conspiracies," approved July 31, 1861, whereby said Andrew Johnson, President of the United States, did then and there commit, and was guilty of a high crime in office.

ARTICLE V.

That said Andrew Johnson, President of the United States, unmindful of the high duties of his office and of his oath of office, on the 21st day of February, in the year of our Lord 1868, and on divers other days and times in said year, before the 2d day of March, A. D. 1868, at Washington, in the District of Columbia, did unlawfully conspire with one Lorenzo Thomas, and with other persons to the House of Representatives unknown, to prevent and hinder the execution of an act entitled "An act regulating the tenure of certain civil offices," passed March 2, 1867, and in pursuance of said conspiracy did unlawfully attempt to prevent Edwin M. Stanton, then and there being Secretary for the Department of War, duly appointed and commissioned under the laws of the United States, from holding said office, whereby the said Andrew Johnson, President of the United States, did then and there commit and was guilty of a high misdemeanor in office.

ARTICLE VI.

That said Andrew Johnson, President of the United States, unmindful of the high duties of his office and of his oath of office, on the 21st day of February, in the year of our Lord 1868, at Washington, in the District of Columbia, did unlawfully conspire with one Lorenzo Thomas, by force to seize, take, and possess the property of the United States in the Department of War, and then and there in the custody and charge of Edwin M. Stanton, Secretary for said Department, contrary to the provisions of an act entitled "An act to define and punish certain conspiracies," approved July 31, 1861, and with intent to violate and disregard an act entitled "An act regulating the tenure of certain civil offices," passed March 2, 1867, whereby said Andrew Johnson, President of the United States, did then and there commit a high crime in office.

ARTICLE VII.

That said Andrew Johnson, President of the United States, unmindful of the high duties of his office and of his oath of office, on the 21st day of February, in the year of our Lord 1868, at Washington, in the District of Columbia, did unlawfully conspire with one Lorenzo Thomas with intent unlawfully to seize, take, and possess the property of the United States in the Department of War, in the custody and charge of Edwin M. Stanton, Secretary for said Department, with intent to violate and disregard the act entitled "An act regulating the tenure of certain civil offices," passed March 2, 1867, whereby said Andrew Johnson, President of the United States, did then and there commit a high misdemeanor in office.

ARTICLE VIII.

That said Andrew Johnson, President of the United States, unmindful of the high duties of his office and of his oath of office, with intent unlawfully to control the disbursements of the moneys appropriated for the military service and for the Department of War, on the 21st day of February, in the year of our Lord 1868, at Washington, in the District of Columbia, did unlawfully and contrary to the provisions of an act entitled "An act regulating the tenure of certain civil offices," passed March 2, 1867, and in violation of the Constitution of the United States, and without the advice and consent of the Senate of the United States, and while the Senate was then and there in session, there being no vacancy in the office of the Secretary for the Department of War, with intent to violate and disregard the act aforesaid, then and there issue and deliver to one Lorenzo Thomas a letter of authority in writing, in substance as follows, that is to say:

"EXECUTIVE MANSION,
"Washington, D.C., February 21, 1868.

"SIR: Hon. Edwin M. Stanton having been this day removed from the office as Secretary for the Department of War, you are hereby authorized and empowered to act as Secretary of War ad interim, and will immediately enter upon the discharge of the duties pertaining to that office.

"Mr. Stanton has been instructed to transfer to you all the records, books, papers, and other public property now in his custody and charge.

"Respectfully yours,

ANDREW JOHNSON.

"*Brevet Maj. Gen. Lorenzo Thomas,*
"*Adjutant-General United States Army, Washington, D.C.*

whereby said Andrew Johnson, President of the United States, did then and there commit and was guilty of a high misdemeanor in office.

ARTICLE IX.

That said Andrew Johnson, President of the United States, on the 22d day of February, in the year of our Lord 1868, at Washington, in the District of Columbia, in disregard of the Constitution and the laws of the United States, duly enacted, as Commander in Chief of the Army of the United States, did bring before himself then and there William H. Emory, a major-general by brevet in the Army of the United States, actually in command of the Department of Washington and the military forces thereof, and did then and there, as such Commander in Chief, declare to and instruct said Emory that part of a law of the United States, passed March 2, 1867, entitled "An act making appropriations for the support of the Army for the year ending June 30, 1868, and for other purposes," especially the second section thereof, which provides, among other things, that "all orders and instructions relating to military operations issued by the President or Secretary of War shall be issued through the General of the Army, and, in case of his inability, through the next in rank," was unconstitutional and in contravention of the commission of said Emory, and which said provision of law had been theretofore duly and legally promulgated by general order for the government and direction of the Army of the United States, as the said Andrew Johnson then and there well knew, with intent thereby to induce said Emory, in his official capacity as commander of the Department of Washington, to violate the provisions of said act, and to take and receive, act upon, and obey such orders as he, the said Andrew Johnson, might make and give, and which should not be issued through the General of the Army of the United States, according to the provisions of said act, and with the further intent thereby to enable him, the said Andrew Johnson, to prevent the execution of an act entitled "An act regulating the tenure of certain civil offices," passed March 2, 1867, and to unlawfully prevent Edwin M. Stanton, then being Secretary for the Department of War, from holding said office and discharging the duties thereof, whereby said Andrew Johnson, President of the United States, did then and there commit and was guilty of a high misdemeanor in office.

ARTICLE X.

That said Andrew Johnson, President of the United States, unmindful of the high duties of his office and the dignity and proprieties thereof, and of the harmony and courtesies which ought to exist and be maintained between the executive and legislative branches of the Government of the United States, designing and intending to set aside the rightful authority and powers of Congress, did attempt to bring into disgrace, ridicule, hatred, contempt, and reproach the Congress of the United States and the several branches thereof, to impair and destroy the regard and respect of all the good people of the United States for the Congress and legislative power thereof (which all officers of the Government ought inviolably to preserve and maintain), and to excite the odium and resentment of all the good people of the United States against Congress and the laws by it duly and constitutionally enacted; and in pursuance of his said design and intent, openly and publicly, and before divers assemblages of the citizens of the United States convened in divers parts thereof to meet and receive said Andrew Johnson the Chief Magistrate of the United States, did, on the 18th day of August, in the year of our Lord 1866, and on divers other days and times, as well before as afterwards, make and deliver with a loud voice certain intemperate, inflammatory, and scandalous harangues, and did therein utter loud threats and bitter menaces as well against Congress as the laws of the United States duly enacted thereby, amid the cries, jeers, and laughter of the multitudes then assembled and within hearing, which are set forth in the several specifications hereinafter written, in substance and effect, that is to say:

Specification first.—In this, that at Washington, in the District of Columbia, in the Executive Mansion, to a committee of citizens who called upon the Presi-

dent of the United States, speaking of an concerning the Congress of the United States, said Andrew Johnson, President of the United States, heretofore, to wit, on the 18th day of August, in the year of our Lord 1866, in a loud voice, declare in substance and effect, among other things, that is to say:

"So far as the executive department of the Government is concerned, the effort has been made to restore the Union, to heal the breach, to pour oil into the wounds which were consequent upon the struggle, and (to speak in common phrase) to prepare, as the learned and wise physician would, a plaster healing in character and coextensive with the wound. We thought, and we think, that we had partially succeeded; but as the work progresses, as reconstruction seemed to be taking place and the country was becoming reunited, we found a disturbing and marring element opposing us. In alluding to that element, I shall go no further than your convention and the distinguished gentleman who has delivered to me the report of its proceedings. I shall make no reference to it that I do not believe the time and the occasion justify.

"We have witnessed in one department of the Government every endeavor to prevent the restoration of peace, harmony, and union. We have seen hanging upon the verge of the Government, as it were, a body called, or which assumes to be, the Congress of the United States, while in fact it is a Congress of only a part of the States. We have seen this Congress pretend to be for the Union when its every step and act tended to perpetuate disunion and make a disruption of the States inevitable. * * * We have seen Congress gradually encroach step by step upon constitutional rights and violate, day after day and month after month, fundamental principles of the Government. We have seen a Congress that seemed to forget that there was a limit to the sphere and scope of legislation. We have seen a Congress in a minority assume to exercise power which, allowed to be consummated, would result in despotism or monarchy itself."

Specification second.—In this, that at Cleveland, in the State of Ohio, heretofore, to wit, on the 3d day of September, in the year of our Lord 1866, before a public assemblage of citizens and others, said Andrew Johnson, President of the United States, speaking of and concerning the Congress of the United States did, in a loud voice, declare in substance and effect among other things, that is to say:

"I will tell you what I did do. I called upon your Congress that is trying to break up the Government."

* * * * * * *

"In conclusion, beside that, Congress had taken much pains to poison their constituents against him. But what had Congress done? Have they done anything to restore the union of these States? No; on the contrary, they had done everything to prevent it; and because he stood now where he did when the rebellion commenced he had been denounced as a traitor. Who had run greater risks or made greater sacrifices than himself? But Congress, factious and domineering, had undertaken to poison the minds of the American people."

Specification third.—In this, that at St. Louis, in the State of Missouri, heretofore, to wit, on the 8th day of September, in the year of our Lord 1866, before a public assemblage of citizens and others, said Andrew Johnson, President of the United States, speaking of and concerning the Congress of the United States, did, in a loud voice, declare, in substance and effect, among other things, that is to say:

"Go on. Perhaps if you had a word or two on the subject of New Orleans you might understand more about it than you do. And if you will go back—if you will go back and ascertain the cause of the riot at New Orleans, perhaps you will not be so prompt in calling out 'New Orleans.' If you will take up the riot at New Orleans and trace it back to its source or its immediate cause, you will find out who was responsible for the blood that was shed there. If you will take up the riot at New Orleans and trace it back to the Radical Congress, you will find that the riot at New Orleans was substantially planned. If you will take up the proceedings in their caucuses, you will understand that they there knew that a convention was to be called which was extinct by its power having expired; that it was said that the intention was that a new government was to be organized, and on the organization of that government the intention was to enfranchise one portion of the population, called the colored population, who had just been emancipated, and at the same time disfranchise white men. When you design to talk about New Orleans you ought to understand what you are talking about. When you read the speeches that were made, and take up the facts on the Friday and Saturday before that convention sat, you will there find that speeches were made incendi-

ary in their character, exciting that portion of the population, the black population, to arm themselves and prepare for the shedding of blood. You will also find that that convention did assemble in violation of law, and the intention of that convention was to supersede the reorganized authorities in the State government of Louisiana, which had been recognized by the Government of the United States; and every man engaged in that rebellion in that convention, with the intention of superseding and upturning the civil government which had been recognized by the Government of the United States, I say that he was a traitor to the Constitution of the United States, and hence you find that another rebellion was commenced having its origin in the Radical Congress. * * *

"So much for the New Orleans riot. And there was the cause and the origin of the blood that was shed; and every drop of blood that was shed is upon their skirts, and they are responsible for it. I could test this thing a little closer, but will not do it here to-night. But when you talk about the causes and consequences that resulted from proceedings of that kind, perhaps as I have been introduced here and you have provoked questions of this kind, though it does not provoke me, I will tell you a few wholesome things that have been done by this Radical Congress in connection with New Orleans and the extension of the elective franchise.

"I know that I have been traduced and abused. I know it has come in advance of me here, as elsewhere, that I have attempted to exercise an arbitrary power in resisting laws that were intended to be forced upon the Government; that I had exercised that power; that I had abandoned the party that elected me, and that I was a traitor because I exercised the veto power in attempting and did arrest for a time a bill that was called a 'Freedman's Bureau' bill; yes, that I was a traitor. And I have been traduced, I have been slandered, I have been maligned, I have have been called Judas Iscariot, and all that. Now, my countrymen here to-night, it is very easy to indulge in epithets; it is easy to call a man a Judas and cry out traitor; but when he is called upon to give arguments and facts he is very often found wanting. Judas Iscariot—Judas. There was a Judas, and he was one of the twelve apostles. Oh, yes; the twelve apostles had a Christ. The twelve apostles had a Christ, and he never could have had a Judas unless he had had twelve apostles. If I have played the Judas, who has been my Christ that I have played the Judas with? Was it Thad. Stevens? Was it Wendell Phillips? Was it Charles Sumner? These are the men that stop and compare themselves with the Saviour; and everybody that differs with them in opinion, and to try and stay and arrest the diabolical and nefarious policy, is to be denounced as a Judas.

* * * * * * *

"Well, let me say to you, if you will stand by me in this action; if you will stand by me in trying to give the people a fair chance, soldiers and citizens, to participate in these offices, God being willing, I will kick them out. I will kick them out just as fast as I can.

"Let me say to you, in concluding, that what I have said I intended to say. I was not provoked into this, and I care not for their menaces, the taunts, and the jeers. I care not for threats. I do not intend to be bullied by my enemies nor overawed by my friends. But, God willing, with your help I will veto their measures whenever any of them come to me."

Which said utterances, declarations, threats, and harangues, highly censurable in any, are peculiarly indecent and unbecoming in the Chief Magistrate of the United States, by means whereof said Andrew Jackson has brought the high office of the President of the United States into contempt, ridicule, and disgrace, to the great scandal of all good citizens, whereby said Andrew Jackson, President of the United States, did commit, and was then and there guilty of, a high misdemeanor in office.

ARTICLE XI.

That said Andrew Johnson, President of the United States, unmindful of the high duties of his office and of his oath of office, and in disregard of the Constitution and laws of the United States, did heretofore, to wit, on the 18th day of August, 1866, at the city of Washington, and the District of Columbia, by public speech, declare and affirm, in substance, that the Thirty-ninth Congress of the United States was not a Congress of the United States authorized by the Constitution to exercise legislative power under the same; but, on the contrary, was a Congress of only part of the States, thereby denying and intending to deny that the legislation of said Congress was valid or obligatory

upon him, the said Andrew Johnson, except in so far as he saw fit to approve the same, and also thereby denying and intending to deny the power of the said Thirty-ninth Congress to propose amendments to the Constitution of the United States; and in pursuance of said declaration, the said Andrew Johnson, President of the United States, afterwards, to wit, on the 21st day of February, 1868, at the city of Washington, in the District of Columbia, did unlawfully and in disregard of the requirements of the Constitution, that he should take care that the laws be faithfully executed, attempt to prevent the execution of an act entitled "An act regulating the tenure of certain civil offices," passed March 2, 1867, by unlawfully devising and contriving, and attempting to devise and contrive, means by which he should prevent Edwin M. Stanton from forthwith resuming the functions of the office of Secretary for the Department of War, notwithstanding the refusal of the Senate to concur in the suspension therefore made by said Andrew Johnson, of said Edwin M. Stanton from said office of Secretary for the Department of War, and also by further unlawfully devising and contriving, and attempting to devise and contrive, means then and there to prevent the execution of an act entitled "An act appropriations for the support of the Army for the fiscal year ending June 30, 1868, and for other purposes," approved March 2, 1867, and also to prevent the execution of an act entitled "An act to provide for the more efficient government of the rebel States," passed March 2, 1867; whereby the said Andrew Johnson, President of the United States, did then, to wit, on the 21st day of February, 1868, at the city of Washington, commit and was guilty of a high misdemeanor in office.

And the House of Representatives, by protestation, saving to themselves the liberty of exhibiting at any time hereafter any further articles or other accusation or impeachment against the said Andrew Johnson, President of the United States, and also of replying to his answers which he shall make unto the articles herein preferred against him, and of offering proof to the same and every part thereof, and to all and every other article, accusation, or impeachment which shall be exhibited by them, as the case shall require, do demand that the said Andrew Johnson may be put to answer the high crimes and misdemeanors in office herein charged against him, and that such proceedings, examinations, trials, and judgments may be thereupon had and given as may be agreeable to law and justice.

SCHUYLER COLFAX,
Speaker of the House of Representatives.

Attest:

EDWARD MCPHERSON,
Clerk of the House of Representatives.

Mr. Bingham having concluded the reading of the articles of impeachment, the President pro tempore informed the managers that the Senate would take proper order on the subject of the impeachment, of which due notice would be given to the House of Representatives.

The managers, by their chairman, Mr. Bingham, then delivered the articles of impeachment at the table of the Secretary, and withdrew, accompanied by the Members of the House of Representatives.

The Committee of the Whole, having returned to the Hall of the House,[48] rose and the Speaker resumed the chair, whereupon Mr. Henry L. Dawes, of Massachusetts, the chairman, reported:

Mr. Speaker: The House in the Committee of the Whole, by order of the House, have accompanied their managers to the Senate while they represented, in the name of the House of Representatives and of all the people of the United States, articles of impeachment agreed upon by the House against Andrew Johnson, President of the United States. The President of the Senate announced that the Senate would take order in the premises, of which due notice would be given to the House of Representatives.

2421. President Johnson's impeachment, continued.

Resolution providing for introduction of the Chief Justice and the organization of the Senate for the trial of President Johnson.

[48] House Journal, p. 471; Globe, p. 1661.

The Senate ordered a copy of its rules for the trial of President Johnson to be sent to the House.

The notice to the Chief Justice to meet the Senate for the trial of President Johnson was delivered by a committee of three Senators, who were his escort also.

In the Senate, on the same day, Mr. Howard moved [49] the adoption of the following:

Resolved, That at 1 o'clock to-morrow afternoon the Senate will proceed to consider the impeachment of Andrew Johnson, President of the United States, at which time the oath or affirmation required by the rules of the Senate sitting for the trial of an impeachment shall be administered by the Chief Justice of the United States, as the presiding officer of the Senate, sitting as aforesaid, to each member of the Senate, and that the Senate sitting as aforesaid will at the time aforesaid receive the managers appointed by the House of Representatives.

Ordered, That the Secretary lay this resolution before the House of Representatives.

Ordered, That the articles of impeachment exhibited against Andrew Johnson, President of the United States, be printed.

Ordered, That a copy of the "rules of procedure and practice in the Senate when sitting on the trial of impeachments" be communicated by the Secretary to the House of Representatives, and a copy thereof delivered by him to each member of the House.

Mr. George F. Edmunds proposed a simpler resolution, taking the ground that the pending resolution, in some respects, provided for what had already been provided in the rules. But Mr. Howard replied that the House was not obliged to take cognizance of the rules. The resolutions and orders were then agreed to as offered. The communication was duly received in the House.[50]

Thereupon, on motion of Mr. Stephen C. Pomeroy, of Kansas,

Ordered, That the notice to the Chief Justice of the United States to meet the Senate in the trial of the case of impeachment, and requesting his attendance as presiding officer, be delivered to him by a committee of three Senators, to be appointed by the Chair, who shall wait upon the Chief Justice to the Senate Chamber and conduct him to the chair.

The President pro tempore appointed Messrs. Pomeroy, Henry Wilson, of Massachusetts, and Charles R. Buckalew, of Pennsylvania, the committee.

2422. President Johnson's impeachment, continued.

The ceremonies of inducting the Chief Justice and organizing the Senate for the trial of President Johnson.

The President pro tempore left the chair at the hour for the Senate to sit for the trial of the President.

On taking the chair to preside at the trial of President Johnson the Chief Justice had the oath administered by an associate justice.

Having taken the oath himself the Chief Justice administered it to the Senators sitting for the trial of President Johnson.

After the oath had been administered to the Senators sitting for the trial of President Johnson the Sergeant-at-Arms was directed to make proclamation.

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[49] Senate Journal, p. 268; Globe, pp. 1657, 1658.
[50] House Journal, p. 475.

The Senate having organized for the trial of President Johnson, rules were adopted and the House was notified of the organization and of readiness to receive the managers.

On March 5 [51] in the Senate the hour of 1 o'clock having arrived, the President pro tempore said:

The morning hour having expired, all legislative and executive business of the Senate is ordered to cease for the purpose of proceeding to business pertaining to the impeachment of the President of the United States. The chair is vacated for that purpose.

The President pro tempore then left the chair.

The Chief Justice of the United States entered the Chamber, accompanied by Mr. Justice Nelson, and escorted by Senators Pomeroy, Wilson, and Buckalew, the committee appointed for that purpose.

The Chief Justice took the chair and said:

Senators: I attend the Senate in obedience to your notice, for the purpose of joining with you in forming a source of impeachment for the trial of the President of the United States, and I am now ready to take the oath.[52]

The oath was administered by Mr. Justice Nelson to Chief Justice Chase in the following words:

I do solemnly swear that in all things appertaining to the trial of the impeachment of Andrew Johnson, President of the United States, I will do impartial justice according to the Constitution and laws. So help me God.

[The Senators rise when the Chief Justice entered the Chamber and remained standing till the conclusion of the administration of the oath to him.]

The CHIEF JUSTICE. Senators, the oath will now be administered to the Senators as they will be called by the Secretary in succession. [To the Secretary.] Call the roll.

The administration of the oath then proceeded until the name of Mr. Benj. F. Wade, of Ohio, was called, when a question was raised as to his competency to vote.[53]

If the managers on the part of the House of Representatives were present during this proceeding, it was informally, as no mention is made of their presence.

On March 6 [54] the question as to Mr. Wade's right to vote with withdrawn, and the administration of the oath was concluded.

Thereupon the following occurred:

All the Senators present having taken the oath required by the Constitution, the Senate is now organized for the purpose of proceeding to the trial of the impeachment of Andrew Johnson, President of the United States. The Sergeant-at-Arms will make proclamation.

The SERGEANT-AT-ARMS. Hear ye, hear ye, hear ye. All persons are commanded to keep silence on pain of imprisonment while the Senate of the United States is sitting for the trial of the articles of impeachment against Andrew Johnson, President of the United States.

After the Chief Justice had submitted the question: "Shall the rules of proceeding adopted by the Senate on the 2d of March be the rules of proceeding in the trial of the impeachment?", and the same had been

[51] Senate Journal, pp. 809, 810; Globe, p. 1671.
[52] The Journal has this record "By direction of the Chief Justice the following oath was administered to him," etc. The Senate, in adopting rules for the trial, had assumed that the Chief Justice would not be sworn. See proceedings on Rule XXIV, section 2080 of this volume.
[53] For discussion of this question see section 2061 of this volume.
[54] Senate Journal, p. 811; Globe, p. 1701.

determined in the affirmative, Mr. Howard offered the following order, which was agreed to:

Ordered, That the Secretary of the Senate notify the House of Representatives that the Senate is now organized for the trial of the articles of impeachment against Andrew Johnson, President of the United States, and is ready to receive the managers of the impeachment at its bar.

2423. President Johnson's impeachment, continued.

The House did not attend the managers in making the formal demand that the Senate take process against President Johnson.

The House managers having demanded process against President Johnson, the Senate ordered a summons to issue, returnable on a given date.

The sessions of the Senate sitting for an impeachment trial may adjourn for more than three days.

The managers, having returned from demanding that process be issued against President Johnson, reported verbally to the House.

The managers of the impeachment of President Johnson were given leave to sit during sessions of the House and power to compel testimony.

A question had arisen in the House [55] as to whether or not the House should attend the managers, and Mr. Bingham said:

Mr. Speaker, after consultation with the managers on the part of the House, I am instructed by them to say to the House that, inasmuch as this is a mere formal proceeding to-day, they do not suppose it to be necessary or according to usage to ask the House to attend them to the bar of the Senate until the issue shall be joined.

In due time the managers (excepting Mr. Stevens), appeared [56] at the bar of the Senate, and their presence was announced by the Sergeant-at-Arms.

The Chief Justice said:

The managers of the impeachment on the part of the House of Representatives will please take the seats assigned to them.

The managers having been seated in the area in front of the chair.

Mr. Manager Bingham rose and said:

Mr. President, we are instructed by the House of Representatives, as its managers, to demand that the Senate take process against Andrew Johnson, President of the United States, that he may answer at the bar of the Senate upon the articles of impeachment heretofore preferred by the House of Representatives through its managers before the Senate.

Mr. Howard, a Senator, thereupon moved the following order, which was agreed to: [57]

Ordered, That a summons do issue, as required by the rules of procedure and practice in the Senate when sitting on the trial of impeachments, to Andrew Johnson, returnable on Friday, the 13th day of March instant, at 1 o'clock in the afternoon.

After a subject relating to an amendment of the rules had been disposed of, Mr. Howard moved that the Senate sitting for the trial of the

[55] Globe, p. 1683.
[56] Senate Journal, p. 816; Globe, p. 1701.
[57] Senate Journal, p. 823; Globe, p. 1701.

President upon articles of impeachment,[58] adjourn to Friday, the 13th of March instant, at 1 o'clock afternoon.

This motion was agreed to, and the Chief Justice thereupon declared the Senate sitting for the trial of impeachments adjourned to the time named and vacated the chair.

The President pro tempore resumed the chair and called the Senate to order.[59]

The managers having returned to the House, appeared at the bar,[60] and being recognized by the Speaker, Mr. Bingham said:

I have the honor to report, on behalf of the managers in the matter of the impeachment of Andrew Johnson, President of the United States, that the Senate has organized for the trial of the impeachment; that in the name of the House of Representatives and in the behalf of all the people of the United States, the managers have demanded of the Senate that process be issued against Andrew Johnson, President of the United States, to answer to the articles heretofore exhibited against him at the bar of the Senate; and that the Senate has advised us that process will be issued against him in that behalf, returnable on the 13th instant, at 1 o'clock p.m.

On March 6,[61] also in the House, Mr. Bingham offered the following:

Resolved, That the managers on the part of the House, in the matter of the impeachment of the President, be, and hereby are, authorized to sit during the sessions of the House, and shall have power to send for persons and papers, administer oaths, and take the testimony of witnesses.

Mr. Bingham explained that this was desired to enable the managers to administer oaths to witnesses. The resolution was agreed to, yeas 89, nays 25.

2424. President Johnson's impeachment, continued.

Ceremonies at the return of the summons to President Johnson to appear and answer the articles of impeachment.

Form used by the Sergeant-at-Arms in Calling President Johnson to appear and answer the articles of impeachment.

President Johnson entered his appearance by a letter addressed to the Chief Justice and naming the counsel to appear for him.

President Johnson by his own letter and by a paper filed and signed by his counsel asked forty days in which to prepare his answer.

The House in Committee of the Whole, on notice from the Senate, attended on the return day of the summons to President Johnson.

The Chief Justice held, in the Senate sitting for the trial of President Johnson, that the journal should be read before other proceedings.

On March 13 [62] at 1 p.m. the Chief Justice entered the Senate Chamber, resumed the chair, and said (to the Sergeant-at-Arms):

Make proclamation.

The SERGEANT-AT-ARMS. Hear ye! hear ye. All persons are commanded to keep silence while the Senate of the United States is sitting for the trial of the articles of impeachment exhibited by the House of Representatives against Andrew Johnson, President of the United States.

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[58] The Globe (p. 1701) indicates that Mr. Howard used the word "court," but the Journal does not permit the word.
[59] Senate Journal, pp. 276–823; Globe p. 1701.
[60] House Journal, p. 484; Globe, p. 1711.
[61] House Journal, p. 481; Globe, p. 1706.
[62] House Journal, p. 519; Globe, p. 1869.

Propositions being made to notify the House of Representatives and also that several Senators be sworn, the Chief Justice said:

The first business is to read the journal of the last session of the court. The Senators will be sworn in afterwards.

The Secretary read the journal of the proceedings of the Senate sitting for the trial of impeachment of Andrew Johnson, President of the United States, on Friday, March 6, 1868.

Mr. Jacob M. Howard, of Michigan, submitted this order, which was agreed to:

Ordered, That the Secretary inform the House of Representatives that the Senate is in its Chamber, and ready to proceed with the trial of Andrew Johnson, President of the United States, and that seats are provided for the accommodation of the Members.

This message being received in the House,[83] that body resolved itself into Committee of the Whole, with Mr. Elihu B. Washburne, of Illinois, in the chair, and thereupon attended the managers to the Senate.

The managers having appeared at the bar, were announced by the Sergeant-at-Arms and conducted to the position assigned them.

The oath was then administered to several Senators not previously sworn.

Then the following proceedings occurred:[84]

The CHIEF JUSTICE. The Secretary of the Senate will read the return of the Sergeant-at-Arms to the summons directed to be issued by the Senate.

The Chief Clerk read the following return appended to the writ of summons:

The foregoing writ of summons, addressed to Andrew Johnson, President of the United States, and the foregoing precept, addressed to me, were this day duly served on the said Andrew Johnson, President of the United States, by delivering to and leaving with him true and attested copies of the same at the Executive Mansion, the usual place of abode of the said Andrew Johnson, on Saturday, the 7th day of March instant, at 7 o'clock in the afternoon of that day.

GEORGE T. BROWN,
Sergeant-at-Arms of the United States Senate.

WASHINGTON, *March 7, 1868.*

The Chief Clerk administered to the Sergeant-at-Arms the following oath:

I, George T. Brown, Sergeant-at-Arms of the Senate of the United States, do swear that the return made and subscribed by me upon the process issued on the 7th day of March, A.D. 1868, by the Senate of the United States against Andrew Johnson, President of the United States, is truly made, and that I have performed said service therein prescribed. So help me God.

The CHIEF JUSTICE. The Sergeant-at-Arms will call the accused.

The SERGEANT-AT-ARMS. Andrew Johnson, President of the United States, Andrew Johnson, President of the United States, appear and answer the articles of impeachment exhibited against you by the House of Representatives of the United States.

There being no response, Mr. Reverdy Johnson, of Maryland, a Senator, made this suggestion:

I understand that the President has retained counsel, and that they are now in the President's room attached to this wing of the Capitol. They are not

[83] Senate Journal, p. 824; Globe Supplement, p. 6.
[84] Globe Supplement, p. 6.

advised, I believe, of the court being organized. I move that the Sergeant-at-Arms inform them of that fact.

The CHIEF JUSTICE. If there be no objection, the Sergeant-at-Arms will so inform the counsel of the President.

The Sergeant-at-Arms presently returned with Hon. Henry Stanbery, of Kentucky; Hon. Benjamin R. Curtis, of Massachusetts, and Hon. Thomas A. R. Nelson, of Tennessee, who were conducted to the seats assigned the counsel of the President.

Then the following occurred:

The Sergeant-at-Arms announced the Members of the House of Representatives, who entered the Senate Chamber preceded by the chairman of the Committee of the Whole House (Mr. E. B. Washburne, of Illinois), into which that body had resolved itself to witness the trial, who was accompanied by the Speaker and Clerk.

The CHIEF JUSTICE (to the counsel for the President). Gentlemen, the Senate is now sitting for the trial of the President of the United States upon articles of impeachment exhibited by the House of Representatives. The court will now hear you.

Mr. STANBERY. Mr. Chief Justice, my brothers Curtis and Nelson and myself are here this morning as counsel for the President. I have his authority to enter his appearance, which, with your leave, I will proceed to read:

"In the matter of the impeachment of Andrew Johnson, President of the United States.

"Mr. CHIEF JUSTICE: I, Andrew Johnson, President of the United States, having been served with a summons to appear before this honorable court, sitting as a court of impeachment to answer certain articles of impeachment found and presented against me by the honorable the House of Representatives of the United States, do hereby enter my appearance by my counsel, Henry Stanbery, Benjamin R. Curtis, Jeremiah S. Black, William M. Evarts, and Thomas A. R. Nelson, who have my warrant and authority therefor, and who are instructed by me to ask of this honorable court a reasonable time for the preparation of my answer to said articles.

"After a careful examination of the articles of impeachment and consultation with my counsel, I am satisfied that at least forty days will be necessary for the preparation of my answer, and I respectfully ask that it be allowed.

"ANDREW JOHNSON."

The CHIEF JUSTICE. The paper will be filed.

Mr. STANBERY. Mr. Chief Justice, I have also a professional statement in support of the application. Whether it is in order to offer it now or to wait until the appearance is entered your Honor will decide.

The CHIEF JUSTICE. The appearance will be considered as entered. You may proceed.

Mr. STANBERY. I will read the statement.

"In the matter of the impeachment of Andrew Johnson, President of the United States.

"Henry Stanbery, Benjamin R. Curtis, Jeremiah S. Black, William M. Evarts, and Thomas A. R. Nelson, of counsel for the respondent, move the court for the allowance of forty days for the preparation of the answer to the articles of impeachment, and in support of the motion make the following professional statement:

"The articles are eleven in number, involving many questions of law and fact. We have, during the limited time and opportunity afforded us, considered as far as possible the field of investigation which must be explored in the preparation of the answer, and the conclusion at which we have arrived is that with the utmost diligence the time we have asked is reasonable and necessary.

"The precedents as to time for answer upon impeachments before the Senate, to which we have had opportunity to refer, are those of Judge Chase and Judge Peck.

"In the case of Judge Chase time was allowed from the 3d of January until the 4th of February next succeeding to put in his answer, a period of thirty-two days; but in this case there were only eight articles, and Judge Chase had been for a year cognizant of most of the articles, and had been himself engaged in preparing to meet them.

"In the case of Judge Peck there was but a single article. Judge Peck asked for time from the 10th to the 25th of May to put in his answer, and it was granted. It appears that Judge Peck had been long cognizant of the ground laid for his impeachment, and had been present before the committee of the House upon the examination of the witnesses, and had been permitted by the House of Representatives to present to that body an elaborate answer to the charges.

"It is apparent that the President is fairly entitled to more time than was allowed in either of the foregoing cases. It is proper to add that the respondents in these cases were lawyers, fully capable of preparing their own answers, and that no pressing official duties interfered with their attention to that business; whereas the President, not being a lawyer, must rely on his counsel. The charges involve his acts, declarations, and intentions, as to all which his counsel must be fully advised upon consultation with him, step by step, in the preparation of his defense. It is seldom that a case requires such constant communication between client and counsel as this, and yet such communication can only be had at such intervals as are allowed to the President from the usual hours that must be devoted to his high official duties.

"We further beg leave to suggest for the consideration of this honorable court that as counsel, careful as well of their own reputation as of the interests of their client in a case of such magnitude as this, so out of the ordinary range of professional experience, where so much responsibility is felt, they submit to the candid consideration of the court that they have a right to ask for themselves such opportunity to discharge their duty as seems to them to be absolutely necessary.

"HENRY STANBERY,
"B. R. CURTIS,
"JEREMIAH S. BLACK, } per H. S.
"WILLIAM M. EVARTS, }
"THOMAS A. R. NELSON,
"Of Counsel for the Respondent.

"MARCH 13, 1868."

2425. President Johnson's impeachment, continued.

The Senate denied the motion of President Johnson's counsel that he be allowed forty days to answer and granted ten days.

The managers urged, in view of Rule VIII, that President Johnson should answer on the return day, but were overruled.

Review of English precedents as to the distinction between the pleadings and the trial of an impeachment.

The Senate deliberated in secret session on the application of President Johnson for time to prepare his answer.

The proceedings of secret sessions of the Senate in the Johnson trial appear in the Journal, but the debates were not recorded.

Immediately [65] Mr. Manager Bingham raised the question that under the language of the eighth rule the motion for continuance was not allowable, the provision of the rule being that if the respondent appeared he should answer, the terms of the rule being:

If the accused, after service, shall fail to appear, either in person or by attorney, on the day so fixed therefor, as aforesaid, or appearing shall fail to file his answer to such articles of impeachment, the trial shall proceed nevertheless as upon a plea of not guilty.

Counsel for the respondent argued that it would be oppressive for the proceedings to be so hastened, and an innovation upon even the worst precedents in English history. Assuming, apparently, that they must at once proceed to trial, they stated that they could not summon

[65] Globe Supplement, p. 7.

their witnesses until the pleadings were prepared. Mr. Henry Stanbery further said:

Rule 9 provides:

"At 12 o'clock and 30 minutes afternoon of the day appointed for the return of the summons against the person impeached."

This is the return day; it is not the trial day. The letter answers the gentlemen. According to the letter of the eighth rule they say "this is the trial day; go on; not a moment's delay; file your answer and proceed to trial; or without your answer let a general plea of not guilty be entered, and proceed at once with the trial." The ninth rule says this is the return day, not the trial day. Then the tenth rule says:

"The person impeached shall then be called to appear and answer the articles of impeachment against him."

That is the call made on the return day. The accused is called to appear and answer. He is here; he appears; he states his willingness to answer; he only asks a reasonable time to prepare the answer. Then rule 11 speaks "of the day appointed for the trial." That is not this day. This day, the day which the gentlemen would make the first day of the trial, is, in your own rules, put down for the return day, and you must have some other day for the trial day to suit the convenience of the parties; so that the letter of one rule answers the letter of another rule.

Mr. Manager Bingham replied that the making up of the issue and the trial were distinct matters. Citing a precedent, he said:

A very remarkable case in the twelfth volume of State Trials lies before me, wherein Lord Holt presided, on the trial of Sir Richard Grahme, Viscount Preston, and others, charged with high treason. In that case the accused appeared, as the accused by the learned gentlemen appears this morning, after the indictment presented in the court, and before plea asked for continuance. The answer that fell from the lips of the Lord Chief Justice was, we are not to consider the question of trial or the time of trial until plea be pleaded. Let me give his very words:

"L. C. HOLT. My lord, we debate the time of your trial too early; for you must put yourself upon your trial first by pleading."

And when Lord Preston presses him again on the point Lord Chief Justice Holt responds:

"My lord, we can not dispute with you concerning your trial till you have pleaded. I know not what you will say to it; for aught I know there may be no occasion for a trial. I can not tell what you will plead; your lordship must answer to the indictment before we can enter into the debate of this matter." (12 State Trials, 664.)

The eighth rule of the Senate, last clause, provides that if the party appearing shall plead guilty there may be no further proceedings in the case, no trial about it; nothing remains to be done but to pronounce judgment under the Constitution. It is time enough for us to talk about a trial when we have an issue. The rule is a plain one, a simple one.

And I may be pardoned for saying that I fail to perceive anything in rules 10 or 11 to which the learned counsel have referred that by any kind of construction can be supposed to limit the effect of the words in rule 8, to wit:

"If the accused, after service, shall fail to appear, either in person or by attorney, on the day so fixed therefor as aforesaid, or appearing shall fail to file his answer [on the day on which he is summoned to appear] the trial shall proceed nevertheless as upon a plea of not guilty."

When words are plain in a written law there is an end to all construction; they must be followed. The managers so thought when they appeared at this bar. All they ask is the enforcement of the rule, not a postponement of forty days, and at the end of that time to be met with a dilatory plea—a motion, if you please—to quash the articles, or a question raising the inquiry whether this is the Senate of the United States.

The Chief Justice being about to put the motion submitted by the counsel for the respondent, Mr. George F. Edmunds, of Vermont, submitted [66] the following:

[66] Senate Journal, p. 826; Globe Supplement, p. 826.

Ordered, That the respondent file his answer to the articles of impeachment on or before the 1st day of April next, and that the managers of the impeachment file their replication thereto within three days thereafter, and that the matter stand for trial on Monday, April 6, 1868.

Then, on motion of Mr. Oliver P. Morton, of Indiana, it was voted "that the Senate retire to deliberate and confer in regard to its determination of the question." The Journal indicates that the Chief Justice retired with the Senate. The proceedings during the secret session were recorded in the Journal,[67] but not in the report of the trial. As soon as the Senate had assembled in the conference chamber, Mr. Charles D. Drake, of Missouri, moved [68] to strike out of Mr. Edmunds's resolution all after the word "*Resolved*" and insert: "That the respondent file answer to the articles of impeachment on or before Friday, the 20th day of March instant."

At first this was agreed to, yeas 28, nays 20, but on motion of Mr. Lyman Trumbull, of Illinois, and by a vote of yeas 27, nays 23, the vote was reconsidered, and then Mr. Drake's amendment was amended by striking out the words "Friday, the 20th," and inserting "Monday, the 23d." The amendment as amended was agreed to, and then the order as amended was agreed to.

The Senate then returned to its Chamber; and the Chief Justice announced to the counsel for the President that their motion to be allowed forty days to prepare and file answer to the articles of impeachment was denied, and that the Senate had adopted the following order:

Ordered, That the respondent file answer to the articles of impeachment on or before Monday, the 23d day of March instant.

2426. President Johnson's impeachment, continued.

After argument as to the propriety of delay, the Senate determined that the trial of President Johnson should proceed immediately after replication should be filed.

The Chief Justice held, in the Johnson impeachment, that both managers and counsel might be heard on a motion of a Senator to fix the time for the trial to begin.

Then, by instruction of the managers, Mr. Manager Bingham submitted [69] the following motion:

The managers ask the Senate respectfully to adopt the following order:

"*Ordered*, That upon the filing of a replication by the managers on the part of the House of Representatives the trial of Andrew Johnson, President of the United States, upon the articles of impeachment exhibited by the House of Representatives shall proceed forthwith."

The question being put on agreeing to the order, there appeared, yeas 25, nays 26. So the order was disagreed to.

Thereupon, Mr. John Sherman, of Ohio, a Senator, offered [70] the following:

Ordered, That the trial of the articles of impeachment shall proceed on the 6th day of April next.

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[67] In former trials the Journal did not record the secret sessions. It seems to have been considered that the Constitution and the rules required the Journal to be kept. See remarks of Mr. Edmunds, Globe, p. 1886.

[68] Senate Journal, pp. 826, 827.

[69] Senate Journal, p. 827; Globe Supplement, p. 8.

[70] Senate Journal, pp. 827, 828; Globe Supplement, pp. 8–11.

Mr. Henry Wilson, of Massachusetts, a Senator, moved to amend by striking out "the 6th day of April" and inserting "the 1st day of April."

Mr. Manager Butler thereupon asked if the managers might be heard on the motion.

The Chief Justice replied:

The Chair is of opinion that the managers have a right to be heard and also the counsel for the accused.

Mr. Manager Butler thereupon argued for a speedy trial. The precedents for delay, which might be cited from the case of Judge Chase, were not applicable, since the railroads and telegraph had revolutionized means of communication. As justifying and enforcing the need of expedition, Mr. Butler said:

The ordinary delays in court, the ordinary time given in ordinary cases for men to answer when called before tribunals of justice, have no application to this case. The rules by which cases are heard and determined before the Supreme Court of the United States are not rules applicable to the case at bar; and for this reason, if for no other, when ordinary trials are had, when ordinary questions are examined at the bar of any court, there is no danger to the common weal in delay, the Republic may take no detriment if the trial is postponed; to give the accused time injures nobody; to grant him indulgence hurts no one, and may help one, and perhaps an innocent man. But here the House of Representatives have presented at the bar of the Senate, in the most solemn form, the Chief Executive officer of the nation. They say (and they desire your judgment upon their accusation) that he has usurped power which does not belong to him; that he is at this very time breaking the laws solemnly enacted by you, the Senate, and those who present him here, the Congress of the United States, and that he still proposes so to do.

Sir, who is the criminal—I beg pardon for the word—the respondent at the bar? He is the Chief Executive of the nation, and when I have said that, I have taken out from all ordinary rules this trial, because I submit with deference that here and now, for the first time in the history of the world, has any nation brought its ruler to the bar of its highest tribunal in a constitutional method, under the rules and forms prescribed by its Constitution, and therefore all the rules, all the analogies, all the likeness to a common and ordinary trial of any cause, civil or criminal, cease at once, are silent, and ought not to weigh in judgment. Other nations have tried and condemned their kings and rulers, but the process has always been in violence and subversive of their constitutions and framework of government, not in submission to and accordance with it.

When I name the respondent as the Chief Executive, I say he is the Commander in Chief of your armies; he specially claims that command, not by force and under the limitations of your laws, but as a prerogative of his office and subject to his arbitrary will. He controls, through his subordinates, your Treasury. He commands your Navy. Thus he has all elements of power. He controls your foreign relations. In any hour of passion, of prejudice, of revenge for fancied wrong in his own mind, he may complicate your peace with any nation of the earth, even while he is being arraigned as a respondent at your bar. And mark me, sir, may I respectfully submit that the very question here at issue this day and this hour is, whether he shall control beyond the reach of your laws, and outside of your laws, the Army of the United States. The one greatest of all questions here at issue is whether he shall be able, against law—setting aside your laws, setting aside the decrees of the Senate, setting aside the laws enacted by Congress, overriding the legislative power of the country, claiming it as in attribute of executive power only, to control the great military arm of this Government, and control it if he chooses at his own good pleasure, its your ruin and the ruin of the country.

Mr. Nelson, counsel for the respondent, in pleading for delay, said:

Mr. Chief Justice, I need not tell you, nor need I tell many of the honorable Senators whom I address on this occasion, many of whom are lawyers, many of whom have been clothed in times past with the judicial ermine, that in the courts of law the vilest criminal who ever was arraigned in the United States has been given time for preparation, time for hearing. The Constitution of the

country secure to the vilest man in the land the right not only to be heard himself, but to be heard by counsel; and no matter how great his crime, no matter how deep may be the malignity of the offense with which he is charged, he is tried according to the forms of law; he is allowed to have counsel; continuances are granted to him; if he is unable to obtain justice, time is given to him, and all manner of preparation is allowed him.

If this is so in courts of common law, that are fettered and bound by the iron rules to which I have adverted, how much more in a great tribunal like this that does not follow the precedents of law, but that is aiming and seeking alone to attain justice, ought we to be allowed ample time for preparation in reference to charges of the nature which we have here? How much more, sir, should such time be given us?

We are told that the President acted in regard to one of the matters which is charged against him by the House of Representatives on the 21st of February, and that by the 4th of March—if I did not mistake the statement of the honorable manager—the House of Representatives had presented this accusation against the President of the United States; and, that, therefore, the President, who knew what he was doing, should be prepared for his defense. Mr. Chief Justice, is it necessary for me to remind you and honorable Senators that you can upon a page of foolscap paper prepare a bill of indictment against an individual which may require weeks in the investigation? Is it necessary for me to remind this honorable body that it is an easy thing to make charges, but that it is often a laborious and difficult thing to make a defense against those accusations?

Reasoning from the analogy furnished by such proceedings at law, I earnestly maintain before this honorable body that suitable time should be given us to answer the charges which are made here. A large number of these charges—those of them connected with the President's action in reference to the Secretary of War—involve questions of the deepest importance. They involve an inquiry running back to the very foundation of the Government; they involve an examination of the precedents which have been set by different administrations; they involve, in short, the most extensive range of inquiry. The two last charges that were presented by the House of Representatives, if I may be pardoned for using the expression in the view which I entertain of them, open Pandora's box, and will cause an investigation as to the great differences of opinion which have existed between the President and the House of Representatives, an inquiry which, so far as I can perceive, will be almost interminable in its character.

Mr. Manager Bingham, in arguing against delay, commented on the fact that no formal application had been made by the accused himself for delay. Mr. Bingham also referred to the fact that in the case of Judge Chase the trial had been ordered to proceed on the day the answer was received.

Mr. Roscoe Conkling, of New York, a Senator, proposed to the order offered by Mr. Sherman this amendment:

Strike out all after the word "ordered" and insert: "That unless otherwise ordered by the Senate, for cause shown, the trial of the pending impeachment shall proceed immediately after replication shall be filed."

This amendment was agreed to—yeas 40, nays 10; and then the order as amended was agreed to, as follows:

Ordered, That, unless otherwise ordered by the Senate for cause shown, the trial of the pending impeachment shall proceed immediately after replication shall be filed.

Then, on motion of Mr. Jacob M. Howard, of Michigan,

the Senate sitting for the trial of the President upon articles of impeachment, adjourned to Monday, the 23d day of March instant, at 1 o'clock p.m.

2427. President Johnson's impeachment, continued.

The House, by a standing order, determined to attend in Committee of the Whole, the trial of President Johnson.

Forms of procedure at the change in the Senate form a legislative session to a session for the trial of the President.

During the trial of the President the Chief Justice was escorted to the chair by the chairman of a committee of the Senate.

The House attended at each session of the trial of the President on notice from the Senate.

The sessions of the Senate for the trial of the President were opened by proclamation.

The managers were announced when they attended in the Senate for the trial of the President, but the counsel for respondent entered unannounced.

The House of Representatives was announced when, as a Committee of the Whole, it attended the trial of the President.

On March 20,[71] in the House, Mr. George Boutwell, under suspension of the rules, presented the following resolutions, which was agreed to by the House without division:

Resolved, That on the days when the Senate shall sit for the trial of the President upon the articles of impeachment exhibited by the House of Representatives, the House, in Committee of the Whole, will attend with the managers at the bar of the Senate at the hour named for the commencement of the proceedings.

On March 23,[72] in the House, a message was received from the Senate by their Secretary, that—

the Senate is in its Chamber and ready to proceed on the trial of Andrew Johnson, President of the United States, and that seats are provided for the accommodation of the Members.

This message was ordered by the Senate before the Chief Justice had taken his seat as Presiding Officer.[73]

Thereupon, on motion of Mr. Elihu B. Washburne, of Illinois, the House resolved itself into a Committee of the Whole and with Mr. Washburne as chairman proceeded to the Senate.

In the Senate, at the hour of 1 o'clock, the President pro tempore [74] said: [75]

According to the order of the Senate, the chair will be now vacated, that the Senate may be presided over by the Chief Justice of the United States for the trial of the impeachment.[76]

Thereupon the Chief Justice of the United States entered the Senate Chamber, escorted by Mr. Pomeroy, the chairman of the Senate committee heretofore appointed for that purpose, and took the chair.

The Sergeant-at-Arms made proclamation in the prescribed form; the managers on the part of the House of Representatives appeared, their presence was announced by the Sergeant-at-Arms, and they took their seats; the counsel for the President appeared and took seats, apparently without announcement, and then the Sergeant-at-Arms announced the presence of the House of Representatives; and the Committee of the Whole House, headed by Mr. E. B. Washburne, of Illinois, the Chairman of the Committee of the Whole, and the Clerk of the House, entered the Chamber, and the Members were conducted to the seats assigned them.

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[71] Second session Fortieth Congress, House Journal, pp. 549, 550; Globe, p. 2021.
[72] House Journal, p. 561; Globe, p. 2071.
[73] Globe, pp. 2068, 2069; Senate Journal, p. 334.
[74] B. F. Wade, of Ohio, President pro tempore.
[75] Senate Journal, p. 334; Globe, p. 2069.
[76] Globe supplement, p. 1.

A Senator who had not taken the oath was sworn, and then the Journal of the preceding sitting was read.[77]

2428. President Johnson's impeachment, continued.

The answer of President Johnson to the articles of impeachment.

The answer of the President took up the articles one by one, denying some of the charges, admitting others, but denying that they set forth impeachable offenses and excepting to the sufficiency of others.

President Johnson's answer was signed by himself and counsel.

In his answer President Johnson referred to the Senate as a court.

The answer by President Johnson to the articles of impeachment was accompanied by two exhibits.

The answer of President Johnson to the articles of impeachment was read by his counsel.

After this disposition of a question relating to the competency of the Senate to proceed with the case,[78] the counsel for the President filed his answer and by direction of the Chief Justice read it,[79] beginning in form as follows:

Senate of the United States, sitting as a court of impeachment for the trial of Andrew Johnson, President of the United States.

The answer of the said Andrew Johnson, President of the United States, to the articles of impeachment exhibited against him by the House of Representatives of the United States.

ANSWER TO ARTICLE I

For answer to the first article he says: That * * *, etc.

The answer then proceeds, article by article:

ARTICLE I. The answer reviews at length the transactions with reference to Secretary Stanton and concludes with these specific denials:

And this respondent, proceeding to answer specifically each substantial allegation in the said first article, says: He denies that the said Stanton, on the 21st day of February, 1868, was lawfully in possession of the said office of Secretary for the Department of War. He denies that the said Stanton, on the day last mentioned, was lawfully entitled to hold the said office against the will of the President of the United States. He denies that the said order for the removal of the said Stanton was unlawfully issued. He denies that the said order was issued with intent to violate the act entitled "An act to regulate the tenure of certain civil offices." He denies that the said order was a violation of the last-mentioned act. He denies that the said order was a violation of the Constitution of the United States, or of any law thereof, or of his oath of office. He denies that the said order was issued with an intent to violate the Constitution of the United States or any law thereof, or this respondent's oath of office; and he respectfully, but earnestly, insists that not only was it issued by him in the performance of what he believed to be an imperative official duty, but in the performance of what this honorable court will consider was, in point of fact, an imperative official duty. And he denies that any and all substantive matters, in the said first article contained, in manner and form as the same are therein stated and set forth, do, by law, constitute a high misdemeanor in office, within the true intent and meaning of the Constitution of the United States.

[77] Senate Journal, pp. 828, 829; Globe, pp. 11, 12.
[78] See section 2060 of this volume.
[79] Senate Journal, pp. 829–860; Globe supplement, pp. 12–22.

ART. II. The answer in full is as follows:

And for answer to the second article, this respondent says that he admits he did issue and deliver to said Lorenzo Thomas the said writing set forth in said second article, bearing date at Washington, D.C., February 21, 1868, addressed to Bvt. Maj. Gen. Lorenzo Thomas, Adjutant-General United States Army, Washington, D.C., and he further admits that the same was so issued without the advice and consent of the Senate of the United States, then in session, but he denies that he thereby violated the Constitution of the United States, or any law thereof, or that he did thereby intend to violate the Constitution of the United States, or the provisions of any act of Congress; and this respondent refers to his answer to said first article for a full statement of the purposes and intentions with which said order was issued, and adopts the same as part of his answer to this article; and he further denies that there was then and there no vacancy in the said office of Secretary for the Department of War, or that he did then and there commit, or was guilty of a high misdemeanor in office, and this respondent maintains and will insist:

1. That at the date and delivery of said writing there was a vacancy existing in the office of Secretary for the Department of War.

2. That, notwithstanding the Senate of the United States was then in session, it was lawful and according to long and well established usage to empower and authorize the said Thomas to act as Secretary of War ad interim.

3. That, if the said act regulating the tenure of civil offices be held to be a valid law, no provision of the same was violated by the issuing of said order or by the designation of said Thomas to act as Secretary of War ad interim.

ART. III. The answer is as follows, in full:

And for answer to said third article this respondent says that he abides by his answer to said first and second articles, in so far as the same are responsive to the allegations contained in the said third article, and, without here again repeating the same answer, prays the same be taken as an answer to this third article as fully as if here again set out at length, and as to the new allegation contained in said third article, that this respondent did appoint the said Thomas to be Secretary of the Department of War ad interim, this respondent denies that he gave any other authority to said Thomas than such as appears in said written authority set out in said article, by which he authorized and empowered said Thomas to act as Secretary for the Department of War ad interim, and he denies that the same amounts to an appointment and insists that it is only a designation of an officer of that Department to act temporarily as Secretary for the Department of War ad interim until an appointment should be made. But, whether the said written authority amounts to an appointment or to a temporary authority or designation, this respondent denies that in any sense he did thereby intend to violate the Constitution of the United States, or that he thereby intended to give the said order the character or effect of an appointment in the constitutional or legal sense of that term. He further denies that there was no vacancy in said office of Secretary for the Department of War existing at that date of said written authority.

ART. IV. In answer to Article IV the charge of conspiracy was denied, as also the charge that intimidation and threats were used in connection with the attempt to supersede Secretary Stanton by General Thomas; and in concluding, the following exception is taken:

This respondent doth here except to the sufficiency of the allegation contained in said fourth article, and states for ground of exception that it is not stated that there was any agreement between this respondent and the said Thomas, or any other person or persons, to use intimidation and threats, nor is there any allegation as to the nature of and intimidation and threats, or that there was any agreement to carry them into execution, or that any step was taken or agreed to be taken to carry them into execution, and that the allegation in said article that the intent of said conspiracy was to use intimidation and threats is wholly insufficient, inasmuch as it is not alleged that the said intent formed the basis or became a part of any agreement between the said alleged conspirators, and, furthermore, that there is no allegation of any conspiracy or agreement to use intimidation or threats.

ART. V. The answer in full, with an exception:

And for answer to the said fifth article this respondent denies that on the said 21st day of February, 1868, or at any other time or times in the same year before the said 2d day of March, 1868, or at any prior or subsequent time, at Washington aforesaid or at any other place, this respondent did unlawfully conspire with the said Thomas, or with any other person or persons, to prevent or hinder the execution of the said act entitled "An act regulating the tenure of certain civil offices," or that, in pursuance of said alleged conspiracy, he did unlawfully attempt to prevent the said Edwin M. Stanton from holding said office of Secretary for the Department of War, or that he did thereby commit, or that he was thereby guilty of, a high misdemeanor in office. Respondent, protesting that said Stanton was not then and there Secretary for the Department of War, begs leave to refer to his answer given to the fourth article and to his answer given to the first article as to his intent and purpose in issuing the orders for the removal of Mr. Stanton and the authority given to the said Thomas, and prays equal benefit therefrom as if the same were here again repeated and fully set forth.

And this respondent excepts to the sufficiency of the said fifth article, and states his ground for such exception, that it is not alleged by what means or by what agreement the said alleged conspiracy was formed or agreed to be carried out, or in what way the same was attempted to be carried out, or what were the acts done in pursuance thereof.

ART. VI. The answer in full:

And for answer to the said sixth article, this respondent denies that on the said 21st day of February, 1868, at Washington aforesaid, or at any other time or place, he did unlawfully conspire with the said Thomas by force to seize, take, or possess, the property of the United States in the Department of War, contrary to the provisions of the said acts referred to in the said article, or either of them, or with intent to violate either of them. Respondent, protesting that said Stanton was not then and there Secretary for the Department of War, not only denies the said conspiracy as charged, but also denies any unlawful intent in reference to the custody and charge of the property of the United States in the said Department of War, and again refers to his former answers for a full statement of his intent and purpose in the premises.

ART. VII. The answer in full:

And for answer to the said seventh article respondent denies that on the said 21st day of February, 1868, at Washington aforesaid, or at any other time and place, he did unlawfully conspire with the said Thomas with intent unlawfully to seize, take, or possess the property of the United States in the Department of War with intent to violate or disregard the said act in the said seventh article referred to, or that he did then and there commit a high misdemeanor in office. Respondent, protesting that the said Stanton was not then and there Secretary for the Department of War, again refers to his former answers, in so far as they are applicable, to show the intent with which he proceeded in the premises, and prays equal benefit therefrom, as if the same were here again fully repeated. Respondent further takes exception to the sufficiency of the allegations of this article as to the conspiracy alleged upon the same grounds as stated in the exception set forth in his answer to said article fourth.

ART. VIII. The answer in full:

And for answer to the said eighth article this respondent denies that on the 21st day of February, 1868, at Washington aforesaid, or at any other time and place, he did issue and deliver to the said Thomas the said letter of authority set forth in the said eighth article, with the intent unlawfully to control the disbursements of the money appropriated for the military service and for the Department of War. This respondent, protesting that there was a vacancy in the office of Secretary for the Department of War, admits that he did issue the said letter of authority, and he denies that the same was with any unlawful intent whatever, either to violate the Constitution of the United States or any act of Congress. On the contrary, this respondent again affirms that his sole intent was to vindicate his authority as President of the United States, and by peaceful means to bring the question of the right of the said Stanton to continue to hold the said office of Secretary of War to a final decision before the Supreme Court

of the United States, as has been hereinbefore set forth; and he prays the same benefit from his answer in the premises as if the same were here again repeated at length.

ART. IX. In answer to Article IX the President reviews his transactions and conversations with General Emory, admits that he expressed an opinion that the law in question was unconstitutional, shows that he expressed the same opinion to the House of Representatives by message, and summarizes:

Respondent doth therefore deny that by the expression of such opinion he did commit or was guilty of a high misdemeanor in office, and this respondent doth further say that the said article nine lays no foundation whatever for the conclusion stated in the said article, that the respondent, by reason of the allegations therein contained, was guilty of a high misdemeanor in office.

ART. X. In answer to this article the President does not admit that the passages set forth as portions of addresses delivered by him correctly or justly present his speeches, and demands that, in case the matter set forth in the article is deemed to constitute a high misdemeanor cognizable by the court, proof shall be required to be made of the actual speech. He protests that he has not been unmindful of the high duties of his office, or the harmonies and courtesies proper between different branches of the Government, or that he has had designs against the rightful power and authority of Congress; and that in all his communications to the Congress and the public he has acted within and according to his right and privilege as a citizen and his right and duty as President. And in conclusion he says:

And this respondent says that neither the said tenth article nor any specification thereof nor any allegation therein contained touches or relates to any official act or doing of this respondent in the office of President of the United States or in the discharge of any of its constitutional or legal duties or responsibilities; but said article and the specifications and allegations thereof, wholly and in every part thereof, question only the discretion or propriety of freedom of opinion or freedom of speech, as exercised by this respondent as a citizen of the United States in his personal right and capacity, and without allegation or imputation against this respondent of the violation of any law of the United States touching or relating to freedom of speech or its exercise by the citizens of the United States, or by this respondent as one of the said citizens or otherwise; and he denies that by reason of any matter in said article or its specifications alleged he has said or done anything indecent or unbecoming in the Chief Magistrate of the United States, or that he has brought the high office of the President of the United States into contempt, ridicule, or disgrace, or that he has committed or has been guilty of a high misdemeanor in office.

ART. XI. The President denies specifically the charges, standing upon his right to freedom of speech as set forth in the answer to the preceding article, and concludes:

And this respondent, further answering the said eleventh article, denies that by means or reason of anything in said article alleged this respondent, as President of the United States, did, on the 21st day of February, 1868, or at any other day or time, commit, or that he was guilty of, a high misdemeanor in office.

And this respondent, further answering the said eleventh article, says that the same and the matters therein contained do not charge or allege the commission of any act whatever by this respondent, in his office of President of the United States, nor the omission by this respondent of any act of official obligation or duty in his office of President of the United States; nor does the said article nor the matters therein contained name, designate, describe, or define any act or mode or form of attempt, device, contrivance, or means, or of attempt at device, contrivance, or means whereby this respondent can know or understand what act or mode or form of attempt, device, contrivance, or means, or of attempt at device, contrivance, or means, are imputed to or charged against

this respondent, in his office of President of the United States, or intended so to be, or whereby this respondent can more fully or definitely make answer unto the said article than he hereby does.

Having answered article by article, the answer concludes:

And this respondent, in submitting to this honorable court this his answer to the articles of impeachment exhibited against him, respectfully reserves leave to amend and add to the same from time to time, as may become necessary or proper, and when and as such necessity and propriety shall appear.

ANDREW JOHNSON.

HENRY STANBERY,
B. R. CURTIS,
THOMAS A. R. NELSON,
WILLIAM M. EVARTS,
W. S. GROESBECK,
Of Counsel.

Attached to the answer were two exhibits, one being a message transmitted to the Senate by the President March 2, 1867, wherein the right of removal of officers was discussed; and the other a message of December 12, 1867, relating particularly to the case of Mr. Stanton.

2429. President Johnson's impeachment continued.

The answer of President Johnson to the articles of impeachment having been read, the question was taken on receiving it and placing it on file.

On the request of the managers the Senate ordered an attested copy of the answer of President Johnson to be sent to the House.

The answer of President Johnson having been received, the Senate gave the managers time to consult the House on a replication.

The reading of the answer being concluded, the Chief Justice said:[80]

Senators, you have heard the answer submitted by the counsel for the President of the United States. Those of you who are in favor of receiving and ordering this answer to be filed will say "aye," and those who are of the contrary opinion will say "no." [Having put the question.] It is so ordered; the answer is received and will be filed.

Thereupon Mr. Manager Boutwell presented a request that a copy of the answer be furnished to the House of Representatives. The Chief Justice put the question on the motion suggested by the request of the managers, and it was agreed to, the formal order being:

Ordered, That the managers have time to consult the House of Representatives on a replication, and that they be furnished with a copy of the answer of the respondent; and

Ordered, That the Secretary communicate to the House of Representatives an attested copy of the answer of the President to the articles of impeachment, together with a copy of the foregoing order.

2430. President Johnson's impeachment continued.

The answer to President Johnson having been read, his counsel offered a paper, signed by themselves, asking thirty days to prepare for trial.

The managers contended that President Johnson's request for time to prepare for the trial should have been signed by himself and under oath.

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[80] Senate Journal, p. 860; Globe supplement, pp. 22, 23.

The managers opposed President Johnson's request for thirty days to prepare for trial, citing American and English precedents in argument.

The Senate granted to President Johnson a less time than his counsel asked to prepare for trial.

In granting to President Johnson time to prepare for trial the Senate intimated that there should be no delays after the beginning of the trial.

The Senate retired to consider President Johnson's application for time to prepare for trial.

The proceedings in the Senate consultation chamber during the Johnson trial appear in the Journal and Globe; but the debates are not given. (Footnote.)

Thereupon Mr. Evarts, in behalf of the respondent, submitted the following motion: [81]

To the Senate of the United States sitting as a court of impeachment:

And now, on this 23d day of March, in the year 1868, the counsel for the President of the United States, upon reading and filing his answer to the articles of impeachment exhibited against him, respectfully represent to this honorable court that after the replication shall have been filed to the said answer, the due and proper preparation of and for the trial of the cause will require, in the opinion and judgment of such counsel, that a period of not less than thirty days should be allowed to the President of the United States and his counsel for such preparation, and before the said trial should proceed.

HENRY STANBERY,
B. R. CURTIS,
THOMAS A. R. NELSON,
WILLIAM M. EVARTS,
W. S. GROESBECK,
Of Counsel.

Mr. Manager Logan, on behalf of the House of Representatives, opposed the motion on the ground that the reasons given were not sufficient, and that the trial should be hastened because the respondent was continuing daily in the misuse of power for which he was arraigned. As to the precedents he said:

In the many trials we have reported in this and other countries this application has no precedent.

In the case of Judge Chase his application stated, in substance, that it was not in his power to obtain information respecting facts, alleged against him to have taken place in Philadelphia and Richmond, in time to prepare and put in his answer and proceed to trial before the 5th day of March then next following; and further that he could not get his witnesses or counsel nor prepare his answer, at the same time disclaiming that this was done for delay. This application was sworn to by the respondent; he was given time, and the facts show that his answer was filed and his trial had, and he acquitted in five days' less time than he swore it would take him to prepare for trial.

In Judge Peck's case his application stated his difficulties in obtaining witnesses, the distance they lived from Washington, the time it would require them to travel from St. Louis to Washington, the necessity for copying and obtaining records; that four years had elapsed since the transpiring of the acts complained of against him. This application was also sworn to. If the learned counsel remember the trial of Queen Caroline before the Parliament of Great Britain, when time was granted for the procurement of evidence the learned attorney-general then and there protested against this granting of time becoming a precedent for any future trial, this application being granted merely through courtesy to the Queen, when witnesses were deemed absolutely necessary to protect, if possible, her reputation. This application differs in form and substance from any that our attention has been directed to, made by the counsel, signed by themselves, and sworn to by no one.

[81] Senate Journal, pp. 860, 861; Globe supplement, pp. 23–28.

Mr. Logan in conclusion said:

I presume no man will doubt that if an application of this kind were made to a court at law the inquiry would be: "Have you issued your subpoenas; have you attempted to get your witnesses; have you attempted to make any preparation to try the cause?" And if the counsel would answer that they had made no preparation whatever; that they had issued no subpoenas; had made no attempt to procure witnesses or get ready for the trial of the cause, but merely desired time for thought and reflection, the application would certainly be denied. And against the granting of this, not made upon the oath of any person, not signed by the President, and merely intended for the benefit of counsel, we, the managers, in the name of the House of Representatives and the whole people of this Republic do most solemnly protest.

Later Mr. Manager Bingham urged:

I submit that a question of this magnitude has never been decided upon a mere presentation of a statement of counsel, in this country or in any country. To speak more plainly, a motion for continuance arising on a question of this sort, I venture to say, has never been decided affirmatively upon such an issue on a mere statement of counsel. If Andrew Johnson, the accused at this bar, has witnesses that were not within the process of this court up to this day, but whose attendance he can hope to procure if time be allowed him, he can make affidavit before this tribunal that they are material and set forth in his affidavit what he expects to prove by them. I concede that upon such a showing there would be something upon which the Senate might properly act.

Mr. Evarts, of counsel for the respondent, said:

In our estimate of the course of this proceeding before this honorable court we have not yet arrived at a time when it was the duty of counsel or was at the charge of the accused to know or consider what the issues were upon which he was to prepare on his side or expect on the other the production of proofs. Beyond that, we feel no occasion to present by affidavit to this honorable court a matter so completely within its cognizance that our time to plead was fixed so as to offer us but eight working days for that duty of counsel. * * *

It would seem to me that we are placed thus far in the attitude of a defendant in a civil or in a public prosecution who upon the issue joined desires time to prepare for trial. The ordinary course in such a case is that as matter of right, as matter of absolute and universal custom, one is not required or expected to give any cause of actual obstruction and difficulty in reference to a continuance to what is the term of the court, doubtless in most cases to occur within a brief period after the issue is joined. This court having no such arrangement and no such possible arrangement of its affairs in advance, we are obliged at each stage of regular proceeding to ask your attention as to what you will provide and consider in the particular case is, according to the general nature of the procedure and the understood attitude of both parties to it, a just and reasonable proposition to be made by us as to the time that should be allowed for the preparation in all respects for this trial after the issue shall have been joined.

At the conclusion of the discussion between the managers and the counsel for the respondent Mr. John B. Henderson, a Senator from Missouri, moved that the application of counsel for the respondent be postponed until after the filing of the replication. This motion was disagreed to, yeas 25, nays 28.

The question then recurring on granting the application of counsel for the respondent, it was denied, yeas 12, nays 41.

Thereupon Mr. Evarts, counsel for the respondent, submitted the following:

The counsel for the President now move that there be allowed for the preparation of the President of the United States for the trial, after the replication shall be filed and before the trial shall be required to proceed, such reasonable time as shall now be fixed by the Senate.

Pending its consideration the Senate adjourned until the next day, March 24. When it convened on that day [82] for the trial the replication

[82] Senate Journal, pp. 862–864; Globe supplement, pp. 28, 29.

of the House of Representatives was filed, and then the consideration of the application for time was resumed. In answer to the request of counsel for the respondent, Mr. Reverdy Johnson, of Maryland, a Senator, proposed the following:

Ordered, That the Senate proceed to the trial of the President under the articles of impeachment exhibited against him at the expiration of ten days from this day, unless for causes shown to the contrary.

To this Mr. Charles Sumner, of Massachusetts, a Senator, proposed an amendment, which he subsequently withdrew, striking out all after the word ordered and inserting:

Now the replication has been filed, the Senate, adhering to its rule already adopted, will proceed with the trial from day to day (Sundays excepted) unless otherwise ordered on reason shown.

Pending consideration, the Senate voted, yeas 29, nays 23, to retire for consultation,[83] and being called to order in their conference chamber, Mr. Johnson modified his order to read as follows:

Ordered, That the Senate will commence the trial of the President upon the articles of impeachment exhibited against him on Thursday, the 2d of April.

On motion of Mr. Sumner, and by a vote of yeas 28, nays 24, this order was amended by striking out "Thursday, the 2d of April," and inserting "Monday, the 30th of March instant."

A proposition to suspend consideration of the subject until the managers had opened their case and submitted their evidence, was presented by Mr. George H. Williams, of Oregon, but was disagreed to, yeas 9, nays 42.

On motion of Mr. Thomas A. Hendricks, of Indiana, and without division, the order proposed by Mr. Johnson was further amended by adding the words—

and proceed therein with all convenient dispatch, under the rules of the Senate sitting upon the trial of an impeachment.

The order as amended was then agreed to; and the Senate having returned to their Chamber, the Chief Justice informed the counsel for the respondent that the Senate had agreed upon an order in response to their application, as follows:

Ordered, That the Senate will commence the trial of the President upon the articles of impeachment exhibited against him on Monday, the 30th of March instant, and proceed therein with all convenient dispatch, under the rules of the Senate sitting upon the trial of an impeachment.

2431. President Johnson's impeachment continued.

The form of President Johnson's answer was commented on during preparation of the replication in the House.

Argument as to whether or not a demurrer is permissible in an impeachment case.

Comment on the use of the phrase "all the people" in the pleadings in an impeachment case.

Form of resolutions adopting the replication in the Johnson trial and directing its presentation in the Senate.

In the House, on March 23,[84] Mr. George S. Boutwell, of Massachusetts, from the managers, reported a form of replication. In reporting it he said:

[83] The proceedings in the consultation chamber appear both in the Journal and Globe. (Globe Journal, p. 863; Globe supplement, p. 28.)

[84] House Journal, pp. 564, 566; Globe, pp. 2073–2075, 2078–2081.

The attention of the managers was called to the peculiar form of the answer filed by the President. To most of the articles, however, he makes answer, in substance, that he is not guilty, although the form of the answer is different from that which has generally been employed in similar cases. In respect to some of the articles the answer probably amounts to a demurrer merely. But upon the whole the managers have chosen to treat the answer of the President to each and every article as a plea of the general issue of not guilty. And the managers are of opinion that no advantage can be taken, as against the House of Representatives, from the form of replication which has been reported by the managers.

Mr. George W. Woodward, of Pennsylvania, criticising the demurrer, said:

If I understood the answer of the President to the eleventh article of impeachment, it amounts to a demurrer to that article. It denies that there is any impeachable offense charged in the eleventh article. My own private opinion is that the demurrer or answer is very conclusive. I do not think there is any impeachable offense charged in the eleventh article.

The answer of the President putting that point in issue, which is a legal question and amounts to a demurrer, there should be a special replication to that part of the answer which relates to the eleventh article, or a formal rejoinder in demurrer. This general replication does not join an issue upon that article at all; it is what might be called a departure in pleading. Here is a demurrer to the eleventh article which denies that any impeachable offense is charged in it. The managers do not aver in the replication that the eleventh article charges any impeachable offense, and therefore there is no issue upon the record upon that article.

To this Mr. John A. Bingham, of Ohio, replied:

Now, as to the answer of the President, I beg leave to call the attention of the House and the attention of the gentleman from Pennsylvania [Mr. Woodward] to the fact that while it does contain much that is argumentative, much that may be called demurrer, which is never allowed at all in an impeachment case, which was never introduced into the proceedings of an impeachment case—for there never was a demurrer entertained by the Senate in an impeachment case, none ever entertained in the House of Lords of England; there is no such note of record; it does not lie; special pleading is unknown to the whole proceeding—yet this answer of the President to the eleventh article of impeachment, in its last clause, does expressly deny, and is therefore simply a plea of not guilty—it expressly denies that he committed a crime. As to form, it is nothing; substance is everything.

Mr. Fernando Wood, of New York, objected to the language of the replication, in that it professed to reply in the name of all the people of the United States; but Mr. Benjamin F. Butler, of Massachusetts, replied that this form, using the words "all the people" had been in use five hundred years, and had been questioned only once, in the days of Charles I.

The replication was agreed to on March 24 by a vote of yeas 116, nays 36, whereby the House—

Resolved, That the House hereby adopts the replication to the answer of the President, as now submitted by the managers.

Thereupon, on motion of Mr. Boutwell, the following was agreed to:

Resolved, That a message be sent to the Senate by the Clerk of the House informing the Senate that the House of Representatives has adopted a replication to the answer of the President of the United States on the articles of impeachment exhibited against him, and that the same will be presented to the Senate by the managers on the part of the House.

2432. President Johnson's impeachment continued.

The replication of the House to President Johnson's answer to the articles of impeachment.

The replication in the Johnson trial was signed by the Speaker and attested by the Clerk.

The Senate ordered that an authenticated copy of the replication to President Johnson's answer be furnished to counsel of the respondent.

On March 24[85] in the Senate sitting for the trial, the message authorized by the resolution was received, and immediately upon its being laid before the Senate, Mr. Manager Boutwell presented the replication:

IN THE HOUSE OF REPRESENTATIVES,
UNITED STATES, *March 24, 1868.*

Replication by the House of Representatives of the United States to the answer of Andrew Johnson, President of the United States, to the articles of impeachment exhibited against him by the House of Representatives.

The House of Representatives of the United States have considered the several answers of Andrew Johnson, President of the United States, to the several articles of impeachment against him by them exhibited in the name of themselves and of all the people of the United States, and reserving to themselves all advantage of exception to the insufficiency of his answer to each and all of the several articles of impeachment exhibited against said Andrew Johnson, President of the United States, do deny each and every averment in said several answers, or either of them, which denies or traverses the acts, intents, crimes, or misdemeanors charged against said Andrew Johnson in the said articles of impeachment, or either of them; and for replication to said answer do say that said Andrew Johnson, President of the United States, is guilty of the high crimes and misdemeanors mentioned in said articles, and that the House of Representatives are ready to prove the same.

SCHUYLER COLFAX,
Speaker of the House of Representatives.
EDWARD MCPHERSON,
Clerk of the House of Representatives.

Thereupon, on motion of Mr. Reverdy Johnson, of Maryland, a Senator, it was:

Ordered, That the Secretary of the Senate be directed to furnish the counsel of the President an authenticated copy of the replication of the House of Representatives to the answer of the President to the articles of impeachment exhibited against him by the House of Representatives.

2433. President Johnson's impeachment continued.

The opening addresses of managers and counsel in the Johnson trial.

The opening addresses in the Johnson trial discussed constitutional questions and outlined evidence.

Definition of impeachable offenses by counsel for President Johnson.

By consent the managers in the Johnson trial reserved the right to supply omissions in evidence after they had closed their testimony.

On motion of counsel for President Johnson, the Senate adjourned over to permit time for preparation of testimony for the defense.

On March 30,[86] the day set for the commencement of the trial, the Senate assembled and the proceedings began with the usual proclamation and ceremonies. The journal having been read, the Chief Justice said:

Gentlemen, managers of the House of Representatives, you will now proceed in support of the articles of impeachment.

[85] Senate Journal, p. 862; Globe supplement, p. 28.
[86] Senate Journal, p. 865; Globe supplement, pp. 29–53.

Mr. Manager Benjamin F. Butler then opened the case for the managers, speaking nearly three hours, and touching on the following topics: (*a*) What are impeachable offenses, antagonizing the view that only indictable offenses are impeachable; (*b*) whether or not the Senate sat as a court, taking the view that it did not; (*c*) and a review of the issues presented by the articles and the reply, with arguments in support of the articles. Mr. Butler also presented a brief of the authorities upon the law and impeachable crimes and misdemeanors, prepared by Mr. William Lawrence, of Ohio, and revised by himself.[87]

Then the managers proceeded with the testimony, Mr. Manager James F. Wilson proceeding first with certain documentary evidence. The presentation of testimony, documentary and oral, continued until Saturday, April 4,[88] when it was announced on behalf of the managers that the case on behalf of the House of Representatives was substantially closed, but that in looking over their testimony they might find some omissions which they might wish to supply, and therefore they did not wish to be precluded from offering them. The counsel for the President announced that they took no exception to this reservation.

Thereupon Mr. Benjamin R. Curtis, of Massachusetts, of counsel for the President, announced that they desired time for preparation of their testimony, and therefore he would move that "when this court adjourns, it adjourn to Thursday next." [89]

Thereupon Mr. John Conness, a Senator from California, moved that the Senate sitting for the trial should adjourn until Wednesday. Mr. Reverdy Johnson, a Senator from Maryland, moved an amendment substituting Thursday for Wednesday, and it was agreed to, yeas 37, nays 10. Then the motion as amended was agreed to.

At the reconvening on April 9, the managers occupied a brief time in presenting additional evidence, after which Mr. Benj. R. Curtis, of counsel for the President, opened the defense, speaking the remainder of this day and concluding on April 10.[90] He first reviewed the issues presented by the articles and the answer, and then argued (*a*) that impeachable offenses were "only high criminal offenses against the United States, made so by some law of the United States existing when the acts complained of were done;" and (*b*) that the Senate, in trying an impeachment, was a court.

At the conclusion of Mr. Curtis's opening the presentation of testimony on behalf of the respondent was begun, and proceeded from day to day until April 18,[91] when Mr. William M. Evarts, of counsel, announced that the defense had concluded its testimony, but would reserve the privilege to offer proof that might have been overlooked because of the illness of Mr. Stanberry, to whom had been intrusted the examination of witnesses.

2434. President Johnson's impeachment continued.

The order of the final arguments in the trial of President Johnson.

Disorder occurring in the galleries during the Johnson trial, they were cleared.

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[87] Globe supplement, pp. 41–50.
[88] Senate Journal, pp. 882, 883; Globe supplement, p. 121.
[89] It will be observed that this was merely an adjournment of the Senate sitting for the trial and therefore not governed by the rule of the Constitution. The Senate itself in its legislative capacity was in session during intervening days.
[90] Senate Journal, p. 885; Globe supplement, pp. 123–136.
[91] Senate Journal, p. 914; Globe supplement, p. 238.

On April 20 [92] the managers introduced certain verbal and documentary evidence, after which, on April 23, the Senate, after consideration, agreed to [93] the following:

Ordered, That as many of the managers as desire to do so be permitted to file arguments or to address the Senate orally; but the conclusion of the oral argument shall be by one manager, as provided in the twenty-first rule.

Thereupon Mr. John A. Logan, on behalf of the managers, and in accordance with the above rule, filed an argument.[94] On the same day Mr. Manager George S. Boutwell began an oral argument, which he concluded on the succeeding day.[95] Thereupon Mr. Thomas A. R. Nelson, of counsel for the respondent, began an argument in defense, which he concluded on the succeeding day, April 24.[96]

On April 25,[97] after the consideration of business relative to course of procedure in passing judgment, Mr. William S. Groesbeck, counsel for the President, continued argument for the defense, concluding on that day.

On Monday, April 27, Mr. Manager Thaddeus Stevens argued for the managers.[98] He was followed on the same day by Mr. Manager Thomas Williams, who concluded on the next day.[99]

At the conclusion of Mr. William's address, Mr. Manager Benjamin F. Butler asked and obtained leave of the Senate,[100] by unanimous consent, to make "a short narration of facts, made necessary by what fell from Mr. Nelson, of counsel for the President, in his speech of Friday last." Mr. Nelson, also by unanimous consent, was permitted to reply.

On April 28,[101] Mr. William M. Evarts, counsel for the respondent, then began argument for the defense, which he continued daily until May 1, when he concluded. On the same day Mr. Henry Stanbery began the concluding argument for the defense, finishing on May 2.[102]

On May 4, 5, and 6,[103] Mr. Manager John A. Bingham made the concluding argument for the managers.

At the conclusion of Mr. Bingham's address [104] there were in the gallery applause and hisses, whereupon, on motion of Mr. James W. Grimes, of Iowa, it was—

Ordered, That the Sergeant-at-Arms be directed to clear the galleries.

In obedience to this order the galleries were completely cleared. Later the galleries were ordered by the Senate to be reopened.

2435. President Johnson's impeachment continued.

Being excluded from the Johnson trial by a secret session, the House returned to its Hall and determined to attend again when informed that the Senate was ready to receive them.

Shortly after, on motion of Mr. George F. Edmunds, of Vermont, the doors of the Senate were closed for deliberation. The House of Representatives consequently returned to their Chamber,[105] and, the

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[92] Senate Journal, p. 914; Globe supplement, p. 239.
[93] Senate Journal, p. 921; Globe supplement, p. 251.
[94] Journal, p. 921; Globe supplement, pp. 251–268.
[95] Journal, p. 921; Globe supplement, pp. 268–286.
[96] Journal, p. 922; Globe supplement, pp. 286–310.
[97] Senate Journal, p. 924; Globe supplement, pp. 310–320.
[98] Senate Journal, p. 925; Globe supplement, pp. 320–324.
[99] Senate Journal, pp. 925, 926; Globe supplement, pp. 324–335.
[100] Senate Journal, p. 926; Globe supplement, pp. 335, 336.
[101] Senate Journal, pp. 926–930; Globe supplement, pp. 337–368.
[102] Senate Journal, p. 930; Globe supplement, pp. 368–379.
[103] Senate Journal, pp. 931, 932; Globe supplement, pp. 379–406.
[104] Senate Journal, pp. 932, 933; Globe supplement, pp. 406, 407.
[1] House Journal, pp. 655, 656; Globe, pp. 2365, 2368.

Speaker having resumed the chair, a question was raised as to the course of procedure.

The Speaker [106] had read the rule under which the House was acting:

Resolved, That on the days when the Senate shall sit for the trial of the President upon the articles of impeachment exhibited by the House of Representatives the House, in Committee of the Whole, will attend with the managers at the bar of the Senate at the hour named for the commencement of the proceedings.

and then ruled:

The Chair rules that under this resolution, the Senate having gone into secret session in their own Chamber for deliberation, and it being impossible for the managers and the House as in the Committee of the Whole to attend at the bar of the Senate, it is the duty of the House to return to its Hall, and here, as the House of Representatives, to transact business while waiting for any message from the Senate after the doors of that body have been reopened. * * * The Chair took some time to examine this resolution, and after consultation with others who are excellent parliamentarians he has no doubt of the fact in his own mind that while the Senate is engaged in secret deliberation for one or four and twenty hours it could not be expected or required of the House to remain in the Senate corridors, and the Speaker, as representing the House, could not consent to it without the direct order of the House. The Chair therefore thinks, the order having been made before the House proceeded to the Senate, that when the House returns business should be transacted; and the Senate having excluded the House from its Chamber, as it has a right to do under its rules, the House must therefore return to the Hall and await a message from the Senate.

Thereupon the Speaker recognized Mr. Elihu B. Washburne, chairman of the Committee of the Whole, who reported:

The Committee of the Whole have, according to order, attended the managers to the bar of the Senate, sitting as a court of impeachment for the trial of Andrew Johnson; and the argument having been closed and the Senate having ordered its doors to be shut for deliberation, the committee thereupon returned with the managers to the Hall of the House.

The Speaker appears to have sent a letter to the Senate asking that the House might be notified when the doors should be opened. This must have been done informally by the Speaker, but the Chief Justice laid it before the Senate, whereupon it was—[107]

Ordered, That the Secretary inform the House of Representatives that the Senate, sitting for the trial of the President upon articles of impeachment, will notify the House when it is ready to receive them at the bar.

2436. President Johnson's impeachment continued.

The Senate declined to make public its debates in secret session on the final judgment in the Johnson trial.

After the doors of the Senate had been closed, [108] it resumed consideration of this resolution, which had been proposed by George F. Edmunds, of Vermont, on April 24:

Ordered, That after the arguments shall be concluded, and when the doors shall be closed for deliberation upon the final question the official reporters of the Senate shall take down the debates upon the final question, to be reported in the proceedings.

This order, with pending amendments relating to restriction of debate, was laid on the table by a vote of 28 yeas, 20 nays.[109]

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[106] Schuyler Colfax, of Indiana, Speaker.
[107] Senate Journal, p. 933; Globe supplement, p. 408.
[108] Senate Journal, p. 933; Globe supplement, pp. 294, 407.
[109] While the debates were not taken down, a statement of what was done in the secret session appears in the Journal and Globe. (Senate Journal, pp. 933–940; Globe supplement, pp. 407–410.)

2437. President Johnson's impeachment continued.

The Senate adopted an order governing its deliberation and voting on the final question in the Johnson trial.

Deliberation having been had in secret session, the Senate voted on the articles of impeachment without debate.

While the deliberations on the final question in the Johnson trial were secret, the Senators were permitted to file written opinions.

Thereupon the Senate proceeded to consider [110] a proposition originally submitted by Mr. Charles Sumner, of Massachusetts, on April 24:

Ordered, That the Senate, sitting for the trial of Andrew Johnson, President of the United States, will proceed to vote on the several articles of impeachment at 12 o'clock on the day after the close of the arguments.

After propositions to amend had been considered, the order was laid on the table, and then, after further consideration, the Senate, without division, agreed to the following, proposed by Mr. Justin S. Morrill, of Vermont:

Ordered, That when the Senate adjourns to-day, it adjourn to meet on Monday next, at 11 o'clock a.m., for the purpose of deliberation, under the rules of the Senate, sitting on the trial of impeachments, and that on Tuesday next following, at 12 o'clock m., the Senate shall proceed to vote without debate on the several articles of impeachment; and each Senator shall be permitted to file within two days after the vote shall have been so taken his written opinion, to be printed with the proceedings.

2438. President Johnson's impeachment continued.

Having disagreed as to the form of final question in the Johnson trial, the Senate left it to the Chief Justice.

On May 7 [111] the Senate proceeded to the consideration of the form in which the question should be put, and various propositions were offered, as follows, for amendment to the rules:

By Mr. Charles Sumner, of Massachusetts:

Rule 23. In taking the votes of the Senate on the articles of impeachment, the Presiding Officer shall call each Senator by his name, and upon each article propose the following question, in the manner following: "Mr. ———, how say you, is the respondent, ———, guilty or not guilty, as charged in the ——— article of impeachment?" whereupon each Senator shall rise in his place and answer "guilty" or "not guilty."

At the suggestion of Mr. Roscoe Conkling, of New York, Mr. Sumner modified this by striking out the words "as charged in" and inserting "of a high crime or misdemeanor (as the case may be) within."

Mr. Charles R. Buckalew, of Pennsylvania, proposed to amend by changing the form of question to the following, which Mr. Sumner accepted:

Mr. ———, how say you, is the respondent, Andrew Johnson, President of the United States, guilty or not guilty of a high crime or misdemeanor (as the case may be) as charged in the article of impeachment?

Mr. John Conness, of California, proposed to amend by substituting for the latter portion of Mr. Sumner's proposition, the following:

Each of the articles Nos. 1, 2, 3, 4, 5, 7, 8, 9, 10, and 11 propose the following question in the manner following: Mr. Senator, how say you, is the respondent, Andrew Johnson, President of the United States, guilty or not guilty of a high

[110] Senate Journal, pp. 934–937; Globe supplement, pp. 408, 409.
[111] Senate Journal, pp. 937, 938; Globe supplement, p. 409.

crime or misdemeanor as charged in this article? And upon each of the articles Nos. 4 and 6 he shall propose the following question: Mr. Senator, how say you, is the respondent, Andrew Johnson, President of the United States, guilty or not guilty of a high crime charged in this article? Whereupon each Senator shall rise in his place and answer "guilty" or "not guilty."

After voting on an amendment proposed by Mr. Thomas A. Hendricks, of Indiana, which provided for voting separately on the several clauses of the eleventh article, the whole subject was, on motion of Mr. Sumner, laid on the table by a vote of, yeas 24, nays 11.

Thereupon, and as appeared later, after an understanding that the Chief Justice should propose a rule, the Senate adjourned to Monday, May 11.

2439. President Johnson's impeachment continued.

Views of the Chief Justice on form of final question in the Johnson trial and on division of the articles for voting.

In the Johnson trial the Senate adopted the form of final question and method of voting suggested by the Chief Justice.

On May 11 [112] the Chief Justice presented the following views, which were ordered to be entered on the Journal:

Senators: In conformity with what seemed to be the general wish of the Senate when it adjourned last Thursday, the Chief Justice, in taking the vote on the articles of impeachment, will adopt the mode sanctioned by the practice in the cases of Chase, Peck, and Humphreys.

He will direct the Secretary to read the several articles successively, and after the reading of each article will put the question of guilty or not guilty to each Senator, rising in his place, in the form used in the case of Judge Chase:

"Mr. Senator ————, how say you, is the respondent, Andrew Johnson, President of the United States, guilty or not guilty of a high misdemeanor, as charged in this article?"

In putting the question on articles 4 and 6, each of which charges a crime, the word "crime" will be substituted for the word "misdemeanor."

The Chief Justice has carefully considered the suggestion of the Senator from Indiana [Mr. Hendricks], which appeared to meet the approval of the Senate, that in taking the vote on the eleventh article, the question should be put on each clause, and has found himself unable to divide the article as suggested. The article charges several facts, but they are so connected that they make but one allegation, and they are charged as constituting one misdemeanor.

The first fact charged is, in substance, that the President publicly declared in August, 1866, that the Thirty-ninth Congress was a Congress of only part of the States and not a constitutional Congress, intending thereby to deny its constitutional competency to enact laws or propose amendments of the Constitution; and this charge seems to have been made as introductory, and as qualifying that which follows, namely, that the President, in pursuance of this declaration, attempted to prevent the execution of the tenure of office act by contriving and attempting to contrive means to prevent Mr. Stanton from resuming the functions of Secretary of War after the refusal of the Senate to concur in his suspension, and also by contriving and attempting to contrive means to prevent the execution of the appropriation act of March 2, 1867, and also to prevent the execution of the rebel States governments act of the same date.

The gravamen of the article seems to be that the President attempted to defeat the execution of the tenure of office act, and that he did this in pursuance of a declaration which was intended to deny the constitutional competency of Congress to enact laws or propose constitutional amendments, and by contriving means to prevent Mr. Stanton from resuming his office of Secretary, and also to prevent the execution of the appropriation act and the rebel States governments act.

The single substantive matter charged is the attempt to prevent the execution of the tenure of office act; and the other facts are alleged either as introductory and exhibiting this general purpose, or as showing the means contrived in furtherance of that attempt.

[112] Senate Journal, pp. 938–940; Globe supplement, pp. 409, 410.

This single matter, connected with the other matters previously and subsequently alleged, is charged as the high misdemeanor of which the President is alleged to have been guilty.

The general question, guilty or not guilty of a high misdemeanor as charged, seems fully to cover the whole charge, and will be put as to this article as well as to the others, unless the Senate direct some mode of division.

In the tenth article the division suggested by the Senator from New York [Mr. Conkling] may be more easily made. It contains a general allegation, to the effect that on the 18th of August, and on other days, the President, with intent to set aside the rightful authority of Congress and bring it into contempt, delivered certain scandalous harangues, and therein uttered loud threats and bitter menaces against Congress and the laws of the United States enacted by Congress, thereby bringing the office of President into disgrace, to the great scandal of all good citizens, and sets forth, in three distinct specifications, the harangues, threats, and menaces complained of.

In respect to this article, if the Senate sees fit so to direct, the question of guilty or not guilty of the facts charged may be taken in respect to the several specifications, and the question of guilty or not guilty of a high misdemeanor, as charged in the article, can also be taken.

The Chief Justice, however, sees no objection to putting the general question on this article in the same manner as on the others: for, whether the particular questions be put on the specifications or not, the answer to the final question must be determined by the judgment of the Senate, whether or not the facts alleged in the specifications have been sufficiently proved, and whether, if sufficiently proved, they amount to a high misdemeanor within the meaning of the Constitution.

On the whole, therefore, the Chief Justice thinks that the better practice will be to put the general question on each article without attempting to make any subdivision, and will pursue this course if no objective is made. He will, however, be pleased to conform to such directions as the Senate may see fit to give in this respect.

On motion of Mr. Charles Sumner, of Massachusetts, it was

Ordered, That the questions be put as proposed by the presiding officer of the Senate, and each Senator shall rise in his place and answer "guilty" or "not guilty" only.

2440. President Johnson's impeachment continued.

Form of voting in the Senate on the final question in the trial of President Johnson.

In the Johnson trial the Senate voted on the articles in an order different from the numerial order.

By direction of the Senate the Chief Justice announced the result after the vote on each article in the Johnson trial.

The House in Committee of the Whole attended in the Senate during the voting on the final question in the Johnson trial.

On May 12,[113] the day set for voting on the articles of impeachment, the illness of a Senator caused the voting to be postponed to May 16. On that day the Chief Justice took his seat at the hour of 12 o'clock, the usual proclamation was made by the Sergeant-at-Arms, etc., and then, on motion of Mr. George F. Edmunds, of Vermont, it was—

Ordered, That the Secretary be directed to inform the House of Representatives that the Senate, sitting for the trial of the President upon articles of impeachment, is now ready to receive them in the Senate Chamber.

Soon thereafter the Sergeant-at-Arms announced the presence of the House of Representatives at the bar, and the Members of the House of Representatives, as in Committee of the Whole, preceded by Mr. E. B. Washburne, chairman of that committee, and accompanied

[113] Senate Journal, pp. 941, 942; Globe supplement, p. 411.

by the Speaker and Clerk, appeared and were conducted to the seats provided for them.

Thereupon, by a vote of yeas 34, nays 19, the Senate agreed to the following order; offered by Mr. George H. Williams, of Oregon:

Ordered, That the Chief Justice, in directing the Secretary to read the several articles of impeachment, shall direct him to read the eleventh article first, and the question shall then be taken on that article, and thereafter the other ten successively as they stand.

Then, on motion of Mr. Edmunds, it was [114]—

Ordered, That the Senate now proceed to vote upon the articles, according to the rules of the Senate.

Thereupon the Chief Justice directed the reading of the eleventh article, which being done, the following procedure occurred:

The CHIEF JUSTICE. Call the roll.

The Chief Clerk called the name of Mr. Anthony.

Mr. Anthony rose in his place.

The CHIEF JUSTICE. Mr. Senator Anthony, how say you? Is the respondent, Andrew Johnson, President of the United States, guilty or not guilty of a high misdemeanor, as charged in this article?

Mr. ANTHONY. Guilty.

[This form was continued in regard to each Senator as the roll was called alphabetically, each rising in his place as his name was called and answering "guilty" or "not guilty." When the name of Mr. Grimes was called, he being very feeble, the Chief Justice said he might remain seated. He, however, with the assistance of friends, rose and answered. The Chief Justice also suggested to Mr. Howard that he might answer in his seat, but he preferred to rise.]

The Chief Justice did not vote.

Immediately upon the vote being completed, a motion for a recess was made and disagreed to, whereupon a motion was made to adjourn. Mr. Reverdy Johnson, of Maryland, asked if it was in order for the Senate to adjourn while pronouncing judgment.

The Chief Justice said:

The precedents seem to be, except in one case, and that is the case of Humphreys, that the announcement be not made by the presiding officer until after the vote has been taken on all the articles. The Chair will, however, take the direction of the Senate. If they desire the announcement of the vote which has been taken to be now made he will make it.

It being the general opinion of the Senate that the announcement be made, the Chief Justice said:

Upon this article thirty-five Senators vote "guilty," and nineteen Senators vote "not guilty." Two-thirds not having pronounced guilty, the President is, therefore, acquitted upon this article.

2441. President Johnson's impeachment continued.

The Senate, overruling the Chief Justice, decided that a motion to adjourn over was in order during the voting on the articles in the Johnson trial.

After voting on one article in the Johnson trial, the Senate adjourned to a day fixed.

Thereupon the question recurred on the motion, made by Mr. George H. Williams, of Oregon, that the Senate adjourn until Tuesday, the 26th instant.

[114] Senate Journal, pp. 942–945; Globe supplement, p. 411.

Mr. Thomas A. Hendricks, of Indiana, made the point of order that as the Senate was engaged in executing an order, any motion except the simple motion to adjourn was not in order.

The Chief Justice ruled [115]—

A motion that when the Senate adjourns it adjourn to meet at a certain day could not now be entertained, because the Senate is in process of executing an order. A motion to adjourn to a certain day seems to the Chair to come under the same rule. He will, therefore, decide the motion not to be in order.

Mr. John Conness, of California, having appealed, the decision of the Chair was overruled, yeas 24, nays 30.[116]

Thereupon the question recurred on the motion of Mr. Williams, which was agreed to, yeas 32, nays 21, after several amendments proposing a different day had been disagreed to.

2442. President Johnson's impeachment continued.

The Senate, overruling the Chief Justice, held in order a motion to rescind its rule governing the voting on the articles of impeachment in the Johnson trial.

The Senate rescinded its order prescribing the method of voting on the articles in the Johnson trial, although it was partially executed.

On May 26,[117] after the Senate had assembled in the usual form, and after the House of Representatives, informed by message, had attended, Mr. George H. Williams, of Oregon, offered the following:

Resolved, That the resolution heretofore adopted as to the order of reading and voting upon the articles of impeachment be rescinded.

Mr. Charles R. Buckalew, of Pennsylanvia, having objected, the Chief Justice held:

The Chief Justice is under the impression that it changes the rule, and he will state the case to the Senate, in order that the Senate may correct him if he is wrong. The twenty-second rule of the Senate provides that—

"On the final question, whether the impeachment is sustained, the yeas and nays shall be taken on each article of impeachment separately."

That necessarily implies that they be taken in their order unless it is otherwise prescribed by the Senate. Subsequently the framing of a question to be addressed to the Senators was left to the Chief Justice, and he stated the views which seemed to him proper to be observed. In the course of that statement he said that "he will direct the Secretary to read the articles successively, and after the reading of each article will put the question of guilty or not guilty to each Senator, rising in his place, in the form used in the case of Judge Chase," and then stated the form.

After the statement was made—

"Mr. Sumner submitted the following order; which was considered by unanimous consent, and agreed to:

"*Ordered*, That the questions be put as proposed by the presiding officer of the Senate, and each Senator shall rise in his place and answer guilty or not guilty, only."

That was the order under which the Senate was acting until on the 16th day of May the Senate adopted the following order moved by the Senator from Oregon [Mr. Williams]:

"*Ordered*, That the Chief Justice, in directing the Secretary to read the several articles of impeachment, shall direct him to read the eleventh article first, and the question shall then be taken on that article, and thereafter the other ten successively as they stand."

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[115] Globe supplement, p. 412.

[116] On May 26, on the same question, the Chief Justice decided as he had first decided, and was again overruled, 35 to 18. (Globe supplement, p. 414.)

[117] Senate Journal, p. 946; Globe supplement, p. 413.

This order changing the rule was in order on the 16th of May, having been voted some days before. Subsequently, after the House had been notified that the Senate was ready to receive them, the Senator from Vermont [Mr. Edmunds] moved—

"That the Senate do now proceed to vote upon the articles according to the order of the Senate just adopted."

The Senate proceeded to vote upon the eleventh article, and after that adjourned until to-day. The present motion is to change the whole of these orders, for changing only the order of the 16th will not reach the effect intended. It must change, also, the order adopted on the motion of the Senator from Massachusetts [Mr. Sumner], and also, as the Chief Justice conceives, the rule. He is of opinion, therefore, that a single objection will take it over this day, but will submit the question directly to the Senate without undertaking to decide it, as it is a matter which relates especially to the present order of business.

The Senate, by a vote of yeas 29, nays 25, decided that the motion was in order. A second point of order, made by Mr. Lyman Trumbull, of Illinois, that an order partially executed might not be rescinded, was also overruled, yeas 24, nays 30.

After propositions to amend and to adjourn had been disagreed to, the motion of Mr. Williams was agreed to.

2443. President Johnson's impeachment continued.

Having voted no on three of the eleven articles, the Senate sitting for the trial of President Johnson adjourned without day.

Before announcing the adjournment voted by the Senate, the Chief Justice directed the Clerk to enter a judgment of acquittal of President Johnson.

Form of acquittal entered in the Journal of the trial of President Johnson.

The acquittal of President Johnson was announced in the House through the report of the chairman of the Committee of the Whole.

Thereupon, on motion of Mr. Williams, the Senate decided to proceed to vote on the second article of impeachment.[118] And the second article having been read, the question was put in the prescribed form, and the Chief Justice announced:

Thirty-five Senators have pronounced the respondent, Andrew Johnson, President of the United States, guilty; nineteen have pronounced him not guilty. Two-thirds not having pronounced him guilty, he stands acquitted upon this article.

In a similar manner the Senate determined to vote on the third article, and the vote having been taken, and having resulted 35 guilty and 19 not guilty, the acquittal was pronounced as before.

Thereupon Mr. Williams moved—

That the Senate, sitting for the trial of the President upon the articles of impeachment, do now adjourn without day.[119]

And there appeared yeas 34, nays 4.

Before announcing the result the Chief Justice said:

The Chief Justice begs leave to remind the Senate that the twenty-second rule provides that "if the impeachment shall not, upon any of the articles presented, be sustained by the votes of two-thirds of the members present, a judgment of acquittal shall be entered." * * * The Clerk will enter, if there be no objection, a judgment according to the rules—a judgment of acquittal.

[118] Senate Journal, pp. 948, 950; Globe supplement, pp. 414, 415.
[119] Senate Journal, pp. 950, 951; Globe supplement, p. 415.

And the Journal has this entry:

The Senate having tried Andrew Johnson, President of the United States, upon articles of impeachment exhibited against him by the House of Representatives, and two-thirds of the Senators present not having found him guilty of the charges contained in the second, third, and eleventh articles of impeachment, it is therefore

Ordered and adjudged, That the said Andrew Johnson, President of the United States, be, and he is, acquitted of the charges in said articles made and set forth.

The Chief Justice then announced the vote on the motion of Mr. Williams to be yeas 34, nays 16; and thereupon declared the Senate, sitting as a court of impeachment for the trial of Andrew Johnson, President of the United States, upon articles of impeachment exhibited against him by the House of Representatives, adjourned without day.

After this adjournment the House of Representatives returned to their Hall, and the Speaker having resumed the chair, Mr. Washburne, of Illinois, made the following report:

The Committee of the Whole have, according to order, attended the managers of the bar of the Senate, sitting as a court of impeachment for the trial of Andrew Johnson; that the respondent has been declared to be acquitted on the second and third articles severally preferred by the House; and that then, without action on the other articles, the Senate, sitting as a court of impeachment, adjourned sine die.[190]

[190] House Journal, p. 735; Globe, p. 2587.

The Impeachment and Trial of William W. Belknap*

2444. The impeachment and trial of William W. Belknap, late Secretary of War.

The impeachment of Secretary Belknap was set in motion through the findings of a committee empowered to investigate generally.

Form of resolution authorizing a general investigation of the Departments of the Government in 1876.

A committee empowered to investigate generally reported a resolution for the impeachment of Secretary Belknap.

The committee reported a resolution for the impeachment of Secretary Belknap, although they had been informed of his resignation of the office.

The work of drawing up the articles impeaching Secretary Belknap was referred to the Judiciary Committee.

On January 14, 1876,[1] Mr. William R. Morrison, of Illinois, from the Committee on Ways and Means, reported the following resolution in lieu of several resolutions which had been referred to the said committee:

Resolved, That the several committees of this House having in charge matters pertaining to appropriations, foreign affairs, Indian affairs, military affairs, naval affairs, post-office and post-roads, public lands, public buildings and grounds, claims, and war claims be, and they are hereby, instructed to inquire, so far as

*Hinds' Precedents, vol. 3, p. 902 (1907).
[1] First session Forty-fourth Congress, House Journal, pp. 183, 184; Record, p. 414.

the same may properly be before their respective committees, into any errors, abuses, or frauds that may exist in the administration and execution of existing laws affecting said branches of the public service, with a view to ascertain what change and reformation can be made so as to promote integrity, economy, and efficiency therein; that the Committees on Expenditures in the State Department, in the Treasury Department, in the War Department, in the Navy Department, in the Post-Office Department, in the Interior Department, in the Department of Justice, and on Public Buildings be, and they are hereby, instructed to proceed at once, as required by the rules of the House, to examine into the state of the accounts and expenditures of the respective Departments submitted to them, and to examine and report particularly whether the expenditures of the respective Departments are justified by law; whether the claims from time to time satisfied and discharged by the respective Departments are supported by sufficient vouchers, establishing their justness both as to their character and amount; whether such claims have been discharged out of funds appropriated therefor, and whether all moneys have been disbursed in conformity with appropriation laws; whether any, and what, provisions are necessary to be adopted to provide more perfectly for the proper application of the public moneys and to secure the Government from demands unjust in their character or extravagant in their amount; whether any, and what, retrenchment can be made in the expenditures of the several Departments without detriment to the public service; whether any, and what, abuses at any time exist in the failure to enforce the payment of moneys which may be due to the United States from public defaulters or others, and to report from time to time such provisions and arrangements as may be necessary to add to the economy of the several Departments and the accountability of their officers; whether any offices belonging to the branches or Departments, respectively, concerning whose expenditures it is their duty to inquire, have become useless or unnecessary; and to report from time to time on the expediency of modifying or abolishing the same; also to examine into the pay and emoluments of all officers under the laws of the United States and to report from time to time such a reduction or increase thereof as a just economy and the public service may require. And for the purpose of enabling the several committees to fully comprehend the workings of the various branches or Departments of Government, respectively, the investigations of said committees may cover such period in the past as each of said committees may deem necessary for its own guidance or information or for the protection of the public interests in the exposing of frauds or abuses of any kind that may exist in said Departments: and said committees are authorized to send for persons and papers, and may report by bill or otherwise.

Resolved further, That the Committee on Public Expenditures be instructed to investigate and inquire into all matters set forth in the foregoing resolutions in the legislative departments of the Government, except in so far as the Senate is exclusively concerned, particularly in reference to the public printing and binding, and shall have the same authority that is conferred upon the other committees aforesaid.

This resolution, under the operation of the previous question, was agreed to without debate or division.

On March 2,[2] Mr. Hiester Clymer, of Pennsylvania, chairman of the Committee on Expenditures in the War Department, presented the following as the unanimous report of that committee:

That they found at the very threshold of their investigation such unquestioned evidence of the malfeasance in office by Gen. William W. Belknap, then Secretary of War, that they find it to be their duty to lay the same before the House.

They further report that this day at 11 o'clock a.m. a letter of the President of the United States was presented to the committee accepting the resignation of the Secretary of War, which is hereto attached, together with a copy of his letter of resignation, which the President informs the committee was accepted about 10 o'clock and 20 minutes this morning. They therefore unanimously report and demand that the said William W. Belknap, late Secretary of War, be dealt with according to the laws of the land, and to that end submit herewith the testimony in the case taken, together with the several statements and exhibits thereto attached, and also a rescript of the proceedings of the committee had during the

[2] House Journal, p. 496; Record, pp. 1426–1433.

investigation of this subject. And they submit the following resolutions, which they recommend shall be adopted:

"*Resolved*, That William W. Belknap, late Secretary of War, be impeached of high crimes and misdemeanors while in office.

"*Resolved*, That the testimony in the case of William W. Belknap, late Secretary of War, be referred to the Committee on the Judiciary, with instructions to prepare and report without unnecessary delay suitable articles of impeachment of said William W. Belknap, late Secretary of War.

"*Resolved*, That a committee of five Members of this House be appointed and instructed to proceed immediately to the bar of the Senate, and there impeach William W. Belknap, late Secretary of War, in the name of the House of Representatives and of all the people of the United States of America, of high crimes and misdemeanors while in office, and to inform that body that formal articles of impeachment will in due time be presented, and to request the Senate to take such order in the premises as they deem appropriate."

2445. Belknap's impeachment continued.

The committee which ascertained questionable facts concerning the conduct of Secretary Belknap gave him opportunity to explain, present witnesses, and cross-examine witnesses.

The House, after a review of English precedents, determined to impeach Secretary Belknap, although he had resigned.

The impeachment of Secretary Belknap was carried to the Senate by a committee of five.

The minority party were represented on the committee to carry the impeachment of Secretary Belknap to the Senate.

Appended to this report,[3] were extracts from the proceedings of the committee showing—

That the Secretary of War had been informed of the testimony, which was read to him in the committee room by the chairman; and that, on his request, he was permitted to employ counsel and cross-examine the witness;

That the committee also gave the Secretary of War permission to appear and make a sworn statement; but that he failed to appear; and

That the evidence against the Secretary of War consisted of the testimony of a single witness, Caleb P. Marsh, partially substantiated as to the charges against the Secretary by a copy of a certain contract between Marsh and one John S. Evans, and substantiated as to certain collateral matters by statements of other persons.

The question being on agreeing to the resolutions accompanying the report, a brief discussion arose. Mr. George F. Hoar, of Massachusetts, objected that impeachment should not be voted so hastily when they were confronted with the important question whether or not an officer could be impeached after resignation. The cases of Warren Hastings and Lord Francis Bacon were hardly applicable, since in England any man might be impeached, while in America only civil officers were subject to that proceeding. Mr. Hoar also cited Story on the Constitution as taking the view that an officer might not be impeached after resignation. Mr. J. C. S. Blackburn, of Kentucky, contended, however, that such was not the import of Judge Story's words, and cited, besides the English cases, the Durell case in the Forty-third Congress as justifying the action proposed by the committee.

Debate having been closed by the previous question, the resolutions were agreed to without division.

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[3] See Record, p. 1426.

And thereupon, under authority of the third resolution, the Speaker [4] appointed as a committee Messrs. Hiester Clymer, of Pennsylvania; William M. Robbins, of North Carolina; J. C. S. Blackburn, of Kentucky; Lyman K. Bass, of New York, and Lorenzo Danford, of Ohio.

These gentlemen were the members of the Committee on Expenditures in the War Department, and a portion of them represented the minority party in the House.

2446. Belknap's impeachment continued.

Ceremonies and forms of presenting the impeachment of Secretary Belknap at the bar of the Senate.

Having carried the impeachment of Secretary Belknap to the Senate, the committee returned and reported verbally to the House.

Forms of resolutions in the Senate providing for taking orders on the impeachment of Secretary Belknap.

The message informing the Senate that a committee would impeach Secretary Belknap at the bar of the Senate included the names of the committee.

On March 3,[5] in the Senate, the following message was received from the House of Representatives at 12 o'clock and 55 minutes p.m., by the hands of Mr. Green Adams, its Chief Clerk:

Mr. President, the House of Representatives has passed the following resolution:

"*Resolved*, That a committee of five Members of this House be appointed and instructed to proceed immediately to the bar of the Senate, and there impeach William W. Belknap, late Secretary of War, in the name of the House of Representatives and of all the people of the United States of America, of high crimes and misdemeanors while in office, and to inform that body that formal articles of impeachment will in due time be presented, and to request the Senate to take such order in the premises as they may deem appropriate."

And it has

"*Ordered*, That Messrs. Hiester Clymer, of Pennsylvania; W. M. Robbins, of North Carolina; J. C. S. Blackburn, of Kentucky; L. K. Bass, of New York, and Lorenzo Danford, of Ohio, be the committee aforesaid."

At 1 o'clock p.m. the Sergeant-at-Arms announced the committee from the House of Representatives, who appeared at the bar of the Senate.

The committee advanced to the area in front of the Chair, when Mr. Clymer said:

Mr. President, in obedience to the order of the House of Representatives we appear before you, and, in the name of the House of Representatives and of all the people of the United States of America, we do impeach William W. Belknap, late Secretary of War of the United States, of high crimes and misdemeanors while in office; and we further inform the Senate that the House of Representatives will in due time exhibit articles of impeachment against him, and make good the same. And in their name we demand that the Senate shall take order for the appearance of the said William W. Belknap to answer said impeachment.

The PRESIDENT pro tempore.[6] Mr. Chairman and gentleman of the committee

The committee thereupon withdrew.

Thereupon Mr. George F. Edmunds, of Vermont, following the usual precedents, offered this order, which was agreed to:

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[4] Michael C. Kerr, of Indiana, Speaker.
[5] Senate Journal, pp. 271, 272; Record, p. 1436.
[6] Thomas W. Perry, of Michigan, President pro tempore.

Ordered, That the message of the House of Representatives relating to the impeachment of William W. Belknap be referred to a select committee to consist of five Senators.

The President pro tempore, by authorization of the Senate, appointed the following committee: Messrs. George F. Edmunds, of Vermont; Roscoe Conkling, of New York; Frederick T. Frelinghuysen, of New Jersey; Allen G. Thurman, of Ohio, and John W. Stevenson, of Kentucky.

Meanwhile the committee on the part of the House had returned to the Hall of Representatives, and Mr. Clymer reported [7] verbally—

that, in obedience to the order of the House, the committee proceeded to the bar of the Senate and, in the name of this body and of all the people of the United States, impeached William W. Belknap, late Secretary of War, of high crimes and misdemeanors in office, and demanded that the Senate shall take order to make him appear before that body and answer for the same, and stated that the House would in due time present articles of impeachment and make them good; to which the response was, "Order shall taken."

On March 6,[8] in the Senate, Mr. Edmunds reported from the select committee the following orders, which were agreed to without division:

Whereas the House of Representatives on the 3d day of March, 1876, by five of its Members, Messrs. Clymer, Robbins, Blackburn, Bass, and Danford, at the bar of the Senate, impeached William W. Belknap, late Secretary of War, of high crimes and misdemeanors, and informed the Senate that the House of Representatives will in due time exhibit particular articles of impeachment against him, and make good the same; and likewise demanded that the Senate take order for the appearance of the said William W. Belknap to answer the said impeachment: Therefore,

Ordered, That the Senate will, according to its standing rules and orders in such cases provided, take proper order thereon (upon the presentation of articles of impeachment), of which due notice shall be given to the House of Representatives.

Ordered, That the Secretary acquaint the House of Representatives herewith.

2447. Belknap's impeachment continued.

In the Belknap case the committee in drawing up articles needed certain special powers as to witnesses.

Discussion of the law giving immunity to witnesses testifying before committees of the House.

On March 8 [9] Mr. J. Proctor Knott, of Kentucky, from the Committee on the Judiciary, who had been directed to report articles of impeachment on the evidence referred to them, submitted the following report:

The Committee on the Judiciary would respectfully report that, in pursuance of the instructions of the House, they have prepared articles of impeachment against William W. Belknap, late Secretary of War, for high crimes and misdemeanors in office, but that, since preparing the same, they have been informed and believe that Caleb P. Marsh, upon whose testimony before the Committee on Expenditures in the War Department, and referred to them by the House, said articles were framed, has gone beyond the jurisdiction of the Government of the United States, and that probably his attendance as a witness before the Senate sitting as a court of impeachment can not be procured; and that they are also informed and believe that other evidence may be procured sufficient to convict said William W. Belknap of high crimes and misdemeanors in office as Secretary of War. They therefore recommend the adoption of the following resolution:

"*Resolved*, That the resolution instructing the Committee on the Judiciary to prepare articles of impeachment against William W. Belknap, late Secretary of

[7] House Journal, p. 503.
[8] Senate Journal, pp. 278, 279.
[9] House Journal, pp. 537, 538; Record pp. 1564–1566; House Report No. 222.

War, for high crime and misdemeanors in office, be recommitted to said committee with power to take further proof, to send for persons and papers, to sit during the sessions of the House, and to report at any time."

Your committee, impressed with the importance of securing the fullest indemnity to such witnesses as may be required to testify in behalf of the Government before either House of Congress, or any committee of either House, or before the Senate sitting as a court of impeachment, would also recommend the immediate passage of the accompanying bill, entitled "A bill to protect witnesses who shall be required to testify in certain cases." They would further recommend that the accompanying bill, entitled "A bill in relation to witness," be introduced, printed, and referred to the Committee on the Judiciary, with leave to report thereon at any time.

In the course of the debate it was urged that so grave a proceeding as the presentation of articles of impeachment should not be undertaken on the testimony of a single witness when, by greater deliberation, other testimony might be procured.

The resolution was agreed to without division.

Immediately thereafter [10] Mr. Knott called up the bill referred to in the report:

A bill (H.R. No. 2572) to protect witnesses who shall be required to testify in certain cases.

Be it enacted, etc., That whenever any person shall be required to testify against his protest before either House of Congress or any committee thereof, or the Senate sitting as a court of impeachment, and shall so testify under protest, he shall not thereafter be held to answer criminally in any court of justice, or subject to any penalty or forfeiture, on account of any fact or act concerning which he shall be so required to testify: *Provided*, That nothing herein contained shall be so construed as to relieve any person from liability to impeachment.

Mr. Knott explained that this provision was necessary because the existing law, section 859 of the Revised Statutes, giving indemnity to witnesses, did not go far enough. A witness might decline to answer on the ground that his answer might uncover other evidence which would incriminate him.

After debate the bill was passed, yeas 206, nays 8.

In the Senate on April 11 [11] the bill was reported adversely and did not become a law.

2448. Belknap's impeachment continued.

The articles impeaching Secretary Belknap were considered in the House and agreed to without amendment.

The House decided to appoint the managers of the Belknap impeachment by resolution instead of by ballot.

One of the managers of the Belknap impeachment being excused, the House chose another.

The minority party were represented among the managers of the Belknap impeachment.

It seems to have been conceded in the Belknap impeachment that the managers should be in accord with the sentiments of the House.

Method of designating the chairman of the managers in the Belknap impeachment.

Forms of resolutions providing for presenting in the Senate the articles impeaching Secretary Belknap.

[10] House Journal, pp. 537, 538; Record, pp. 1566–1572.
[11] Senate Journal, p. 413; Senate Report, No. 253.

The message informing the Senate that articles would be presented against Secretary Belknap contained the names of the managers.

On March 30,[12] in the House, Mr. Knott, from the Committee on the Judiciary, submitted a report, consisting of articles of impeachment (not accompanied by testimony) and a resolution. The articles appear in full in the House Journal. The resolution:

***Resolved*, That seven managers be appointed by ballot to conduct the impeachment exhibited against William W. Belknap, late Secretary of War of the United States.**

On April 3,[13] the report on the articles of impeachment was called up in the House:

The Committee on the Judiciary, having had under consideration the resolution of the House directing them to prepare and report articles in support of the impeachment of William W. Belknap, late Secretary of War, for high crimes and misdemeanors in office, respectfully report the following articles and accompanying resolutions for the action of the House:

"*Resolved*, That the following articles be adopted and presented to the Senate in maintenance and support of the impeachment for high crimes and misdemeanors in office of William W. Belknap, late Secretary of War:" [Here followed the articles.]

These articles were considered in the House without any question being raised as to the propriety of considering them in Committee of the Whole. Under operation of the previous question the resolution adopting the articles, with the accompanying articles, was agreed to, a separate vote not being demanded on any article and no proposition to amend being made.

Then the resolution providing for the appointment of seven managers by ballot was considered, and Mr. Hiester Clymer proposed the following amendment in the nature of a substitute:

Strike out all after the word "resolved" and insert:

That Messrs. J. Proctor Knott, of Kentucky; Scott Lord, of New York; William P. Lynde, of Wisconsin; John A. McMahon, of Ohio; George A. Jenks, of Pennsylvania; William A. Wheeler, of New York; and George F. Hoar, of Massachusetts, be, and they are hereby appointed managers on the part of this House to conduct the impeachment exhibited against William W. Belknap, late Secretary of War of the United States.

The amendment was agreed to, and the resolution as amended was agreed to.

Thereupon Mr. Wheeler, of New York, asked to be excused from service, and the request was granted by the House.

Mr. Elbridge G. Lapham, of New York, was nominated to fill the vacancy, whereupon Mr. Eppa Hunton, of Virginia, expressed the opinion that the managers should be in accord with the sentiments of the House on the question, and asked if Mr. Lapham was thus qualified. Mr. Fernando Wood, of New York, said that in selecting managers they had not gone into any very severe examination of qualifications, assuming that they would represent the House in the opinions which it had expressed unanimously. Without further objection Mr. Lapham was chosen by the House as a manager.

Then, at the request of Mr. Knott, the name of Mr. Lord was placed at the head of the list of managers.

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[12] House Journal, pp. 696–703; Record, pp. 2081, 2082; House Report No. 345.
[13] House Journal, pp. 726–733; Record, pp. 2159–2161.

Of the managers, as thus chosen, the first five were Members of the majority party in the House and the remaining two were Members of the minority party.

On motion of Mr. Clymer the following resolutions were agreed to:

Resolved, That the articles agreed to by this House to be exhibited in the name of themselves and of all the people of the United States against William W. Belknap, late Secretary of War, in maintenance of their impeachment against him of high crimes and misdemeanors in office be carried to the Senate by the managers appointed to conduct said impeachment.

Resolved, That a message be sent to the Senate to inform them that this House have appointed Mr. Scott Lord, of New York; Mr. J. Proctor Knott, of Kentucky; Mr. William P. Lynde, of Wisconsin; Mr. John A. McMahon, of Ohio; Mr. George A. Jenks, of Pennsylvania; Mr. Elbridge G. Lapham, of New York; and Mr. George F. Hoar, of Massachusetts, managers to conduct the impeachment against William W. Belknap, late Secretary of War, and have directed the said managers to carry to the Senate the articles agreed upon by this House to be exhibited in maintenance of their impeachment against said William W. Belknap, and that the Clerk of the House do go with said message.

As first offered, the second resolution did not contain the names of the managers; but Mr. James A. Garfield, of Ohio, suggested that inasmuch as the Senate was always informed of the names of the managers of a conference, it seemed right that they should be similarly informed in this far more important proceeding. So the names were included.

2449. Belknap's impeachment continued.

Ceremonies and forms in presenting in the Senate the articles impeaching Secretary Belknap.

The articles of impeachment in the Belknap case.

Forms of messages preceding the presentation of the articles impeaching Secretary Belknap.

The House did not accompany their managers when articles of impeachment were presented against Secretary Belknap.

The articles impeaching Secretary Belknap were signed by the Speaker and attested by the Clerk.

The chairman of the managers having read the articles impeaching Secretary Belknap, laid them on the table of the Senate.

Having presented in the Senate the articles impeaching Secretary Belknap, the managers reported verbally in the House.

On April 3,[14] in the Senate, Mr. George M. Adams, Clerk of the House of Representatives, appeared at the bar of the Senate and said:

Mr. President, I am directed to inform the Senate that the House of Representatives has passed the following resolutions: [Here followed the resolutions.]

The President pro tempore said:

The Secretary will inform the House of Representatives that the Senate will receive the managers for the purpose of exhibiting articles of impeachment agreeably to notice received.

The Clerk of the House thereupon withdrew.

On April 4,[15] in the House, the Secretary of the Senate delivered this message:

I am directed to inform the House that the Senate is ready to receive the managers appointed by the House of Representatives to carry to the Senate articles of impeachment against William W. Belknap, Secretary of War.

[14] Senate Journal, p. 278; Record, p. 2155.
[15] House Journal, p. 748; Record, p. 2182.

Soon after the receipt of this message Mr. Manager Lord, rising to a question of privilege,[16] asked if it was the wish of the House to accompany the managers in the presentation of the articles of impeachment. It was recalled that in the cases of Judge Humphreys and President Johnson the House had accompanied the managers; but, on the other hand, it was pointed out that the message of the Senate referred only to the managers. No proposition that the House attend was made and the matter dropped.

Soon after, in the Senate,[17] the managers of the impeachment on the part of the House of Representatives appeared at the bar (at 1 o'clock and 25 minutes p.m.) and their presence was announced by the Sergeant-at-Arms.

The PRESIDENT pro tempore. The managers on the part of the House of Representatives are admitted and the Sergeant-at-Arms will conduct them to seats provided for them within the bar of the Senate.

The managers were thereupon escorted by the Sergeant-at-Arms of the Senate to the seats assigned to them in the area in front of the Chair.

Mr. Manager LORD. Mr. President, the managers on the part of the House of Representatives are ready to exhibit on the part of the House articles of impeachment against William W. Belknap, late Secretary of War.

The PRESIDENT pro tempore. The Sergeant-at-Arms will make proclamation.

The SERGEANT-AT-ARMS. Hear ye, hear ye, hear ye. All persons are commanded to keep silence, on pain of imprisonment, while the House of Representatives is exhibiting to the Senate of the United States articles of impeachment against William W. Belknap, late Secretary of War.

Mr. Manager Lord rose and read the articles of impeachment,[18] as follows:

Articles exhibited by the House of Representatives of the United States of America in the names of themselves and of all the people of the United States of America, against William W. Belknap, late Secretary of War, in maintenance and support of their impeachment against him for high crimes and misdemeanors while in said office.

ARTICLE I

That William W. Belknap, while he was in office as Secretary of War of the United States of America, to wit, on the 8th day of October, 1870, had the power and authority, under the laws of the United States, as Secretary of War, as aforesaid, to appoint a person to maintain a trading establishment at Fort Sill, a military post of the United States; that said Belknap, as Secretary of War, as aforesaid, on the day and year aforesaid, promised to appoint one Caleb P. Marsh to maintain said trading establishment at said military post; that thereafter, to wit, on the day and year aforesaid, the said Caleb P. Marsh and one John S. Evans entered into an agreement in writing substantially as follows, to wit:

Articles of agreement made and entered into this 8th day of October, A.D. 1870, by and between John S. Evans, of Fort Sill, Indian Territory, United States of America, of the first part, and Caleb P. Marsh, of No. 51 West Thirty-fifth street, of the city, county, and State of New York, of the second part, witnesseth, namely:

"Whereas the said Caleb P. Marsh has received from Gen. William W. Belknap, Secretary of War of the United States, the appointment of posttrader at Fort Sill, aforesaid; and whereas the name of said John S. Evans is to be filled into the commission of appointment of said posttrader at Fort Sill, aforesaid, by permission and at the instance and request of said Caleb P. Marsh and for the purpose of carrying out the terms of this agreement; and whereas said John S.

[16] Record, p. 2184.
[17] Senate Journal, pp. 382–390; Record, pp. 2178–2180.
[18] These articles appear in full in the Senate Journal.

Evans is to hold said position of posttrader, as aforesaid, solely as the appointee of said Caleb P. Marsh and for the purposes hereinafter stated:

"Now, therefore, said John S. Evans, in consideration of said appointment and the sum of $1 to him in hand paid by said Caleb P. Marsh, the receipt of which is hereby acknowledged, hereby covenants and agrees to pay to said Caleb P. Marsh the sum of $12,000 annually, payable quarterly in advance, in the city of New York, aforesaid; said sum to be so payable during the first year of this agreement absolutely and under all circumstances, anything hereinafter contained to the contrary notwithstanding; and thereafter said sum shall be so payable, unless increased or reduced in amount, in accordance with the subsequent provisions of this agreement.

"In consideration of the premises, it is mutually agreed between the parties aforesaid as follows, namely:

"First. This agreement is made on the basis of seven cavalry companies of the United States Army, which are now stationed at Fort Sill aforesaid.

"Second. If at the end of the first year of this agreement the forces of the United States Army stationed at Fort Sill, aforesaid, shall be increased or diminished not to exceed one hundred men, then this agreement shall remain in full force and unchanged for the next year. If, however, the said forces shall be increased or diminished beyond the number of one hundred men, then the amount to be paid under this agreement by said John S. Evans to said Caleb P. Marsh shall be increased or reduced in accordance therewith and in proper proportion thereto. The above rule laid down for the continuation of this agreement at the close of the first year thereof shall be applied at the close of each succeeding year so long as this agreement shall remain in force and effect.

"Third. This agreement shall remain in force and effect so long as said Caleb P. Marsh shall hold or control, directly or indirectly, the appointment and position of posttrader at Fort Sill, aforesaid.

"Fourth. This agreement shall take effect from the date and day the Secretary of War, aforesaid, shall sign the commission of posttrader at Fort Sill, aforesaid, said commission to be issued to said John S. Evans at the instance and request of said Caleb P. Marsh and solely for the purpose of carrying out the provisions of this agreement.

"Fifth. Exception is hereby made in regard to the first quarterly payment under this agreement, it being agreed and understood that the same may be paid at any time within the next thirty days after the said Secretary of War shall sign the aforesaid commission of posttrader at Fort Sill.

"Sixth. Said Caleb P. Marsh is at all times, at the request of said John S. Evans, to use any proper influence he may have with said Secretary of War for the protection of said John S. Evans while in the discharge of his legitimate duties in the conduct of the business as posttrader at Fort Sill, aforesaid.

"Seventh. Said John S. Evans is to conduct the said business of posttrader at Fort Sill, aforesaid, solely on his own responsibility and in his own name, it being expressly agreed and understood that said Caleb P. Marsh shall assume no liability in the premises whatever.

"Eighth. And it is expressly understood and agreed that the stipulations and covenants aforesaid are to apply to and bind the heirs, executors, and administrators of the respective parties.

"In witness whereof the parties to these presents have hereunto set their hands and seals the day and year first above written.

"JOHN S. EVANS. [SEAL.]
"C. P. MARSH. [SEAL.]

"Signed, sealed, and delivered in presence of—
"E. T. BARTLETT."

That thereafter, to wit, on the 10th day of October, 1870, said Belknap, as Secretary of War, aforesaid, did, at the instance and request of said Marsh, at the city of Washington, in the District of Columbia, appoint said John S. Evans to maintain said trading establishment at Fort Sill, the military post aforesaid, and in consideration of said appointment of said Evans, so made by him as Secretary of War, as aforesaid, the said Belknap did, on or about the 2d day of November, 1870, unlawfully and corruptly receive from said Caleb P. Marsh the sum of $1,500, and that at divers times thereafter, to wit, on or about the 17th of January, 1871, and at or about the end of each three months during the term of one whole year, the said William W. Belknap, while still in office as Secretary of War, as aforesaid, did unlawfully receive from said Caleb P. Marsh like sums of $1,500, in consideration of the appointment of the said John S. Evans by him, the said Belknap, as Secretary of War, as aforesaid, and in considera-

tion of his permitting said Evans to continue to maintain the said trading establishment at said military post during that time; whereby the said William W. Belknap, who was then Secretary of War, as aforesaid, was guilty of high crimes and misdemeanors in office.

ARTICLE II

That said William W. Belknap, while he was in office as Secretary of War of the United States of America, did, at the city of Washington, in the District of Columbia, on the 4th day of November, 1873, willfully, corruptly, and unlawfully take and receive from one Caleb P. Marsh the sum of $1,500, in consideration that he would continue to permit one John S. Evans to maintain a trading establishment at Fort Sill, a military post of the United States, which said establishment said Belknap, as Secretary of War, as aforesaid, was authorized by law to permit to be maintained at said military post, and which the said Evans had been before that time appointed by said Belknap to maintain; and that said Belknap, as Secretary of War, as aforesaid, for said consideration, did corruptly permit the said Evans to continue to maintain the said trading establishment at said military post. And so the said Belknap was thereby guilty, while he was Secretary of War, of a high misdemeanor in his said office.

ARTICLE III

That said William W. Belknap was Secretary of War of the United States of America before and during the month of October 1870, and continued in office as such Secretary of War until the 2d day of March 1876; that as Secretary of War as aforesaid said Belknap had authority, under the laws of the United States, to appoint a person to maintain a trading establishment at Fort Sill, a military post of the United States, not in the vicinity of any city or town; that on the 10th day of October, 1870, said Belknap, as Secretary of War as aforesaid, did, at the city of Washington, in the District of Columbia, appoint one John S. Evans to maintain said trading establishment at said military post; and that said John S. Evans, by virtue of said appointment, has since, till the 2d day of March, 1876, maintained a trading establishment at said military post, and that said Evans, on the 8th day of October, 1870, before he was so appointed to maintain said trading establishment as aforesaid, and in order to procure said appointment and to be continued therein, agreed with one Caleb P. Marsh that, in consideration that said Belknap would appoint him, the said Evans, to maintain said trading establishment at said military post, at the instance and request of said Marsh, he, the said Evans, would pay to him a large sum of money, quarterly, in advance, from the date of his said appointment by said Belknap, to wit, $12,000 during the year immediately following the 10th day of October, 1870, and other large sums of money, quarterly, during each year that he, the said Evans, should be permitted by said Belknap to maintain said trading establishment at said post; that said Evans did pay to said Marsh said sum of money quarterly during each year after his said appointment, until the month of December, 1875, when the last of said payments was made; that said Marsh, upon the receipt of each of said payments, paid one-half thereof to him, the said Belknap. Yet the said Belknap, well knowing these facts, and having the power to remove said Evans from said position at any time, and to appoint some other person to maintain said trading establishment, but criminally disregarding his duty as Secretary of War, and basely prostituting his high office to his lust for private gain, did unlawfully and corruptly continue said Evans in said position and permit him to maintain said establishment at said military post during all of said time, to the great injury and damage of the officers and soldiers of the Army of the United States stationed at said post, as well as of emigrants, freighters, and other citizens of the United States, against public policy, and to the great disgrace and detriment of the public service.

Whereby the said William W. Belknap was, as Secretary of War as aforesaid, guilty of high crimes and misdemeanors in office.

ARTICLE IV

That said William W. Belknap, while he was in office and acting as Secretary of War of the United States of America, did, on the 10th day of October, 1870, in the exercise of the power and authority vested in him as Secretary of War as aforesaid by law, appoint one John E. Evans to maintain a trading establishment at Fort Sill, a military post of the United States, and he, the said Belknap, did

receive, from one Caleb P. Marsh, large sums of money for and in consideration of his having so appointed said John S. Evans to maintain said trading establishment at said military post, and for continuing him therein, whereby he has been guilty of high crimes and misdemeanors in his said office.

Specification 1.—On or about the 2d day of November, 1870, said William W. Belknap, while Secretary of War as aforesaid, did receive from Caleb P. Marsh $1,500, in consideration of his having appointed said John S. Evans to maintain a trading establishment at Fort Sill aforesaid, and for continuing him therein.

Specification 2.—On or about the 17th day of January, 1871, the said William W. Belknap, while Secretary of War as aforesaid, did receive from said Caleb P. Marsh $1,500, in consideration of his having appointed said John S. Evans to maintain a trading establishment at Fort Sill aforesaid, and for continuing him therein.

Specification 3.—On or about the 18th day of April, 1871, the said William W. Belknap, while Secretary of War as aforesaid, did receive from said Caleb P. Marsh $1,500, in consideration of his having appointed said John S. Evans to maintain a trading establishment at Fort Sill aforesaid, and continuing him therein.

Specification 4.—On or about the 25th day of July, 1871, the said William W. Belknap, while Secretary of War as aforesaid, did receive from said Caleb P. Marsh $1,500, in consideration of his having appointed said John S. Evans to maintain a trading establishment at Fort Sill aforesaid, and continuing him therein.

Specification 5.—On or about the 10th day of November, 1871, the said William W. Belknap, while Secretary of War as aforesaid, did receive from said Caleb P. Marsh $1,500, in consideration of his having appointed said John S. Evans to maintain a trading establishment at Fort Sill aforesaid, and continuing him therein.

Specification 6.—On or about the 15th day of January, 1872, the said William W. Belknap, while Secretary of War as aforesaid, did receive from said Caleb P. Marsh $1,500, in consideration of his having appointed said John S. Evans to maintain a trading establishment at Fort Sill aforesaid, and continuing him therein.

Specification 7.—On or about the 13th day of June, 1872, the said William W. Belknap, while Secretary of War as aforesaid, did receive from said Caleb P. Marsh $1,500, in consideration of his having appointed said John S. Evans to maintain a trading establishment at Fort Sill aforesaid, and continuing him therein.

Specification 8.—On or about the 22d day of November, 1872, the said William W. Belknap, while Secretary of War as aforesaid, did receive from said Caleb P. Marsh $1,500, in consideration of his having appointed said John S. Evans to maintain a trading establishment at Fort Sill aforesaid, and continuing him therein.

Specification 9.—On or about the 28th day of April, 1873, the said William W. Belknap, while Secretary of War as aforesaid, did receive from said Caleb P. Marsh $1,000, in consideration of his having appointed said John S. Evans to maintain a trading establishment at Fort Sill aforesaid, and continuing him therein.

Specification 10.—On or about the 16th day of June, 1873, the said William W. Belknap, while Secretary of War as aforesaid, did receive from said Caleb P. Marsh $1,700, in consideration of his having appointed said John S. Evans to maintain a trading establishment at Fort Sill aforesaid, and continuing him therein.

Specification 11.—On or about the 4th day of November, 1873, the said William W. Belknap, while Secretary of War as aforesaid, did receive from said Caleb P. Marsh $1,500, in consideration of his having appointed said John S. Evans to maintain a trading establishment at Fort Sill aforesaid, and continuing him therein.

Specification 12.—On or about the 22d day of January, 1874, the said William W. Belknap, while Secretary of War as aforesaid, did receive from said Caleb P. Marsh $1,500, in consideration of his having appointed said John S. Evans to maintain a trading establishment at Fort Sill aforesaid, and continuing him therein.

Specification 13.—On or about the 10th day of April, 1874, the said William W. Belknap, while Secretary of War as aforesaid, did receive from said Caleb P. Marsh $1,500, in consideration of his having appointed said John S. Evans

to maintain a trading establishment at Fort Sill aforesaid, and continuing him therein.

Specification 14.—On or about the 9th day of October, 1874, the said William W. Belknap, while Secretary of War as aforesaid, did receive from said Caleb P. Marsh $1,500, in consideration of his having appointed said John S. Evans to maintain a trading establishment at Fort Sill aforesaid, and continuing him therein.

Specification 15.—On or about the 24th day of May, 1875, the said William W. Belknap, while Secretary of War as aforesaid, did receive from said Caleb P. Marsh $1,500, in consideration of his having appointed said John S. Evans to maintain a trading establishment at Fort Sill aforesaid, and continuing him therein.

Specification 16.—On or about the 17th day of November, 1875, the said William W. Belknap, while Secretary of War as aforesaid, did receive from said Caleb P. Marsh $1,500, in consideration of his having appointed said John E. Evans to maintain a trading establishment at Fort Sill aforesaid, and continuing him therein.

Specification 17.—On or about the 15th day of January, 1876, the said William W. Belknap, while Secretary of War as aforesaid, did receive from said Caleb P. Marsh $750, in consideration of his having appointed said John S. Evans to maintain a trading establishment at Fort Sill aforesaid, and continuing him therein.

ARTICLE V

That one John S. Evans was, on the 10th day of October, in the year 1870, appointed by the said Belknap to maintain a trading establishment at Fort Sill, a military post on the frontier, not in the vicinity of any city or town, and said Belknap did, from that day continuously to the 2d day of March, 1876, permit said Evans to maintain the same; and said Belknap was induced to make said appointment by the influence and request of one Caleb P. Marsh; and said Evans paid to said Marsh, in consideration of such influence and request and in consideration that he should thereby induce said Belknap to make said appointment, divers large sums of money at various times, amounting to about $12,000 a year from the date of said appointment to the 25th day of March, 1872, and to about $6,000 a year thereafter until the 2d day of March, 1876, all which said Belknap well knew; yet said Belknap did, in consideration that he would permit said Evans to continue to maintain said trading establishment and in order that said payments might continue and be made by said Evans to said Marsh as aforesaid, corruptly receive from said Marsh, either to his, the said Belknap's own use or to be paid over to the wife of said Belknap, divers larger sums of money at various times, namely: The sum of $1,500 on or about the 2d day of November, 1870; the sum of $1,500 on or about the 17th day of January, 1871; the sum of $1,500 on or about the 18th day of April, 1871; the sum of $1,500 on or about the 25th day of July, 1871; the sum of $1,500 on or about the 10th day of November, 1871; the sum of $1,500 on or about the 15th day of January, 1872; the sum of $1,500 on or about the 13th day of June, 1872; the sum of $1,500 on or about the 22d day of November, 1872; the sum of $1,000 on or about the 28th day of April, 1873; the sum of $1,700 on or about the 16th day of June, 1873; the sum of $1,500 on or about the 4th day of November, 1873; the sum of $1,500 on or about the 22d day of January, 1874; the sum of $1,500 on or about the 10th day of April, 1874; the sum of $1,500 on or about the 9th day of October, 1874; the sum of $1,500 on or about the 24th day of May, 1875; the sum of $1,500 on or about the 17th day of November, 1875; the sum of $750 on or about the 15th day of January, 1876; all of which acts and doings were while the said Belknap was Secretary of War of the United States, as aforesaid, and were a high misdemeanor in said office.

And the House of Representatives by protestation, saving to themselves the liberty of exhibiting at any time hereafter any further articles of accusation or impeachment against the said William W. Belknap, late Secretary of War of the United States, and also of replying to his answers which he shall make unto the articles herein preferred against him, and of offering proof to the same and every part thereof, and to all and every other article, accusation, or impeachment which shall be exhibited by them, as the case shall require, do demand that the said William W. Belknap may be put to answer the high crimes and misdemeanors in office herein charged against him, and that such proceed-

ings, examinations, trials, and judgments may be thereupon had and given as may be agreeable to law and justice.

MICHAEL C. KERR,
Speaker of the House of Representatives.

Attest.
GEO. M. ADAMS,
Clerk of the House of Representatives.

The reading of the articles of impeachment having been concluded, the President pro tempore informed the managers that the Senate would take proper order on the subject of the impeachment, of which due notice would be given to the House of Representatives.

The managers, by their chairman, Mr. Lord, then delivered the articles of impeachment at the table of the Secretary and withdrew.

Soon thereafter, in the House, the Speaker pro tempore [19] directed that business be suspended to receive a report from the managers on the part of the House of the impeachment of W. W. Belknap, late Secretary of War.

The managers appeared at the bar, when Mr. Lord said:

Mr. Speaker, the managers of impeachment beg leave to report to the House that the articles of impeachment prepared by the House of Representatives against William W. Belknap, late Secretary of War, have been exhibited and read to the Senate, and the Presiding Officer of that body stated to the managers that the Senate would take order in the premises, due notice of which would be given to the House of Representatives.[20]

2450. Belknap's impeachment continued.

At the organization of the Senate for the Belknap trial the oath was administered by the Chief Justice.

The Senate organized for the Belknap trial after the articles of impeachment had been presented.

The Senate, having organized for the Belknap trial, informed the House by message.

On April 5,[21] in the Senate, Mr. Edmunds offered this resolution, which was thereupon agreed to:

Ordered, That a committee of two Senators be appointed by the Chair to wait upon the Chief Justice of the United States and invite him to attend in the Senate Chambers at 1 o'clock p.m. this day, or, in case of his inability to attend, any one of the associate justices.

The Chair thereupon appointed Messrs. Edmunds and Allen G. Thurman, of Ohio, as the committee.

Soon thereafter the following proceedings occurred:

The Chief Justice of the United States, Hon. Morrison R. Waite, entered the Senate Chamber, escorted by Messrs. Edmunds and Thurman, the committee appointed for the purpose.

The PRESIDENT pro tempore. The hours of 1 o'clock having arrived, the Senate, according to its rule, will now proceed to the consideration of the articles of impeachment exhibited by the House of Representatives against William W. Belknap, late Secretary of War. The Chief Justice will take the seat provided for him at the right of the Chair.

The Chief Justice took a seat by the side of the President pro tempore of the Senate.

The PRESIDENT pro tempore. The Senate will give attention while the constitutional oath is being administered.

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[19] William A. Wheeler, of New York, Speaker pro tempore.
[20] House Journal, p. 745; Record, p. 2186.
[21] Senate Journal, pp. 394, 908,, 909; Record, pp. 2212, 2215, 2216.

The Chief Justice administered the oath to the President pro tempore, as follows:

You do solemnly swear that in all things appertaining to the trial of the impeachment of William W. Belknap, late Secretary of War, now pending, you will do impartial justice according to the Constitution and laws. So help you God.

The PRESIDENT pro tempore. The Secretary will now call the roll of Senators, alphabetically in groups of six, and Senators as they are so called will advance to the desk and take the oath.

After the oaths had been administered Mr. Frederick T. Frelinghuysen, of New Jersey, offered the following, which was agreed to:

Ordered, That the Secretary notify the House of Representatives that the Senate is now organized for the trial of articles of impeachment against William W. Belknap, late Secretary of War, and is ready to receive the managers on the part of the House at its bar.

And in obedience thereto the Secretary delivered the following message at the bar of the House: [22]

Mr. Speaker, I am directed to inform the House of Representatives that the Senate is now organized for the trial of articles of impeachment against William W. Belknap, late Secretary of War, and it is ready to receive the managers of impeachment on the part of the House at its bar.

2451. Belknap impeachment continued.

The House being notified that the Senate was organized for the trial of Secretary Belknap, the managers attended and demanded that process issue.

On the demand of the managers the Senate ordered process to issue against Secretary Belknap, fixing the day of return.

Having demanded of the Senate that process issue against Secretary Belknap, the managers reported verbally to the House.

At 1 o'clock and 40 minutes p.m. the managers of the impeachment on the part of the House of Representatives appeared at the bar and their presence was announced by the Sergeant-at-Arms.[23]

The PRESIDENT pro tempore. The Sergeant-at-Arms will conduct the managers to the seats provided for them within the bar of the Senate.

The managers were conducted to the seats assigned them within the space in front of the Secretary's desk.

The PRESIDENT pro tempore. Gentlemen managers, the Senate is now organized for the trial of the impeachment of William W. Belknap, late Secretary of War.

Thereupon Mr. Manager Lord, chairman of the managers, rose and said:

We are instructed by the House of Representatives, as its managers, to demand that the Senate issue process against William W. Belknap, late Secretary of War; that he answer at the bar of the Senate the articles of impeachment heretofore exhibited by the House of Representatives, through its managers, before the Senate.

Thereupon Mr. Edmunds offered the following, which was agreed to by the Senate:

Ordered. That a summons be issued, as required by the rules of procedure and practice in the Senate when sitting for the trial of impeachment, to William W. Belknap, returnable on Monday, the 17th day of the present month, at 1 o'clock in the afternoon.

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[22] House Journal, p. 750; Record, p. 2228.
[23] Senate Journal, p. 909; Record of trial, p. 4.

Thereupon, after a discussion caused by the fact that the rules for impeachment trials provided for the return of the summons at 12:30, while the order just adopted fixed 1 o'clock as the hour, Mr. Edmunds moved that the Senate sitting for the trial of impeachment adjourn to Monday, the 17th instant at 12:30 o'clock. And this motion was agreed to, yeas 38, nays 10.

And thereupon the Senate resumed its legislative session.[24]

In the House meanwhile the managers had returned [25] and reported—

that, in answer to the summons from the Senate, they proceeded to its bar, and that the Senate had fixed Monday, the 17th of this month, as the day on which the process against William W. Belknap, late Secretary of War, shall be returnable.

2452. Belknap's impeachment continued.

Ceremonies and forms of the return of the writ of summons against Secretary Belknap.

Secretary Belknap appeared in person and with counsel to answer the articles of impeachment.

The Chief Justice administered the oath to the Sergeant-at-Arms on the return of the writ of summons in the Belknap case.

On April 17 [26] the following record appears:

The Chief Justice of the United States entered the Senate Chamber, escorted by Messrs. Edmunds and Thurman, the committee appointed for the purpose.

The PRESIDENT pro tempore. The hour of 12 o'clock and 30 minutes having arrived, in pursuance of rule the legislative and executive business of the Senate will be suspended and the Senate will proceed the consideration of the articles of impeachment exhibited by the House of Representatives against William W. Belknap, late Secretary of War.

The Chief Justice took a seat by the side of the President pro tempore of the Senate.

The PRESIDENT pro tempore. The Sergeant-at-Arms will make the opening proclamation.

The SERGEANT-AT-ARMS. Hear ye, hear ye, hear ye. All persons are commanded to keep silence on pain of imprisonment while the Senate of the United States is sitting for the trial of the articles of impeachment exhibited by the House of Representatives against William W. Belknap, late Secretary of War.

The PRESIDENT pro tempore. The Secretary will now call the names of those Senators who have not been sworn, and such Senators, as they are called, will advance to the desk and take oath.

Certain Senators have been sworn,

On motion of Mr. Edmunds, it was

Ordered, That the Secretary inform the House of Representatives that the Senate is in its Chamber and ready to proceed with the trial of the impeachment of William W. Belknap, and that seats are provided for the accommodation of the Members.

The PRESIDENT pro tempore. The Secretary will invite the House accordingly.

The message was presently delivered [27] in the House of Representatives, where a discussion arose as to whether the House should attend or not, and as to the manner of attendance. My Lord stated that the usual custom had been for the House to go over on the trial, but for some reason the Senate had seen fit to change the custom and invite the House on this day, and it seemed to him that the House

[24] Senate Journal, p. 395.
[25] House Journal, p. 750; Record, p. 2229.
[26] Senate Journal, p. 910; Record of trial, pp. 5, 6.
[27] House Journal, p. 811; Record, pp. 2512, 2513.

should attend in a body, headed by the Speaker. Mr. George F. Hoar, of Massachusetts, suggested that an examination of the precedents showed that it would be better to go over as a Committee of the Whole; and on his motion—

the House resolved itself into a Committee of the Whole House, and proceeded in that capacity of the Senate Chamber.

Meanwhile, at 1 o'clock p.m., William W. Belknap entered the Senate Chamber, accompanied by his counsel, Hon. Jeremiah S. Black, Hon. Montgomery Blair, and Hon. M. H. Carpenter, who were conducted to the seats assigned them in the space in front of the Secretary's desk on the right of the Chair.

At 1 o'clock and 2 minutes p.m., the Sergeant-at-Arms announced the managers on the part of the House of Representatives.

The PRESIDENT pro tempore. The managers will be admitted and conducted to seats provided for them within the bar of the Senate.

The managers were conducted to seats provided in the space in front of the Secretary's desk on the left of the Chair, namely: Hon. Scott Lord, of New York; Hon. J. Proctor Knott, of Kentucky; Hon. William P. Lynde, of Wisconsin; Hon. J. A. McMahon, of Ohio; Hon. G. A. Jenks, of Pennsylvania; Hon. E. G. Lapham, of New York, and Hon. George F. Hoar, of Massachusetts.

Mr. Manager LORD. Mr. President, in accordance with the invitation extended, the House of Representatives has resolved itself into a Committee of the Whole and will attend upon this sitting of this court on being waited upon by the Sergeant-at-Arms.

The PRESIDENT pro tempore. The Sergeant-at-Arms will wait upon the House of Representatives and invite them to the Chamber of the Senate.

At 1 o'clock and 5 minutes p.m., the Sergeant-at-Arms announced the presence of the Members of the House of Representatives, who entered the Senate Chamber preceded by the chairman of the Committee of the Whole House (Mr. Samuel J. Randall, of Pennsylvania), into which that body had resolved itself to witness the trial, who was accompanied by the Speaker and Clerk of the House.

The PRESIDENT pro tempore. The Secretary will now read the minutes of the sitting on Wednesday, the 5th instant.

The Secretary read the Journal of proceedings of the Senate sitting for trial of the impeachment of Wednesday, April 5, 1876.

The PRESIDENT pro tempore. The Secretary will now read the return of the Sergeant-at-Arms to the summons directed to be served.

The Secretary read the following return appended to the writ of summons:

The foregoing writ of summons addressed to William W. Belknap and the foregoing precept addressed to me were duly served upon the said William W. Belknap by delivering to and leaving with him true and attested copies of the same at No. 2022 G street, Washington City, the residence of the said William W. Belknap, on Thursday the 6th day of April, 1876, at 6 o'clock and 40 minutes in the afternoon of that day.

JOHN R. FRENCH,
Sergeant-at-Arms of the Senate of the United States.

The PRESIDENT pro tempore. The Chair understands that Rule 9 will be suspended for reasons already stated, and the Chief Justice will now administer the oath to the officer attesting the truth of this return.[20]

[20] The Rule No. 9 provided for the administration of the oath by the Presiding Officer, but as a doubt had arisen as to the legal competency of an oath administered by one not especially empowered by statute so to do, the Chief Justice had been invited to attend.

The Chief Justice administered the following oath to the Sergeant-at-Arms:

I, John R. French, do solemnly swear that the return made by me upon the process issued on the 6th day of April, by the Senate of the United States, against W. W. Belknap, is truly made, and that I have performed such service as therein described: So help me God.

The PRESIDENT pro tempore. The committee will please escort the Chief Justice to the Supreme Court Room.

The Chief Justice retired, escorted by the committee, Mr. Edmunds and Mr. Thurman.

The PRESIDENT pro tempore. The Sergeant-at-Arms will now call William W. Belknap, the respondent, to appear and answer the charges of impeachment brought against him.

The SERGEANT-AT-ARMS. William W. Belknap, William W. Belknap, appear and answer the articles of impeachment exhibited against you by the House of Representatives.

William W. Belknap, accompanied by Mr. Matt H. Carpenter, Mr. Jeremiah S. Black, and Mr. Montgomery Blair, as counsel, having appeared at the bar of the Senate, were directed by the Presiding Officer to take the seats assigned them.

The Presiding Officer then informed the respondent that the Senate is now sitting for the trial of William W. Belknap, late Secretary of War, upon articles of impeachment exhibited by the House of Representatives, and will now hear him in answer thereto.

2453. Belknap's impeachment continued.

The answer of Secretary Belknap to the articles of impeachment.

The answer of Secretary Belknap demurred to the articles, alleging that he was not a civil officer of the United States when they were exhibited.

Form of announcing the appearance of counsel in the Belknap trial.

The answer of Secretary Belknap being presented, the Senate, on request, ordered a copy of the answer to be furnished to the managers.

The Senate allowed to the House time for preparation of a replication in the Belknap trial, and informed the House thereof by message.

The House determined, after respondent's answer, that it would be represented at the Belknap trial by its managers only.

Whereupon, Mr. Carpenter, of counsel, on behalf of the said William W. Belknap, made answer:

That William W. Belknap a private citizen of the United States and of the State of Iowa, in obedience to the summons of the Senate sitting as a court of impeachment to try the articles presented against him by the House of Representatives of the United States, appears at the bar of the Senate sitting as a court of impeachment and interposes the following plea; which I will ask the Secretary to read and request that it may be filed.

The Secretary read as follows:

In the Senate of the United States sitting as a court of impeachment.

THE UNITED STATES OF AMERICA *v.* WILLIAM W. BELKNAP.

Upon articles of impeachment of the House of Representatives of the United States of America, of high crimes and misdemeanors.

And the said William W. Belknap, named in the said articles of impeachment, comes here before the honorable the Senate of the United States sitting as a court

of impeachment, in his own proper person, and says that this honorable court ought not to have or take further cognizance of the said articles of impeachment exhibited and presented against him by the House of Representatives of the United States, because, he says, that before and at the time when the said House of Representatives ordered and directed that he, the said Belknap, should be impeached at the bar of the Senate, and at the time when the said articles of impeachment were exhibited and presented against him, the said Belknap, by the said House of Representatives, he, the said Belknap, was not, nor hath he since been, nor is he now an officer of the United States; but at the said times was, ever since hath been, and now is a private citizen of the United States and of the State of Iowa; and this he, the said Belknap, is ready to verify; wherefore he prays judgment whether this court can or will take further cognizance of the said articles of impeachment.

WM. W. BELKNAP.

UNITED STATES OF AMERICA, *District of Columbia, ss:*

William W. Belknap, being first duly sworn on oath, says that the foregoing plea by him subscribed is true in substance and fact.

WM. W. BELKNAP.

Subscribed and sworn to before me this 17th day of April, 1876.

DAVID DAVIS,
Associate Justice of the Supreme Court of the United States.

Mr. CARPENTER. Mr. President, Judge Jeremiah S. Black, Hon. Montgomery Blair, and myself also appear as counsel for Mr. Belknap.

The PRESIDENT pro tempore. The Secretary will note the appearance of the respondent and the presence of the counsel named.

Mr. Manager Lord thereupon submitted this motion:

The Managers on the part of the House of Representatives request a copy of the plea filed by W. W. Belknap, late Secretary of War, and the House of Representatives desire time until Wednesday, the 19th instant, at 1 o'clock, to consider what replication to make to the plea of the said W. W. Belknap, late Secretary of War.

It was ordered accordingly, and the Secretary was directed to notify the House of Representatives thereof.

Thereupon the Senate sitting for the trial adjourned to Wednesday, the 19th instant, at 12:30 o'clock.

The House, in Committee of the Whole House, returned to their Hall—

and the Speaker having resumed the Chair, Mr. Randall reported that the committee, in pursuance of the order of the House, had attended the Senate sitting as a court of impeachment, in company with the Managers on the part of the House.[29]

Soon thereafter the Secretary of the Senate delivered a message as to the time set for the trial, which message was, on motion of Mr. Hoar, referred to the managers.

Later, on this day, Mr. Randall presented this resolution, which was agreed to without debate or division:[30]

Resolved, That in the future proceedings of the impeachment trial of W. W. Belknap, late Secretary of War, the House appear, in the prosecution of said impeachment before the Senate sitting as a court of impeachment by its managers only.

2454. Belknap's impeachment continued.

The replication of the House to the answer of respondent in the Belknap trial.

Forms and ceremonies of presenting in the Senate the replication in the Belknap trial.

[29] House Journal, pp. 811, 812.
[30] House Journal, p. 814; Record, p. 2533.

The House, in their replication in the Belknap trial, alleged a new matter not set forth in the articles.

In the House, on April 19,[31] Mr. Lord, by direction of the managers, reported the replication, and without debate or division it was—

Ordered, That the House adopt the replication to the answer of William W. Belknap, as now submitted by the managers.

Then it was

Resolved, That a message be sent to the Senate, by the Clerk of the House, informing the Senate that the House of Representatives has adopted a replication to the plea of William W. Belknap, late Secretary of War, to the articles of impeachment exhibited against him, and that the same will be presented to the Senate by the managers on the part of the House.

This message was presently delivered in the Senate sitting for the impeachment, the sitting having been opened in due form and the respondent and his counsel being present. The managers presently attended and were assigned seats, whereupon, according to the record—[32]

The PRESIDENT pro tempore. Gentlemen managers, in accordance with the order of the Senate fixing the hour of 1 o'clock as the time at which it will hear you, the Senate is now ready to hear you.

Mr. Manager LORD. Mr. President, the House of Representatives having adopted a replication to the plea of William W. Belknap to the jurisdiction of this court, as advised by the resolution just read, the managers are instructed to present the replication to the Senate sitting as a court of impeachment, and to request that the same may be read the Secretary and filed among the Senate's papers.

The PRESIDENT pro tempore. The replication will be read by the Secretary.

The Secretary read at follows:

In the Senate of the United States sitting as a court of impeachment.

THE UNITED STATES OF AMERICA *v.* WILLIAM W. BELKNAP.

The replication of the House of Representatives of the United States in their own behalf, and also in the name of the people of the United States, to the plea of William W. Belknap to the articles of impeachment exhibited by them to the Senate against the said William W. Belknap.

The House of Representatives of the United States, prosecuting, on behalf of themselves and the people of the United States, the articles of impeachment exhibited by them to the Senate of the United States against said William F. Belknap, reply to the plea of said William W. Belknap, and say that the matters alleged in the said plea are not sufficient to exempt the said William W. Belknap from answering the said articles of impeachment, because they say that at the time all the acts charged in said articles of impeachment were done and committed, and thence continuously done, to the 2d day of March, A.D. 1876, the said William W. Belknap was Secretary of War of the United States, as in said articles of impeachment averred, and, therefore, that by the Constitution of the United States the House of Representatives had power to prefer the articles of impeachment, and the Senate have full and the sole power to try the same. Wherefore they demand that the plea aforesaid of the said William W. Belknap be not allowed, but that the said William W. Belknap be required to answer the said articles of impeachment.

II

The House of Representatives of the United States, so prosecuting in behalf of themselves and the people of the United States the said articles of impeachment exhibited by them to the Senate of the United States against the said William W. Belknap, for a second and further replication to the plea of the said William W. Belknap, say that the matters alleged in the said plea are not sufficient to exempt the said William W. Belknap from answering the said articles

[31] House Journal, pp. 822, 823; Record, p. 2592.
[32] Senate Journal, pp. 913, 914; Record of trial, pp. 7, 8.

of impeachment, because they say that at the time of the commission by the said William W. Belknap of the acts and matters set forth in the said articles of impeachment he, said William W. Belknap, was an officer of the United States, as alleged in the said articles of impeachment; and they say that the said William W. Belknap, after the commission of each one of the acts alleged in the said articles, was and continued to be such officer, as alleged in said articles, until and including the 2d day of March, A.D. 1876, and until the House of Representatives, by its proper committee, had completed its investigation of his official conduct as such officer in regard to the matters and things set forth as official misconduct in the said articles, and the said committee was considering the report it should make to the House of Representatives upon the same, the said Belknap being at the time aware of such investigation and of the evidence taken and of such proposed report.

And the House of Representatives further say that, while its said committee was considering and preparing its said report to the House of Representatives recommending the impeachment of the said William W. Belknap for the matters and things set forth in the said articles, the said William W. Belknap, with full knowledge thereof, resigned his position as such officer on the said 2d day of March, A.D. 1876, with intent to evade the proceedings of impeachment against him. And the House of Representatives resolved to impeach the said William W. Belknap for said matters as in said articles set forth on said 2d day of March, A.D. 1876. And the House of Representatives say that by the Constitution of the United States the House of Representatives had power to prefer said articles of impeachment against the said William W. Belknap, and that the Senate sitting as a court of impeachment has full power to try the same.

Wherefore the House of Representatives demand that the plea aforesaid be not allowed, but that the said William W. Belknap be compelled to answer the said articles of impeachment.

Attest:

MICHAEL C. KERR,
Speaker of the House of Representatives.

GEORGE M. ADAMS,
Clerk of the House of Representatives.

The PRESIDENT pro tempore. If there be no objection, the replication will be filed. The Chair hears none.

2455. Belknap's impeachment continued.

Forms of rejoinder, surrejoinder, and similiter filed in the Belknap trial.

Form of application of respondent for time to prepare a rejoinder in the Belknap trial.

The later pleadings in the Belknap trial were filed with the Secretary of the Senate during a recess of the Senate sitting for the trial.

The surrejoinder of the House of Representatives in the Belknap trial was signed by the Speaker and attested by the Clerk.

Thereupon Mr. Carpenter, of counsel for the respondent, submitted in writing this motion:

In the Senate of the United States sitting as a court of impeachment.

THE UNITED STATES OF AMERICA *v.* WILLIAM W. BELKNAP.

Upon articles of impeachment presented by the House of Representatives against the said William W. Belknap.

Mr. President, the respondent asks for copies of the replications this day filed by the managers and asks for time until Monday next to frame pleadings to meet the same.

WILLIAM W. BELKNAP.

Mr. Edmunds thereupon proposed an order relating to the filing of a rejoinder which would have required the respondent to file at a time

when the Senate would not be sitting for the trial. To this Mr. Carpenter objected, saying that in their pleadings they did not desire to deal with anything less than the court. They could not file with the House of Representatives, because they had no standing there. So, on suggestion of Mr. Roscoe Conkling, of New York, Mr. Edmunds submitted a modified order, which was agreed to, as follows:

Ordered, That the respondent file his rejoinder with the Secretary on or before the 24th day of April instant, who shall deliver a copy thereof to the Clerk of the House of Representatives, and that the House of Representatives file their surrejoinder, if any, on or before the 25th day of April instant, a copy of which shall be delivered by the Secretary to the counsel for the respondent.

Ordered, That the trial proceed on the 27th day of April instant, at 12 o'clock and 30 minutes afternoon.

Thereupon the Senate, sitting for the trial, adjourned to April 27.

On April 27,[38] the Senate at the appointed hour discontinued its legislative business and the session for the impeachment proceedings was opened with the usual proclamation by the Sergeant-at-Arms.

The managers, and the respondent with his counsel, having attended, the President pro tempore directed the journal of the last session's proceedings to be read.

Then, the journal having been read, the President pro tempore directed the reading of the rejoinder filed by the respondent with the Secretary of the 24th instant under the orders of the Senate of the 19th instant:

In the Senate of the United States sitting as a court of impeachment.

THE UNITED STATES OF AMERICA *v.* WILLIAM W. BELKNAP

Upon articles of impeachment of the House of Representatives of the United States of America, of high crimes and misdemeanors.

And the said William W. Belknap saith that the replication of the House of Representatives first above pleaded to the said plea of him, the said Belknap, and the matters therein contained in manner and form as the same are above pleaded and set forth, are not sufficient in law for the said House of Representatives to have or maintain impeachment thereof against him, the said Belknap, and that he, the said Belknap, is not bound by law to answer the same.

And this the said defendant is ready to verify. Wherefore, by reason of the insufficiency of the said replication in this behalf, he, the said Belknap, prays judgment if the said House of Representatives ought to have or maintain this impeachment against him, etc.

WM. W. BELKNAP.

In the Senate of the United States sitting as a court of impeachment.

THE UNITED STATES OF AMERICA *v.* WILLIAM W. BELKNAP

Upon articles of impeachment of the House of Representatives of the United States of America, of high crimes and misdemeanors.

And the said William W. Belknap, as to the second replication of the House of Representatives of the United States, secondly above pleaded, saith that the said House of Representatives ought not, by reason of anything in that replication alleged, to have or maintain the said impeachment against him, the said Belknap, because he says that it is true, as in that replication alleged, that he, the said Belknap, was Secretary of War of the United States from any time until and including the 2d day of March, A.D. 1876, and of this he, the said Belknap, demands trial according to law.

[38] Senate Journal, pp. 915–920; Record of trial, pp. 8–10.

II

And the said Belknap further saith, as to the said second replication of the House of Representatives of the United States, secondly above pleaded, that the said House of Representatives ought not, by reason of anything in that replication alleged, to have or maintain the said impeachment against him, the said Belknap, because he saith that it is not true, as in that replication alleged, that he, the said Belknap, was Secretary of War until the said House of Representatives, by any committee of the said House raised or instructed for that purpose, or having any authority from the House of Representatives in that behalf, had investigated the official conduct of him, the said Belknap, as Secretary of War, in regard to the matters and things set forth as official misconduct in the said articles of impeachment; and of this he, the said Belknap, demands trial according to law.

III

And the said Belknap, as to the said second replication of the said House of Representatives of the United States, secondly above pleaded, further saith that the said House of Representatives ought not, by reason of anything in that replication alleged, to have or maintain the said impeachment against him, the said Belknap, because he says that at the city of Washington, in the District of Columbia, on the 2d day of March, A. D. 1876, at 10 o'clock and 20 minutes in the forenoon of that day, he, the said Belknap, resigned the office of Secretary of War, by written resignation under his hand, addressed and delivered to the President of the United States, and the President of the United States then and there accepted the said resignation, by acceptance in writing under his hand, then and there indorsed upon the said written resignation; so that the said Belknap then and there ceased to be Secretary of War of the United States, and since that time he, the said Belknap, has not been an officer of the United States, but has been a private citizen of the United States and of the State of Iowa, as stated by said Belknap in his said plea; and that at the time he, the said Belknap, resigned as aforesaid, and the said resignation was accepted as aforesaid, the said House of Representatives had not taken any proceeding for the investigation or examination of any of the charges set forth in the said articles of impeachment as official misconduct of him, the said Belknap, as Secretary of War; nor had the said House of Representatives raised any committee of the said House, nor directed nor instructed any committee of the said House, to make inquiry or investigation in that behalf.

And this the said Belknap is ready to verify. Wherefore he prays judgment if the said House of Representatives ought to have or maintain the said impeachment against him, the said Belknap.

IV

And the said Belknap, as to the said second replication of the House of Representatives of the United States, secondly above pleaded, further saith that the said House of Representatives of the United States, by reason of anything in that replication alleged, ought not to have or maintain the said impeachment against him, the said Belknap, because he says that when the said House of Representatives took the first proceeding in relation to the impeachment of him, the said Belknap, and when the matter was first mentioned in the said House—that is, in the afternoon of the 2d day of March, A.D. 1876—the said House of Representatives was fully advised and well knew that he, the said Belknap, had before then resigned the said office of Secretary of War, by resignation in writing, under his hand addressed and delivered to the President of the United States, and that the President of the United States had also before that time, as President as aforesaid, accepted the said written resignation, by acceptance in writing, signed by him and indorsed on the said written resignation, and that he, the said Belknap, was not then an officer of the United States, as the facts were.

And this he, the said Belknap, is ready to verify. Wherefore he prays judgment if the said House of Representatives ought to have or maintain the said impeachment against him, the said Belknap.

V

And the said Belknap, as to the said second replication of the House of Representatives of the United States, secondly above pleaded, further saith that the said House of Representatives of the United States, by reason of anything in that replication alleged, ought not to have or maintain the said impeachment against

him, the said Belknap, because he says that, although true it is that a certain committee of the said House, called the Committee on the Expenditures of the War Department, had been pretending to make some inquiry into or investigation of the matters and things set forth in said articles of impeachment as official misconduct of him, the said Belknap, but without any authority from or direction by the House of Representatives in that behalf, yet he, the said Belknap, says that said committee had not completed its said pretended investigation, but was engaged in the examination of witnesses, when said committee was informed that the said Belknap had resigned as Secretary of War, by resignation in writing, under his hand, addressed and delivered to the President of the United States, and that the President of the United States had accepted the said resignation by acceptance in writing, under his hand, indorsed upon the said written resignation; that said committee received the said information during and before the completion of the said pretended investigation into the alleged facts in that behalf, to wit, at 11 o'clock in the forenoon of the 2d day of March, A.D. 1876, and that thereupon the said committee declared that they, the said committee, had no further duty to perform in the premises.

And this the said Belknap is ready to verify. Wherefore he prays judgment if the said House of Representatives ought to have or maintain the said impeachment against him, the said Belknap.

VI

And said Belknap, as to said second replication of the House of Representatives of the United States, secondly above pleaded, further saith that the said House of Representatives ought not, by anything in that replication alleged, to have or maintain said impeachment against him, said Belknap, because he says that, although true it is that he did resign his position as Secretary of War on the 2d day of March, A. D. 1876, at 10 o'clock and 20 minutes in the forenoon of that day, at the city of Washington, in the District of Columbia, by a resignation in writing, under his hand, addressed to and then and there delivered to the President of the United States, and the President of the United States did then and there accept said resignation, by acceptance in writing, under his hand, then and there by him indorsed upon said written resignation, nevertheless it is not true, as alleged in that replication, that he, said Belknap, resigned his said position with intent to "evade" any proceedings of said House of Representatives to impeach him, said Belknap; but, on the contrary thereof, he avers the fact to be that a standing committee of said House, known as the Committee on the Expenditures of the War Department, without any authority from or direction of said House of Representatives to examine, inquire, or investigate in regard to the matters and things set forth in said articles as official misconduct of him, said Belknap, had examined one Marsh, and he had made a statement to said committee, which said statement, if true, would not support articles of impeachment against him, said Belknap, but which said statement was of such a character in respect to other persons, some of whom had been and one of whom was so nearly connected with him, said Belknap, by domestic ties as greatly to afflict him, said Belknap, and make him willing to secure the suppression of so much of said statement as affected such other persons at any cost to himself, therefore he, said Belknap, proposed to said committee that if said committee would suppress that part of said statement which related to said other persons he, said Belknap, though contrary to the truth, would admit the receipt by him, said Belknap, of all the moneys stated by said Marsh to have been received by him from one Evans, mentioned in said statement, and paid over by said Marsh to any other person or persons, but said committee declined to accede to said proposition, and Hon. Hiester Clymer, chairman of said committee, then declared to said Belknap that he, said Clymer, should move in the said House of Representatives upon the statement of said Marsh, for the impeachment of him, said Belknap, unless the said Belknap should resign his position as Secretary of War before noon of the next day, to wit, March the 2d, A. D. 1876; and said Belknap regarding this statement of said Clymer, chairman as aforesaid, as an intimation that he, said Belknap, could, by thus resigning, avoid the affliction inseparable from a protracted trial in a forum which would attract the greatest degree of public attention and the humiliation of availing himself of the defense disclosed in said statement itself which would cast blame upon said other persons, he yielded to the suggestion made by said Clymer, chairman as aforesaid, believing that the same was made in good faith by

the said Clymer, chairman as aforesaid, and that he, said Belknap, would, by resigning his position as Secretary of War, secure the speedy dismissal of said statement from the public mind, which said statement, though it involved no criminality on his part, was deeply painful to his feelings, and did resign his said position as Secretary of War, as hereinbefore stated, at 10 o'clock and 20 minutes in the forenoon of the 2d day of March, A. D. 1876; and at 11 o'clock in the forenoon of the day and year last aforesaid he, said Belknap, caused said committee to be notified of his said resignation and of the acceptance thereof by the President of the United States aforesaid; all of which was in pursuance and in consequence of the said suggestion so made by said Clymer; and thereupon said committee declared that they, the said committee, had no further duty to perform in the premises. And he, said Belknap, submits that, while said House of Representatives claims that said Clymer was acting on its behalf in said pretended examination of said Marsh, said House ought, in honor and in law, to be estopped to deny that said Clymer was also acting on behalf of said House in suggesting the resignation of him, said Belknap, as aforesaid, and ought not to be heard to complain of a resignation thus induced.

And this he, the said Belknap, is ready to verify. Wherefore he prays judgment if the said House of Representatives ought to have or maintain the impeachment against him, the said Belknap.

WM. W. BELKNAP.

The President pro tempore then said:

This rejoinder will be considered duly filed, if there be no objection. The Secretary will now read the surrejoinder of the House of Representatives to the rejoinder of William W. Belknap.

The Secretary read as follows:

In the Senate of the United States sitting as a court of impeachment

THE UNITED STATES OF AMERICA *v.* WILLIAM W. BELKNAP

By the House of Representatives of the United States, April 25, 1876

The House of Representatives of the United States, in the name of themselves and of all the people of the United States, say that the said first replication to the plea of the said William W. Belknap to the articles of impeachment exhibited against him as aforesaid, and the matters therein continued, in manner and form as the same are above set forth and stated, are sufficient in law for the said House of Representatives to have and maintain the said articles of impeachment against the said William W. Belknap, and that the Senate sitting as a court of impeachment has jurisdiction to hear, try, and determine the same; and the House of Representatives are ready to verify and prove the same, as the Senate sitting as a court of impeachment shall direct and award: Wherefore, inasmuch as the said William W. Belknap hath not answered the said articles of impeachment or in any manner denied the same, the said House of Representatives, for themselves and for all the people of the United States, pray judgment thereon according to law.

II

And the said House of Representatives as to the first and second subdivisions of the rejoinder to the second replication of the House of Representatives to the plea of the defendant to the said articles of impeachment, wherein the said defendant demands trial according to law, the said House of Representatives, in behalf of themselves and all the people of the United States, do the like; and as to the third, fourth, fifth, and sixth subdivisions of the rejoinder of the said defendant to the said second replication, they say that the said House of Representatives, by reason of anything by the said defendant in the last-named subdivisions of said rejoinder above alleged, ought not to be barred from having and maintaining the said articles of impeachment against the said defendant, because they say that, reserving to themselves all advantage of exception to the insufficiency of the said subdivisions of said rejoinder to said second replication, they deny each and every averment in said several rejoinders to said second replication contained, or either of them, which denies or traverses the acts and intents charged against said defendant in said second replication, and they reaffirm the truth of the matters stated therein; and this the said House of Representatives pray may be inquired of by the Senate sitting as a court of impeachment.

Wherefore the said House of Representatives, in the name of themselves and of all the people of the United States, pray judgment thereon according to law.

MICHAEL C. KERR,
Speaker of the House of Representatives.
GEO. M. ADAMS,
Clerk of the House of Representatives.

The President pro tempore said:

The surrejoinder will be considered as duly filed also. The Senate sitting for the trial is now ready to hear the parties.

Mr. Carpenter, of counsel for the respondent, next closed the issue of fact on the plea to jurisdiction by submitting the following similiter:

In the Senate of the United States sitting as a court of impeachment.

THE UNITED STATES OF AMERICA *v.* WILLIAM W. BELKNAP.

Upon articles of impeachment of the House of Representatives of the United States of America of high crimes and misdemeanors.

And the said Belknap, as to the surrejoinders of said House of Representatives to the third, fourth, fifth, and sixth rejoinders of the said Belknap to the second replication of said House of Representatives above pleaded, whereof said House of Representatives have demanded trial, the said Belknap doth the like.

WILLIAM W. BELKNAP.

Mr. Manager Lord submitted [84] a motion relating to the giving of evidence on questions pertaining to the plea to the jurisdiction and to the carrying on of the trial as to the main issue.

2456. Belknap's impeachment continued.

The Senate declined to grant the motion of the counsel for Belknap that the trial be continued to a later date.

The Senate declined to consult the managers before passing on the application of respondent for a continuance of the Belknap trial.

The Senate in secret session passed on the motion for a continuance in the Belknap trial.

After this motion had been submitted by Mr. Lord, Mr. Matt. H. Carpenter, of counsel for the respondent, offered [85] this motion:

That the further hearing and trial of this impeachment of William W. Belknap be continued to the first Monday of December next.

In argument in support of this the counsel for the respondent urged that in the existing political excitement a fair trial was not likely to result. The precedents of the Blount and Peck impeachments were cited to justify the postponement.

The Senate having retired for consultation (of which consultation the debates were not public and not reported), Mr. Edmunds moved that the motion for postponement be denied.

Mr. John Sherman of Ohio, moved to amend by substituting the following:

That the President pro tempore ask the managers if they desire to be heard on the pending motion of Mr. Carpenter, of counsel for respondent.

This motion was disagreed to, yeas 28, nays 31.

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[84] Senate Journal, p. 920; Record of trial, p. 9.
[85] Senate Journal, pp. 920–923; Record of trial, pp. 10–15.

Mr. Edmunds's motion, that the request for a postponement be not granted, was agreed to, yeas 59, nays 0.

Thereupon the Senate returned to their Chamber and the President pro tempore said:

The Presiding Officer is directed to state to the counsel for the respondent that their motion is denied.

2457. Belknap's impeachment continued.

The Senate overruled the motion of the managers that the evidence on the question of the jurisdiction of the Senate in the Belknap case be given before the arguments relating thereto.

The Senate determined in the Belknap case to hear first the question of law as to jurisdiction.

The Senate denied the motion of the managers in the Belknap case to fix the time of answer and trial on the merits before decision on the demurrer.

The Senate ordered a discussion in argument on the right of the House to allege in the replication matters not touched in the articles.

References to American and English precedents in determining order of deciding the question of jurisdiction in the Belknap case.

The Senate in secret session determined on the same time of having the arguments as to jurisdiction in the Belknap trial.

Thereupon the motion proposed previously by Mr. Manager Lord was taken up.[36]

In the Senate of the United States sitting as a court of impeachment.

THE UNITED STATES OF AMERICA *v.* WILLIAM W. BELKNAP.

On motion of the managers.

Ordered, That the evidence on the questions pertaining to the plea to the jurisdiction of this court be given before the arguments relating thereto are heard, and if such plea is overruled that the defendant be required to answer the articles of impeachment within two days, and the House of Representatives to reply if they deem it necessary within two days; and that the trial proceed on the next day after the joining of issue.

In support of this Mr. Manager Lord argued:

With the permission of the court, Mr. President, I will give the following reasons why we think this order should be entered:

All of the issues of law and fact relate to the question of jurisdiction. It is but a single question, upon which the Senate can make but one decision, and the facts pertaining thereto should be proved before the arguments, so that the questions of law and of fact may be considered and decided at the same time. This is the course in all legal tribunals in which questions of law and fact are decided by the same judge or judges.

Now let me refer to some authorities on this point:

"In cases where the jury are to decide on both the law and the fact a general verdict may be rendered on the whole matter." (Starkie's Law of Libel, p. 203.)

In the case of Baylis *v.* Laurance (11 Adolphus and Ellis, 920), referred to by Starkie on the same page, it was held that the law was the same in regard to both civil and criminal cases.

The same author, page 580, states:

"A jury sworn to try the issue may give the general verdict of guilty or not guilty upon the whole matter put in issue, * * * and shall not be required or directed by the court or judge * * * to find the defendant or defendants guilty merely on the proof of the publication."

[36] Senate Journal, pp. 920–926; Record of trial, pp. 9, 10, 15–19.

When by the Constitution the sole power to try impeachments was conferred upon the Senate without any direction as to the mode of procedure, it must have been intended that the rules governing the House of Lords when sitting as a court of impeachment, so far as applicable, should control the Senate sitting as a court of impeachment.

Mr. Erskine, before the Court of King's Bench, in the case of the Dean of Asaph, in regard to the abolition of the king's court and the distribution of its powers, says:

"The barons preserved that supreme superintending jurisdiction which never belonged to the justices, but to themselves only as the jurors in the king's court."

And in a note to his argument found in Goodrich's British Eloquence, page 659, it is said:

"During a trial before the House of Peers every peer present on the trial law has always been judge both of the law and the fact; hence no special verdict can be given on the trial of a peer."

Bouvier, in his Law Dictionary, volume 2, page 540, says:

"A special verdict is one by which the facts of the case are put on the record and the law is submitted to the judges."

See also Bacon's Abridgment, Verdict, D, A.

A special finding or verdict is therefore only necessary when the questions of fact are found in one tribunal and the law is applied by another.

But there is a direct authority on this question from a court of impeachment only second in dignity to this high tribunal. The court of impeachment of the State of New York is composed of the president of the senate, who is the lieutenant-governor, of the senators, and of the judges of the court of appeals. In the case of the People of the State of New York against George G. Barnard, then one of the justices of the supreme court (see vol. 1, pp. 106–108), the respondent interposed a plea to the jurisdiction on the ground that the articles of impeachment were not adopted by the assembly by a vote of the majority of all the members elected thereto, as required by the constitution. A replication to the plea was filed that the assembly did impeach the respondent by a vote of a majority of all the members elected thereto. Witnesses were then examined in regard to this question on both sides; counsel were heard for the respondent in support of the plea, and for the prosecution in opposition; after which the president stated that the question before the court was whether the plea of the respondent should be sustained. Upon the decision not to sustain the plea replications were filed, and the trial on the merits proceeded.

This precedent sustains the motion in this case more fully for the reason that the respondent in that case more than a month before he interposed the plea to the jurisdiction had pleaded to the merits by filing a general answer denying each and every allegation in the articles of impeachment; but discovering a month afterwords, as he though, that the articles of impeachments had not been properly presented, on the ground that a majority of the members elected to the assembly had not concurred therein, he put in a plea to the jurisdiction, and the proceedings were had which I have already stated.

Therefore we submit to this honorable court that the managers, by asking the entry of this order, have suggested the proper method of trial.

In opposition, on April 28, Mr. Carpenter, of counsel for the respondent, argued:

The first part of this order, "That the evidence on the questions pertaining to the jurisdiction of this court be given before the arguments relating thereto are heard," we have no objection to. It is a matter of total indifference to us what is the order which the Senate may make in that particular. Whether the testimony shall be taken and the argument on the facts and the law in regard to the jurisdiction of the court be heard together, or whether they shall be proceeded with at different times is a matter of indifference to us.

To the residue of the order, however, we do seriously object, upon several grounds. In the first place, we object to the managers controlling this case on both sides. We are perfectly willing that they should ask such orders as they please for their own government and their own pleadings; but we object to their fixing or asking any order in regard to our pleadings. This part of the order is:

"And if such plea is overruled, that the defendant be required to answer the articles of impeachment within two days."

I suppose that means answer the articles on the merits.

"And the House of Representatives to reply, if they deem it necessary, within two days; and that the trial proceed on the next day after the joining of issue."

I submit to this honorable court that a proper reply to the managers of the House in regard to this part of the proposed order would be the famous reply which Coke made to the King: "When the question arises and is debated, I will do what is fit and proper for a judge to do; and further, I decline to pledge myself to Your Majesty." When this plea to the jurisdiction shall be disposed of, the defendant may demur to the articles of impeachment, or may not, as he shall be advised; and what will be the circumstances of this court, or of the counsel, or even of the managers, who, although numerous, are not incorporated and are still mortal, this court can not to-day determine. They may not want to make their reply to whatever we may say so speedily as they now think.

In the next place, if the court please, while, as I say, we shall not attempt to make any delays in this case beyond what are absolutely necessary, the argument of the question of the jurisdiction of this court can not be made properly on the day indicated in this order.

Mr. Carpenter then gave reasons, such as the preoccupation of counsel in other duties, the difficulty in getting books of authority, etc., to show why the arguments should be delayed.

Mr. Roscoe Conkling, of New York, proposed the following:

Ordered, That the Senate proceed first to hear and determine the question whether W. W. Belknap, the respondent, is amenable to trial by impeachment for acts done as Secretary of War, notwithstanding his resignation of said office. The motion that testimony be heard touching the exact time of such resignation, and touching the motive and purpose of such resignation, is reserved without prejudice till the question above stated has been considered.

In opposition to the resolution proposed by Mr. Conkling, Mr. Manager Lord argued:

Mr. President and Senators: It seems to me that under the authorities adduced yesterday such a course of procedure would be protracting the trial and entirely unnecessary. Several authorities were produced yesterday to show that a special finding or verdict is only necessary when the questions of fact are found in one tribunal and the law is applied by another. This question of jurisdiction is a single question, and it ought not to be divided and subdivided. The evidence should be in before the judgment of the court is taken on the question of jurisdiction; and this I understand the other side concede. Very great embarrassment might arise; very great delays might ensue from dividing this question. I cited yesterday an authority in the State of New York, to which I will again call the attention of the Senators—the Barnard case.

The court of impeachment in that State, composed of the president of the senate, the lieutenant-governor, the senators, and the judges of the court of appeals, had precisely this question before them. A plea to the jurisdiction was interposed, as follows:

"And the said respondent, in his own proper person and by his counsel, John H. Reynolds and William A. Beach, comes and says that this court ought not to have or take further cognizance of the articles of impeachment, or any or either of them, presented in this court against him, because, he says that the said articles of impeachment were not, nor were any nor was either of them, adopted by the assembly of this State by a vote of a majority of all the members elected thereto, as required by section 1 of article 6 of the constitution of this State."

A replication was put into that plea, asserting—

"That it is not true that the articles of impeachment now presented against the said respondent do not appear to be and are not articles of impeachment adopted by the assembly of the State, but that the said articles do appear to be and are articles of impeachment adopted by the said assembly."

Then Edward M. Johnson and Charles R. Dayton were called and sworn on the part of the respondent. Hon. C. P. Vedder and Hon. Thomas G. Alvord were called and sworn on the part of the prosecution, these being respectively members or officers of the house. Counsel then argued the case, Messrs. Beach and Reynolds, of counsel for respondent, and Mr. Van Cott, of counsel for the prosecution.

The president stated that the question before the court was whether the plea of the respondent should be sustained.

Mr. Lewis moved that the chamber be cleared for private consultation.

The president put the question whether the court would agree to said motion, and it was determined in the affirmative.

The president put the question whether the court would sustain said plea of the respondent, and it was determined in the negative, as follows:

Chief Judge Church, of the court of appeals; Judge Allen, also of the court of appeals, and Senator Murphy in that case voted in the affirmative; the other Senators in the negative. I refer to this case of The People *v.* Barnard to show that in a court of impeachment composed of the senators of the State of New York and the pudges of the court of appeals of that State the precise order was taken for which we move; the evidence was in before the question of jurisdiction was passed upon. Why should we be driven to one single question when there are three or four, and all of them, I apprehend, exceedingly important questions in this case? Perhaps in one view it may be the question of the case whether the defendant resigned for the purpose of evading this impeachment. Why should we try one question at one time and try another question at another time?

Mr. Carpenter argued for the respondent:

Mr. President and Senators, the pleadings proper in this case consist of the articles of impeachment, the plea to the jurisdiction, and the first replication of the House of Representatives, to which there is a demurrer by us and a joinder by the managers. Strictly speaking, that is the only issue that could be made in this case. The honorable managers, however, saw fit, without asking leave, to file two replications, instead of one, to our plea. We of course did not care how fully they went into this question; we were ready to follow them in disregard of technical pleading.

I never heard of a case in a court where a single plea had led to an issue of law and fact or where a declaration or any proceeding whatever was followed by two issues, one of law and one of fact, that the court did not always first dispose of the question of law. That being disposed of, the question of fact may or may not be necessary to be inquired into. While on the part of Mr. Belknap we make no objection to this proceeding, its regularity is a question for the court to determine. It seems to me that the more regular proceeding is that indicated by the order offered by the Senator from New York, that the law of this question should be first settled. If we had been captious about pleading, and had moved the court to strike out this second replication, which is drawn not according to common-law form, but according to the free-and-easy style of the New York code, this court would have stricken it out as having been improprely filed, permission not having been granted to reply double. We did not object because we did not care for forms, and we followed them after their kind in our reply to their pleas. But certainly the course most in harmony with the method pursued in courts of law would be to settle the law upon this point first. If the Senate has no jurisdiction over a man who not in office at the time the impeachment commences, that ends the question. That is a mere question of law; and we shall contend, of course, that any officer of the Government has a perfect right to resign at any moment and that the motives of a man's resignation cannot affect the legal consequences which follow the act of resignation. The Supreme Court of the United States has held where a citizen who wishes to have a litigation with a citizen of his own State moves into another State for the express purpose of giving the Federal courts jurisdiction, that is no objection to the jurisdiction; that a man may change his residence from one State to another for the purpose of obtaining a footing in a Federal court, as well as he may change it for the purpose of improving his health or his financial condition.

I do not regard the issues made as of any substantial consequences to this case. We care nothing about them. We are willing to try them or not try them, as the court directs. But the question is whether this man was in office at the time he was impeached by the House of Representatives? That is fully presented by the articles, by our plea to the jurisdiction, and by the first, which is the only regular, replication on the part of the House and our demurrer thereto. If the Senate shall be of opinion that none but a person in office can be impeached, of course that ends this proceeding. At all events, the method suggested by the order last offered is the method which should be pursued in a court of law. It will be borne in mind that we interposed the first demurrer, and are therefore entitled to open and close in the argument.

The Senate having retired for consultation (of which the proceedings, but not the debates, are reported in the Journal and record of

trial), consideration was first given to a motion by Mr. Edmunds to strike out the second sentence of the pending order and insert:

And that the managers and counsel in such argument discuss the question whether the issues of fact are material.

Mr. Allen G. Thurman, of Ohio, moved the following amendment, which was agreed to:

Add to the words proposed by Mr. Edmunds to be inserted the following:
And whether the matters in support of the jurisdiction alleged by the House of Representatives in the pleadings subsequent to the articles of impeachment can be thus alleged if the same are not averred in said articles.

Then Mr. Edmunds's motion, as amended, was agreed to.

Mr. Thurman moved further to amend the resolution by striking out all after the word "resolved" and in lieu thereof inserting:

That the Senate will first hear the evidence on the issues of fact relating to the question of jurisdiction, and after hearing the same will fix a time for hearing the argument upon the questions of law and fact relating to such jurisdiction.

The amendment was rejected.

Thereupon Mr. Conkling's resolution, as amended, was agreed to, as follows:

Ordered, That the Senate proceed first to hear and determine the question whether W. W. Belknap, the respondent, is amenable to trial by impeachment for acts done as Secretary of War, notwithstanding his resignation of said office; and that the managers and counsel in such argument discuss the question whether the issues of fact are material, and whether the matters in support of the jurisdiction alleged by the House of Representatives in the pleadings subsequent to the articles of impeachment can be thus alleged if the same are not averred in said articles.

2458. Belknap's trial continued.

The Senate by rule determined the order and time of arguments, and the numbers of counsel and managers to speak, on the plea to jurisdiction in the Belknap trial.

Thereupon Mr. Edmunds moved the following:

Ordered, That the hearing proceed on the 4th day of May, 1876; and that three of the managers and three of the counsel for the respondent be heard thereon, as follows: One counsel for the respondent shall open and shall be followed by one manager, and he shall be followed by one counsel for the respondent, who shall be followed by two managers, and one counsel for the respondent shall close the argument; and that such time be allowed for argument as the managers and counsel may desire.

Motions to amend by changing the date from the 4th to the 15th, 16th, and 8th were severally disagreed to, the last-named date, the 8th, being negatived by a vote of yeas 23, nays 32.

Mr. Conkling then moved to amend the resolution by striking out all after the word "resolved" and in lieu thereof inserting—

That the hearing proceed on the 4th day of May, 1876, at 12 o'clock and 30 minutes p.m.; that the opening and close of the argument be given to the respondent; that three counsel and three managers may be heard in such order as may be agreed upon between themselves, and that such time be allowed for argument as the managers and counsel may desire.

After debate,

The amendment was agreed to.

The resolution of Mr. Edmunds, as amended, was then agreed to.

Thereupon the Senate returned to the Senate Chamber and the President pro tempore directed the two orders to be reported.

On May 4,[37] the next session of the Senate sitting for the trial, Mr. Carpenter, of counsel for the respondent, suggested an adjournment until May 15. Thereupon Mr. John Sherman, of Ohio, offered this order:

Ordered, That this court adjourn until Monday, May 15, at 12 o'clock and 30 minutes p.m., and that the argument of the question of jurisdiction be continued to eight hours on each side.

Mr. Aaron A. Sargent, of California, moved to amend by striking out that portion of the order limiting the time of the arguments, and the amendment was agreed to, without division. The order as amended was then disagreed to, yeas 21, nays 40.

Thereupon Mr. Sherman offered the following:

Ordered, That this court adjourn until Monday, May 15, at 12 o'clock and 30 minutes p.m.; and that the argument of the question of jurisdiction be confined to nine hours on each side, to be divided between them as the managers and counsel may agree.

This order was disagreed to, yeas 22, nays 38.

The arguments thereupon began [38] and continued during May 5 and 6 and for a portion of May 8. Mr. Black, of counsel for the respondent, opened, and was followed by Mr. Manager Lord, who was followed by Mr. Carpenter, of counsel for the respondent. Messrs. Managers Knott, Jenks, and Hoar followed Mr. Carpenter, and then Mr. Black closed for the respondent. On May 6 [39] Mr. Manager Knott, after speaking some time, stated that he was unable to proceed further, on account of indisposition, and asked the indulgence of the Senate to conclude his argument on Monday, May 8. This leave was granted; and Mr. Manager Jenks continued the argument on May 6.

2459. Belknap's trial continued.

The Senate decided that it had jurisdiction to try the Belknap impeachment case, although the respondent had resigned the office.

In the Belknap case the Senate decided that respondent's plea in demurrer was insufficient, and that the articles were sufficient.

While deliberating on the question of jurisdiction in the Belknap case the Senate notified the managers and counsel that their attendance was not required.

In the Belknap trial the Senate declined to permit the debates in secret session to be recorded.

Each Senator was permitted to file a written opinion on the question of jurisdiction in the Belknap trial.

After the conclusion of the arguments, on May 8,[40] it was

Ordered, That until further notice the attendance before the Senate, sitting for the trial of the impeachment, of the managers and the respondent will not be required.

Thereupon the Senate adjourned to Monday, May 15.

From May 15 to May 29 [41] the Senate in secret session deliberated on the pending question. The record of the proceedings only appear in the Journal; but none of the speeches are printed. On May 16 [42] Mr. Wil-

[37] Senate Journal, pp. 928, 929; Record of trial, pp. 27, 28.
[38] Senate Journal, pp. 929–931; Record of trial, pp. 28–72.
[39] Senate Journal, p. 930.
[40] Senate Journal, p. 932; Record of trial, p. 72.
[41] Senate Journal, pp. 932–947; Record of trial, pp. 72–77.
[42] Senate Journal, p. 934; Record of trial, p. 73.

liam B. Allison, of Iowa, proposed a motion "that the consultations and opinions expressed in secret session be taken down by the reporters and printed in confidence for the use of Senators;" but on the next day, when the motion was called up, the Senate refused to consider it.

On May 29,[46] on motion of Mr. William Pinkney Whyte, of Maryland, it was

Ordered, That each Senator be permitted to file his opinion in writing upon the question of jurisdiction in this case on or before the 1st day of July, 1876, to be printed with the proceedings in the order in which the same shall be delivered, and the opinions pronounced in the Senate shall be printed in the order in which they were so pronounced.

Also the following resolutions, proposed by Mr. Allen G. Thurman, of Ohio, were, after minor amendments, agreed to,[47] the first by a vote of yeas 37, nays 29: the second by a vote of yeas 45, nays 4, and the third by 35 yeas to 22 nays:

Resolved, That in the opinion of the Senate William W. Belknap, the respondent, is amenable to trial by impeachment for acts done as Secretary of War, notwithstanding his resignation of said office before he was impeached.

Resolved, That the House of Representatives and the respondent be notified that on Thursday, the 1st day of June, 1876, at 1 o'clock p.m., the Senate will deliver its judgment, in open Senate, on the question of jurisdiction raised by the pleadings, at which time the managers on the part of the House and the respondent are notified to attend.

Resolved, That at the time specified in the foregoing resolution the President of the Senate shall pronounce the judgment of the Senate as follows: "It is ordered by the Senate, sitting for the trial of the articles of impeachment preferred by the House of Representatives against William W. Belknap, late Secretary of War, that the demurrer of said William W. Belknap to the replication of the House of Representatives to the plea to the jurisdiction filed by said Belknap be, and the same hereby is, overruled; and, it being the opinion of the Senate that said plea is insufficient in law and that said articles of impeachment are sufficient in law, it is therefore further ordered and adjudged that said plea be, and the same hereby is, overruled and held for naught;" which judgment thus pronounced shall be entered upon the Journal of the Senate sitting as aforesaid.

Before the second resolution was agreed to Mr. Isaac P. Christiancy, of Michigan, proposed the following resolution, but withdrew it after debate:

Whereas the Constitution of the United States provides that no person shall be convicted on impeachment without the concurrence of two-thirds of the members present; and whereas more than one-third of all the members of the Senate have already pronounced their conviction that they have no right or power to adjudge or try a citizen holding no public office or trust when impeached by the House of Representatives; and whereas the respondent, W. W. Belknap, was not when impeached an officer, but a private citizen of the United States, and of the State of Iowa; and whereas said Belknap has, since proceedings of impeachment were commenced against him, been indicted and now awaits trial before a judicial court for the same offenses charged in the articles of impeachment, which indictment is pursuant to a statute requiring in case of conviction (in addition to fine and imprisonment) an infliction of the utmost judgment which can follow impeachment in any case, namely, disqualification ever again to hold office:

Resolved, That in view of the foregoing facts it is inexpedient to proceed further in the case.

On June 1,[48] in open session of the Senate, sitting for the trial, the President pro tempore announced the decision on the question of jurisdiction:

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[46] Senate Journal, pp. 943–947; Record of trial, pp. 76, 77.

[47] For the arguments on the questions involved in these resolutions, see section 2007 of this volume.

[48] Senate Journal, p. 947; Record of trial, pp. 158–161.

On the question of jurisdiction raised by the pleadings in this trial, it is ordered by the Senate sitting for the trial of the articles of impeachment preferred by the House of Representatives against William W. Belknap, late Secretary of War, that the demurrer of said William W. Belknap to the replication of the House of Representatives to the plea to the jurisdiction filed by said Belknap be, and the same hereby is, overruled; and, it being the opinion of the Senate that said plea is insufficient in law and that said articles of impeachment are sufficient in law, it is therefore further ordered and adjudged that said plea be, and the same hereby is, overruled and held for naught.

2460. Belknap's impeachment continued.

The question of jurisdiction being settled, the Senate gave Secretary Belknap ten days to answer on the merits.

The Senate provided that in default of answer from respondent on the merits, the Belknap trial should proceed as on a plea of not guilty.

The Senate fixed the time of proceedings with the evidence in the Belknap trial before respondent's answer on the merits.

In the Belknap trial managers and counsel were directed to furnish one another with their lists of witnesses.

Thereupon Mr. William Pinkney Whyte, of Maryland, proposed the following:

Ordered, That W. W. Belknap is hereby ordered to plead further or answer the articles of impeachment within ten days from this date.

Mr. Francis Kernan, a Senator from New York, proposed this amendment:

Resolved, That in default of an answer within ten days by the respondent to the articles of impeachment, the trial shall proceed as on a plea of not guilty.

Mr. John Sherman, of Ohio, proposed this:

Ordered, That this court adjourn until Tuesday next, and in the meantime the defendant have leave to plead, answer, or demur herein.

The Senate, sitting for the trial, having adjourned to June 6,[46] on that day [47] the order proposed by Mr. Whyte came up for consideration, and on motion of Mr. Sherman it was amended by striking out the words "is hereby ordered to plead further," and inserting the words "have leave to plead further."

Thereupon, at the suggestion of Mr. Manager Scott Lord, Mr. Allen G. Thurman, a Senator from Ohio, proposed to amend by adding thereto:

And that, in default of an answer to the merits within ten days by respondent to the articles of impeachment, the trial shall proceed as upon a plea of not guilty.

This amendment was agreed to, yeas 35, nays 7.

Thereupon, after further amendment at the suggestion of Mr. Whyte, the order was agreed to by a vote of yeas 33, nays 4, in this form:

Ordered, That W. W. Belknap have leave to answer the articles of impeachment within ten days from this date; and that, in default of an answer to the merits within ten days by respondent to the articles of impeachment, the trial shall proceed as upon a plea of not guilty.

Thereupon Mr. Manager Lord proposed the following:

[46] Senate Journal, pp. 948–951; Record of trial, pp. 162–169.
[47] On this day also counsel for respondent raised a question affecting the recently made decision as to the jurisdiction.

Resolved, That on the 6th day of July, 1876, the Senate sitting as a court of impeachment will proceed to hear the evidence on the merits in the trial of this case.

Thereupon several propositions were made as to the time of proceeding with the evidence, the counsel for the respondent asking for a much longer time. Mr. Francis M. Cockrell, of Missouri, proposed June 19 instant [this day being the 6th], but the proposition was disagreed to, yeas 19, nays 27. A proposition made by Mr. George F. Edmunds, of Vermont, fixing the date as July 6 was agreed to, yeas 36, nays 9. Then the order was agreed to as follows:

Ordered, That on the 6th day of July, 1876, at 1 o'clock p.m., the Senate sitting as a court of impeachment will proceed to hear the evidence on the merits of the trial in this case.

Then it was further

Ordered, That the managers furnish to the defendant, or his counsel, within four days, a list of witnesses, as far as at present known to them, that they intend to call in this case; and that, within four days thereafter, the respondent furnish to the managers a list of witnesses, as far as known, that he intends to summon.

Thereupon the Senate, sitting for the trial, adjourned to June 16, that day being selected in order to provide for the answer, which was to be filed within ten days, if at all.

2461. Belknap's impeachment continued.

In the Belknap trial respondent declined to plead on the merits, but filed a protest against the continuance of the trial.

In the Belknap trial the right of the Senate to take jurisdiction by a majority vote was the subject of protest.

A protest filed on behalf of respondent in the Belknap trial was signed by respondent and his counsel.

The Senate, after debate and close division, permitted the filing of a protest by respondent in the Belknap trial.

The Senate considered in secret session the protest of respondent in the Belknap impeachment.

On June 16,[48] Mr. Jeremiah S. Black, of counsel for the respondent, announced that they declined to put in any plea, but asked that this paper be filed:

In the Senate of the United States sitting as a court of impeachment.

THE UNITED STATES OF AMERICA *v.* WILLIAM W. BELKNAP.

And now, to wit, this 16th day of June, 1876, the said William W. Belknap comes into court, and being called upon to plead further to the said articles of impeachment, doth most humbly and with profoundest respect represent and show to this honorable court that on the 17th day of April last past he did plead to the said articles of impeachment, and in his said plea did allege that at the time when the House of Representatives of the United States ordered the said impeachment, and at the time when the said articles of impeachment were exhibited at the bar of the Senate against him, he, the said Belknap, was and ever thereafter had been not a public officer of the United States, but a private citizen of the United States and of the State of Iowa; and that the plea aforesaid and all the matters and things therein contained were by him, said Belknap, fully verified by proofs, namely, by admissions of the said House of Representatives before said court; and the said Belknap further represents and shows to the court here that the truth and sufficiency of the plea pleaded by him as aforesaid were thereupon debated by the managers of the

[48] First session Forty-fourth Congress, Senate Journal, pp. 952, 954, 955; Record of trial, pp. 169–173.

said House of Representatives and the counsel of this respondent, and thereupon submitted to this court for its determination and judgment thereon; and that such proceedings were thereupon had in this court on that behalf in this cause; that afterwards, to wit, on the 29th day of May last past, the members of this court, to wit, the Senators of the United States sitting as a court of impeachment as aforesaid, did severally deliver their several judgments, opinions, and votes on the truth and sufficiency in law of the said plea, when and whereby it was made duly to appear that only thirty-seven Senators concurred in pronouncing said plea insufficient or untrue; whereas twenty-nine Senators sitting in said court, by their opinions and votes, affirmed and declared their opinion to be that said plea was sufficient in law and true in point of fact; so that the said Belknap in fact saith that, on the day and year last aforesaid, twenty-nine Senators sitting in said court declared therein that the said Belknap having ceased to be a public officer of the United States by reason of his resignation of the office of Secretary of War of the United States before proceedings in impeachment were commenced against him by the House of Representatives of the United States, the Senate can not take jurisdiction of this cause; and that seven Senators did not vote upon said question, and only thirty-seven Senators, by their votes, declared their opinion to be that the Senate could take jurisdiction of said cause. And afterwards thirty-seven Senators sitting in said court, and no more, concurred in a resolution declaring that "in the opinion of the Senate William W. Belknap is amenable to trial on impeachment for acts done as Secretary of War, notwithstanding his resignation of said office," and that twenty-nine of said Senators sitting in said court, by their votes, affirmed and declared their opinion to be to the contrary thereof. And afterwards, on the day and year last aforesaid. It was proposed in said court that the President pro tempore of the said Senate should declare the judgment of the said Senate, sitting as aforesaid, to be that said plea of said respondent should be held for naught, and a vote was taken upon said proposition; and, as said vote showed, two-thirds of the said Senators present did not concur therein; but, on the contrary thereof, only thirty-six Senators did not concur therein, and twenty-seven Senators then and there present, and voting on said proposition, did by their votes dissent from and vote against said proposition. All of which appears more fully and at large upon the record of this court in this cause, to which record he, said Belknap, prays leave to refer.

Therefore the said Belknap, referring to the Constitution of the United States, article 1, section 3, clause 6, which provides that "no person shall be convicted without the concurrence of two-thirds of the Members present" (meaning on trial on impeachment), avers that his said plea has not been overruled or held for naught by the Senate sitting as aforesaid, no such judgment having been concurred in by two-thirds of the Senators sitting in said court and voting thereon; but, on the contrary thereof, as the vote aforesaid fully shows, the said plea of the said respondent was sustained, and its truth in fact and sufficiency in law duly affirmed by the said Senate sitting as aforesaid, more than one-third of the Senators of said Senate, sitting as aforesaid, having by their votes so declared, to wit, twenty-seven Senators as aforesaid, and said twenty-seven Senators having by their votes declared and affirmed their opinion to be that said plea of said respondent was true in fact, and was sufficient in law to prevent the Senate sitting as aforesaid from taking further cognizance of said articles of impeachment.

Wherefore the respondent avers that he has already been substantially acquitted by the Senate sitting as aforesaid; and that he, the said respondent, is not bound further to answer said articles of impeachment; the said order requiring this respondent to answer over not having been made with the concurrence of two-thirds of the said Senators sitting as aforesaid and voting upon the question of the passage of said order; and said order having been passed with the concurrence only of less than two-thirds of the said Senators sitting as aforesaid and voting on the question of making and passing said order, the said order ought not to have been entered of record as an order of said court of impeachment in this cause; and said order appearing upon the whole record of said cause to be null and void, as an order of said court.

And the said respondent prays the court now here, as has before formally moved said court, to vacate said order; and the said respondent hereby prays said court that he may be hence dismissed.

WILLIAM W. BELKNAP.
MATT H. CARPENTER,
J. S. BLACK.
MONTGOMERY BLAIR,
Of Counsel for said Respondent.

Mr. George F. Edmunds, a Senator from Vermont, objected to the filing of the paper at present, and Mr. Manager Lord entered a formal objection:

Mr. President and Senators, the objection of the managers to filing this paper is that it is in direct contravention of the order of the Senate, as we view it. The order of the Senate was that on this day the respondent should plead to the merits or that the case should go to trial as upon a plea of not guilty. The Senate have not forgotten that the learned counsel who makes this motion stated distinctly in this tribunal at the last hearing that the question now raised could not be settled until the final determination of the case, for it is utterly impossible to tell at this time what the organization of the Senate will be then. The managers then said, and say now, that on this point we are prepared to argue the question at a proper time, but it seems entirely premature to attempt to argue it now, when it is impossible, as I have already said, to tell what the organization of the Senate will be when the verdict is to be taken. How many it will take to make two-thirds of the Members present at that time it is impossible now to tell; and I repeat the counsel stated emphatically that the question could not be determined until then. He now comes here, declines to plead, and asks that this rather extraordinary paper be filed. And we say there is no precedent for filing it, there is no reason for filing it, and it is a violation of the order of the Senate.

Mr. Montgomery Blair, of counsel for the respondent, said:

We wish a formal paper on the records of this body showing to the Senate and to the country the position and attitude we take upon that subject, and we think that now is the proper time. Of course, we do not say that we stand here to prevent the Senate from proceeding to the trial of the facts. We can not do that, because they have already said—and we take it that what they have said they mean—that, if we do not on this occasion file a plea to the merits of this case, they would proceed and put in a plea of the general issue for us themselves; and we expect that now, as my colleague has said to you. All we ask is that this paper, which states formally the attitude that we hold and shall claim to hold to the end of this trial, shall be noted on the records of this body. I think that any impartial tribunal would grant us that liberty of claiming the right to argue as matter of law that this court has already decided this question in its action upon the special plea heretofore put in. I do not call for any argument from the managers now or at any time hereafter (if they choose to permit it) upon this question.

On June 19,[49] in secret session, Mr. John Sherman, a Senator from Ohio, submitted an order, of which the first portion was as follows:

Ordered, That the paper presented by the defendant on the 16th instant be filed in this cause.

Mr. Allen G. Thurman, of Ohio, moved to amend by inserting after the word "be" the word "not." The amendment was disagreed to, yeas 24, nays 24.

Thereupon the order as proposed by Mr. Sherman was agreed to, yeas 26, nays 24. So the paper was ordered filed.

[49] Senate Journal, pp. 954, 955; Record of trial, pp. 172, 173.

2462. Belknap's impeachment continued.

After settling the question of jurisdiction, the Senate overruled respondent's motion for a continuance of the Belknap trial.

The Senate determined that an impeachment might proceed only while Congress was in session.

On June 17 [50] Mr. Black, of counsel for the respondent, proposed this order:

Ordered, That this case be now continued until some convenient day in the month of November.

On June 19 the Senate, in secret session, considered the order, and on motion of Mr. Allen G. Thurman, of Ohio, it was, without division,

Ordered, That the application of the respondent for postponement of the time for proceeding with trial be overruled.

On June 16 [51] Mr. Manager Lord had proposed the following:

Ordered, That the respondent, W. W. Belknap, shall not be allowed to make any further plea or answer to the articles of impeachment preferred against him on the part of the House of Representatives, but that the future proceedings proceed as upon a general plea of not guilty.

But subsequently he modified it to this form:

Ordered, That W. W. Belknap having made default to plead or answer to the merits within the time fixed by the order of the Senate, the trial proceed as upon a plea of not guilty, in pursuance of the former order.

On June 19 Mr. John Sherman, of Ohio, in secret session, presented an order, the first portion of which provided for the filing of the paper presented by counsel for respondent, and the second portion of which,

Ordered, That * * * the defendant having failed to answer to the merits within ten days allowed by the order of the Senate of the 6th instant, the trial shall proceed on the 6th of July next as upon a plea of not guilty.

Mr. William B. Allison, of Iowa, proposed an amendment substituting "19th day of November" for "6th day of July." This was disagreed to, yeas 9, nays 37.

On motion of Mr. Conkling, by a vote of yeas 21, nays 19, the words "*Provided*, That the impeachment can only proceed while Congress is in session" were added.

Then, as amended, the portion of the order as given was agreed to, as follows, by a vote of yeas 21, nays 16:

And the defendant having failed to answer to the merits within ten days allowed by the order of the Senate of the 6th instant, the trial shall proceed on the 6th of July next as upon a plea of not guilty: *Provided*, The impeachment can only proceed while Congress is in session.

2463. Belknap's impeachment continued.

The Senate provided that subpoenas for respondent's witnesses in the Belknap trial should be issued on recommendation of a committee.

An approved number of witnesses for respondent in the Belknap trial were summoned at public expense.

Thereupon Mr. George F. Edmunds proposed the following, which was agreed to [52] by unanimous consent:

[50] Senate Journal, pp. 952-954; Record of trial, pp. 171, 172.
[51] Senate Journal, pp. 952, 954, 959; Record of trial, pp. 170, 173.
[52] Senate Journal, p. 959; Record of trial, p. 174.

Ordered, That the Secretary issue subpoenas that may be applied for by the respondent for such witnesses to be summoned at the expense of the United States as shall be allowed by a committee, to consist of Senators Frelinghuysen, Thurman, and Christiancy, and that subpoenas for all other witnesses for the respondent shall contain the statement that the witnesses therein named are to attend upon the tender on behalf of the respondent of their lawful fees.

This order was apparently in response to a letter from the Chief Clerk of the Senate, presented on June 16,[53] transmitting a list of witnesses to be summoned on behalf of the respondent, which list had been filed in his office.

2464. Belknap's impeachment continued.

The opening address and presentation of testimony in the Belknap impeachment.

Counsel for respondent made no opening address before presenting testimony in the Belknap trial.

Forms and ceremonies of opening the proceedings of the Senate on a day of the Belknap trial.

The Senate daily informed the House of its readiness to proceed with the Belknap trial.

On July 6,[54] the day set for the trial to proceed, the proceedings opened with the usual formalities. In the Senate the President pro tempore said:

The hour of 12 o'clock having arrived, pursuant to the order of the Senate made on June 19 the legislative and executive business of the Senate will be suspended and the Senate will proceed to the consideration of the articles of impeachment exhibited by the House of Representatives against William W. Belknap, late Secretary of War.

The usual proclamation was made by the Sergeant-at-Arms.

Messrs. Lord, Lynde, McMahon, Jenks, Lapham, and Hoar, of the managers on the part of the House of Representatives, appeared and were conducted to the seats assigned them.

The respondent appeared with his counsel, Messrs. Blair, Black, and Carpenter.

The President pro tempore said:

The Secretary will notify the House of Representatives that the Senate is ready to proceed with the trial and that seats are provided for their accommodation.[55]

The Secretary read the Journal of proceedings of the Senate sitting for the trial of the impeachment of William W. Belknap of Monday, June 19, 1876.

The President pro tempore said:

The Senate in trial is now ready to proceed.

Mr. Manager William P. Lynde then made the opening address on behalf of the House of Representatives, after which witnesses were called and sworn, and after examination by the managers were cross-examined by counsel for the respondent.

On July 12 [56] the testimony presented by the managers was closed, and the President pro tempore said:

The defense will proceed, the case being closed on the part of the managers.

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[53] Senate Journal, p. 952; Record of trial, p. 170.
[54] Senate Journal, p. 960; Record of trial, pp. 174, 175.
[55] This message was sent daily in accordance with rule. The House, however, had voted not to attend.
[56] Senate Journal, p. 975; Record of trial, p. 256.

Thereupon at once, without any opening address, the counsel for the respondent began the introduction of testimony.

On July 19 [57] the testimony for the respondent was concluded. The managers announced that they had nothing in rebuttal.

2465. Belknap's impeachment continued.

In the Belknap trial the Senate permitted three managers and three counsel to argue on the final question, in such order as might be agreed on.

The Senate declined to restrict the time of final arguments in the Belknap trial.

In the Belknap trial the closing speech of the final arguments was by one of the managers.

The illness of counsel or managers was certified to as reason for disarranging the order of final arugment in the Belknap trial.

In the Belknap trial the witnesses were discharged before the final arguments.

Thereupon [58] Mr. Matt. H. Carpenter, of counsel for the respondent, asked for an order permitting three of the counsel for the respondent to be heard in final argument instead of two, as provided in Rule XXI.

Mr. George F. Edmunds, a Senator from Vermont, offered this order:

Ordered, That three persons on each side be allowed six hours for summing up, to be arranged between them.

Mr. Roscoe Conkling, a Senator from New York, proposed to amend by striking out all after the word "*Ordered*," and inserting:

That three managers and three counsel for the respondent may be heard in the concluding argument, in the order in which they state to the Senate they have agreed.

Mr. Edmunds moved to amend the amendment of Mr. Conkling by adding—

and that the argument be limited to six hours on each side.

This amendment was disagreed to, ayes 15, noes 29.

Then, without division, Mr. Conkling's substitute was agreed to, and the original order as amended by the substitute was also agreed to without division.

Then the President pro tempore said:

Will the Senate allow the Chair to state that the Chair understands the witnesses on both sides can be discharged? He makes that announcement so that they can leave.

On July 20 [59] the President pro tempore announced that the arguments would begin, and that the managers would have the opening. Then it was announced that as Mr. Matt. H. Carpenter, of counsel for the respondent, was detained by illness, it had been arranged between the managers and counsel for respondent that Mr. Montgomery Blair, of counsel for the respondent, should open, thereby relieving Mr. Carpenter of the misfortune of not hearing the speech of the manager, to whom he was to reply. At the conclusion of Mr.

[57] Senate Journal, p. 983; Record of trial, p. 285.
[58] Senate Journal, p. 983; Record of trial, pp. 285, 286.
[59] Senate Journal, p. 983; Record of trial, p. 287.

Blair's address a motion to adjourn was disagreed to. Thereupon Mr. Jeremiah S. Black, of counsel for respondent, said it would be a hardship to have an argument from the managers in the absence of Mr. Carpenter. It was suggested that an argument made this day would be in print in the morning in time for counsel to examine it before replying. Thereupon Mr. Manager William P. Lynde proceeded in argument.

On the next day, July 21,[60] Mr. Manager Lynde having concluded his argument on the preceding day, Mr. Black, of counsel for the respondent, submitted a motion that the Senate sitting for the trial adjourn until the 24th, justifying the motion by the following affidavit:

United States Senate sitting as a court of impeachment.

THE UNITED STATES *v.* WILLIAM W. BELKNAP.

DISTRICT OF COLUMBIA, *County of Washington, ss:*

Personally appeared before me D. W. Bliss, who, being sworn according to law, says that he has been the family physician of Matt. H. Carpenter for seven years when in Washington, that he is now under my care and seriously ill with acute gastritis (inflammation of the stomach); that he has been confined to his bed for the past thirty-six hours, and is not able to leave his room today, and I state my belief that he will be able to resume his duties on Monday the 24th instant.

D. W. BLISS, M. D.

Subscribed and sworn before me this 21st day of July, A.D. 1876.

A. E. BOONE, *Notary Public.*

[SEAL.]

Mr. Black's motion was agreed to, yeas 34, nays 5.

On the assembling of the Senate for the trial, on July 24,[61] Mr. Manager Scott Lord presented an affidavit showing:

United States Senate sitting as a court of impeachment.

THE UNITED STATES *v.* WILLIAM W. BELKNAP.

DISTRICT OF COLUMBIA, *County of Washington, ss:*

Personally appeared before me, D. W. Bliss, M. D., a practicing physician, who, being sworn according to law, said that Hon. A. G. Lapham has been under his professional care during the past three days and unable to leave his bed by reason of acute cellulitis and perineal abscess, and he will not, in my opinion, be able to resume his official duties before Wednesday, the 26th instant.

D. W. BLISS, M. D.

Sworn and subscribed to before me this 24th day of July, 1876.

A. E. BOONE, *Notary Public.*

Mr. Manager Lord stated that the managers were prepared to go on in Mr. Lapham's absence, but preferred not to, and asked an adjournment to the 26th. The Senate declined to adjourn, whereupon Mr. Manager Lord asked that Mr. Lapham's argument might be printed. And the argument was ordered printed.

Mr. Manager George A. Jenks next proceeded to argument,[62] and was followed[63] by Mr. Jeremiah S. Black, of counsel for respondent.

On July 25 and 26[64] Mr. Matthew H. Carpenter, of counsel for respondent, submitted argument.

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[60] Senate Journal, p. 984; Record of trial, p. 298.
[61] Senate Journal, p. 985; Record of trial, p. 299.
[62] Record of trial, pp. 306–313.
[63] Record of trial, pp. 314–318.
[64] Record of trial, pp. 319–334.

Following Mr. Carpenter, Mr. Manager Scott Lord, on behalf of the House of Representatives, closed the argument.[65]

2466. Belknap's impeachment continued.

The Senate in secret session adopted an order to govern the voting on the articles in the Belknap amendment.

There was much deliberation over the form of the final question in the Belknap trial.

The voting on the articles in the Belknap impeachment was without debate, but each Senator was permitted to file an opinion.

The Senate in the Belknap trial declined to renounce the practice of deliberating in secret session.

On July 31,[66] as the Senate sitting for the trial was about to determine its method of procedure, Mr. Hannibal Hamlin, a Senator from Maine, proposed such amendment to the rules as would prevent secret sessions; but the Senate, by a vote of 23 yeas to 32 nays, declined to consider it. Then, on motion of Mr. George F. Edmunds, of Vermont, and by a vote of yeas 32, nays 25, the doors were closed for deliberation. Thereupon the following occurred:

Mr. Roscoe Conkling, of New York, submitted the following order for consideration:

Ordered, That when called to vote whether the articles of impeachment or either of them are sustained, any Senator who votes in the negative shall be at liberty to state, if he chooses, that he rests his vote on the absence of guilt proved in fact, or on the want of jurisdiction, as the case may be; and the vote shall be entered in the Journal accordingly.

Mr. Edmunds moved to amend by striking out all after the word "ordered" and inserting:

That on Tuesday next, the 1st day of August, at 12 o'clock meridian, the Senate shall proceed to vote, without debate, on the several articles of impeachment. The presiding officer shall direct the Secretary to read the several articles successively, and after the reading of each article the presiding officer shall put the question following, viz: "Mr. Senator ———, how say you? Is the respondent, William W. Belknap, guilty or not guilty of a high crime or high misdemeanor, as the charge may be, as charged in this article?" Whereupon such Senator shall rise in his place and answer "guilty" or "not guilty" only. And each Senator shall be permitted to file within two days after the vote shall have been so taken his written opinion, to be printed with the proceedings.

Mr. John Sherman, of Ohio, moved to amend the amendment of Mr. Edmunds by striking out the word "only" after "guilty," and in lieu thereof inserting:

And each Senator shall be at liberty to state the ground of his vote in a single sentence, which shall be entered on the Journal.

Mr. Aaron A. Sargent, of California, moved to amend the amendment of Mr. Sherman by inserting in lieu of the words proposed to be inserted:

Any Senator who votes in the negative shall be at liberty to state if he chooses that he rests his vote on the absence of guilt proved in fact, or on the want of jurisdiction, as the case may be; and any Senator who votes in the affirmative may add that he holds the vote of a majority heretofore in favor of jurisdiction binding on him, and the vote shall be entered on the Journal accordingly.

Mr. Edmunds moved to amend the order proposed by Mr. Conkling by striking out all after the word "that" and in lieu thereof inserting:

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[65] Record of trial, pp. 334–341.
[66] Senate Journal, pp. 987–991; Record of trial, pp. 341, 342.

Each Senator may in giving his vote state his reasons therefor, occupying not more than one minute, which reasons shall be entered in the Journal in connection with his vote.

Mr. Conkling moved to amend the amendment of Mr. Edmunds by adding thereto the words:

And immediately following his name and vote.

The amendment of Mr. Conkling to Mr. Edmunds' amendment was agreed to.

On the question to agree to the order of Mr. Edmunds as amended, it was determined in the affirmative.

Mr. Edmunds then withdrew the amendment first offered by him to the order proposed by Mr. Conkling.

The question then being on the order of Mr. Conkling as amended, as follows:

Ordered, That each Senator may, in giving his vote, give his reasons therefor, occupying not more than one minute, which reasons shall be entered in the Journal in connection with his vote and immediately following his name and vote,

It was determined in the affirmative.

Mr. Edmunds submitted the following order for consideration:

Ordered, That on Tuesday next, the 1st day of August, at 12 o'clock meridian, the Senate shall proceed to vote without debate on the several articles of impeachment. The presiding officer shall direct the Secretary to read the several articles successively, and after the reading of each article the presiding officer shall put the question following, namely: "Mr. Senator ———, how say you? Is the respondent, William W. Belknap, guilty or not guilty of a high crime," or "high misdemeanor," as the charge may be, "as charged in this article?" Whereupon such Senator shall rise in his place and answer "guilty" or "not guilty," with his reasons, if any, as provided in the order already adopted; and each Senator shall be permitted to file within two days after the vote shall have been so taken his written opinion, to be printed with the proceedings.

Mr. John J. Ingalls, of Kansas, moved to amend the order by striking out all after the word "impeachment," in line 4, and in lieu thereof inserting:

And that in taking the final question the presiding officer shall call each Senator by name in alphabetical order and upon each article propose as follows: "Mr. Senator ———, how say you, is the impeachment under this article sustained?"

Whereupon each Senator shall rise in his place and answer "yea" or "nay," and may, as provided in the order already adopted, state the ground of his vote.

The question being taken on this amendment by yeas and nays, resulted—yeas 24, nays 27.

So the amendment of Mr. Ingalls was rejected.

The question recurring on the order of Mr. Edmunds, Mr. William B. Allison, of Iowa, demanded a division of the question; and the question being put on the first branch of the order, namely:

Ordered, That on Tuesday next, the 1st day of August, at 12 o'clock meridian, the Senate shall proceed to vote, without debate, on the several articles of impeachment,

It was agreed to.

The question being on the second clause of the order of Mr. Edmunds, Mr. Ingalls moved to amend the clause by inserting in lieu thereof the following:

And that in taking the final question the presiding officer of the Senate shall call each Senator by name in alphabetical order, and upon each article propose as follows, that is to say: "Mr. Senator ———, how say you, is the impeachment under this article sustained?"

Whereupon each Senator shall rise in his place and answer "yea" or "nay," and may also, as provided in the order already adopted, state the grounds of his vote; and each Senator may, within two days thereafter, file his opinion in writing, to be published in the printed proceedings of the case.

Mr. Edmunds demanded a division of Mr. Ingalls's amendment; and the question being put on the first branch thereof, it was disagreed to—yeas 24, nays 26.

The question being put in the second branch of the amendment of Mr. Ingalls—namely, strike out all of the order of Mr. Edmunds after "impeachment" and in lieu thereof insert—

Whereupon each Senator shall rise in his place and answer "yea" or "nay," and may also, as provided in the order already adopted, state the grounds of his vote; and each Senator may, within two days thereafter, file his opinion in writing, to be published in the printed proceedings of the case,

It was disagreed to.

The question recurring on the order of Mr. Edmunds, it was agreed to, as follows:

Ordered, That on Tuesday next, the 1st day of August, at 12 o'clock meridian, the Senate shall proceed to vote, without debate, on the several articles of impeachment. The Presiding Officer shall direct the Secretary to read the several articles successively, and after the reading of each article the presiding officer shall put the question following, namely: "Mr. Senator ——, how say you? Is the respondent, William W. Belknap, guilty or not guilty of a high crime" or "high misdemeanor," as the charge may be, "as charged in this article?" Whereupon each Senator shall rise in his place and answer "guilty" or "not guilty" with his reasons, if any, as provided in the order already adopted.

And each Senator shall be permitted to file within two days after the vote shall have been so taken his written opinion, to be printed with the proceedings.

The Senate, sitting for the trial, thereupon adjourned.

2467. The Belknap's impeachment continued.

The managers alone attended in the Senate on the day the Senate rendered judgment in the Belknap case.

The respondent in the Belknap trial attended throughout until the time of rendering judgment.

The President pro tempore announced the result of the vote on each article and the acquittal of respondent on each.

The vote on the final question in the Belknap trial was affected conclusively by opinions as to the question of jurisdiction.

Having announced the result of the voting in the Belknap case, the President pro tempore directed the entry of a judgment of acquittal.

The adjournment without day of the Senate sitting for the Belknap trial was pronounced after vote of the Senate.

On August 1 [67] the Senate, sitting for the trial, began its proceedings with the usual formalities. The usual message [68] was sent to the House of Representatives; but as usual the managers alone appeared, the House adhering to its resolution made early in the trial. Mr. Matt. H. Carpenter, of counsel for the respondent, appeared. The respondent

[67] Senate Journal, pp. 992–1012; Record of trial, pp. 342–357.
[68] House Journal, p. 1361.

himself, who had attended with his counsel throughout the trial, was not present either on this or the preceding day.

After the Journal had been read the President pro tempore announced that according to the order already adopted the Senate would now proceed to vote on the several articles. The voting then began, the Secretary reading each article, and each Senator rising in his place and pronouncing his decision, either with or without the permitted explanation.

The result of the voting was as follows:

	Guilty	Not guilty
Article I	35	25
Article II	35	25
Article III	35	25
Article IV	35	25
Article V	37	25

After the vote on each article the President pro tempore made announcement in form as follows:

On this article 37 Senators vote "guilty" and 25 Senators vote "not guilty." Two-thirds of the Senators present not sustaining the fifth article, the respondent is acquitted on this article.

An analysis of the reasons given with the votes shows that of those voting "guilty," 2 believed that the Senate had no jurisdiction, but gave their verdict in good faith, since by vote jurisdiction had been assumed. Of those voting "not guilty" 3 announced that they did so on the evidence, while 22 announced that they voted not guilty because they believed the Senate had no jurisdiction. One Senator stated that he declined to vote because he believed they did not have jurisdiction. He did not ask to be excused from voting.

At the conclusion of the voting the President pro tempore announced:

This concludes the action of the Senate on all the articles of the impeachment. The Chair will call the Senate's attention to Rule 22, which provides:

"And if the impeachment shall not upon any of the articles presented be sustained by the votes of two-thirds of the members present, a judgment of acquittal shall be entered."

If there be no objection to complying therewith, the Secretary will be directed to enter a judgment of acquittal. Is there objection? The Chair hears none, and it will be so entered.

The Senate, sitting for the impeachment, then voted, on motion of Mr. George F. Edmunds, a Senator from Vermont, to adjourn without day, and the President pro tempore said:

The Senate sitting for the trial of the impeachment of William W. Belknap, late Secretary of War, stands adjourned without day.

2468. Belknap's impeachment continued.

At the conclusion of the Belknap trial the managers presented to the House a written report of the judgment and certain features of the trial.

On August 2,[69] in the House of Representatives, Mr. Manager Scott Lord presented the following report in writing, which was read to the House and ordered printed:

[69] House Journal, p. 1373, Record, pp. 5082, 5083.

That the defendant, William W. Belknap, has been acquitted on all the articles presented against him, less than two-thirds of the Senators present voting "guilty." The final vote was 61; 37 of the Senators voted "guilty," 23 "not guilty for want of jurisdiction," 1 "not guilty,"[70] and I criticized a portion of the articles of impeachment, and stated that the offenses charged in other of the articles were not proved beyond a reasonable doubt. A change of 5 votes would have resulted in the conviction of the defendant by the two-thirds vote required by the Constitution.

The question of jurisdiction, raised by the plea of the defendant, was the point presented to the court of impeachment. After a protracted and exhaustive argument, the court held that it had jurisdiction, notwithstanding the resignation of the defendant; and the managers proceeded to prove the offenses charged in the articles of impeachment, and after proving them so conclusively that only two[71] Senators in any manner questioned the guilt of the defendant, the minority of the Senate referred to be governed by the deliberate judgment of the majority, that it had jurisdiction, and, in the form and mode before referred to, prevented the conviction of the defendant.

While exercising the power to vote "not guilty," it was practically asserted that there was no converse to the proposition, and therefore the Senators had no legal right to vote "guilty," however satisfied of the guilt of the accused.

Notwithstanding this result, the managers believe that great good will accrue from the impeachment and trial of the defendant. It has been settled thereby that persons who have held civil office in the United States are impeachable, and that the Senate has jurisdiction to try them, although years may elapse before the discovery of the offense or offenses subjecting them to impeachment. To such as are or may hereafter be among the civil officers of the United States, who have no higher plane of integrity than the rule that "honesty is the best policy," and it is conceded they are comparatively few, this decision will be a constant warning that impeachable offenses, though not discovered for years, may result in impeachment, conviction, and public disgrace. To settle this principle, so vitally important in securing the rectitude of the class of officers referred to, is worth infinitely more than all the time, labor, and expense of the protracted trial closed by the verdict of yesterday.

This report was evidently unanimous, and at the conclusion of the reading Messrs. Managers George F. Hoar and Elbridge G. Lapham addressed the House briefly affirming strongly the positions taken by the report.

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[70] Three voted "not guilty"—Messrs. Conover, Patterson, and Wright. (See pp. 355–357 of Record of trial.) The number voting "not guilty for want of jurisdiction" was 22, and 1, Jones, of Florida, declined to vote because he considered the Senate had no jurisdiction.

[71] Three Senators voted not guilty.

The Impeachment and Trial of Charles Swayne [1]

2469. The impeachment and trial of Charles Swayne, judge of the northern district of Florida.

A Member, rising in his place, impeached Judge Swayne both on his own responsibility and on the strength of a legislative memorial.

Discussion as to the degree of definiteness of charges required to justify the House in ordering an investigation.

The House declined to have the impeachment of Judge Swayne considered by a committee before ordering an investigation.

Form of resolution instructing the Judiciary Committee to examine the charges against Judge Swayne.

On December 10, 1903,[2] Mr. William B Lamar, of Florida, claiming the floor for a question of privilege, said:

Mr. Speaker, I believe that the impeachment of a civil officer by this House is a question of privilege. I have made a joint resolution adopted by the legislature of the State of Florida a part of the resolution which I desire to submit to this House for its adoption. In pursuance of this joint resolution of the legislature of the State which I have the honor in part to represent, I impeach Charles Swayne, judge of the northern district of the State of Florida, of high crimes and misdemeanors; and the resolution which I have prepared in accordance with former proceedings of this House in like cases:

"Whereas the following joint resolution was adopted by the legislature of the State of Florida:

"Senate joint resolution in reference to Charles Swayne, judge of the United States court for the northern district of Florida.

"*Be it resolved by the legislature of the State of Florida:*

"Whereas Charles Swayne, United States district judge of the northern district of Florida, has so conducted himself and his court as to cause the people of the State to doubt his integrity and to believe that his official actions as judge are susceptible to corrupt influences and have been so corruptly influenced;

[1] Hinds' Precedents, vol. 3, p. 948 (1907).
[2] Second session Fifty-eighth Congress, Journal, p. 37; Record, pp. 95, 103.

"Whereas it also appears that the said Charles Swayne is guilty of a violation of section 551 of the Revised Statutes of the United States in that he does not reside in the district for which he was appointed and of which he is judge, but resides out of the State of Florida and in the State of Delaware or State of Pennsylvania, in open and defiant violation of said statute, and has not resided in the northern district of Florida, for which he was appointed, in ten years, and is constantly absent from said district, only making temporary visits for a pretense of discharging his official duties;

"Whereas the reputation of Charles Swayne as a corrupt judge is very injurious to the interests of the entire State of Florida, and his constant absence from his supposed district causes great sacrifice of their rights and annoyance and expense to litigants in his court;

"Whereas it also appears that the said Charles Swayne is not only a corrupt judge, but that he is ignorant and incompetent, and that his judicial opinions do not command the respect or confidence of the people;

"Whereas the administration of the United States bankruptcy act in the court of said Charles Swayne and by his appointed referee has resulted in every instance in the waste of the assets of the alleged bankrupt by being absorbed in unnecessary costs, expenses, and allowances, to the great wrong and injury of creditors and others, until such administration is, in effect, legalized robbery and a stench in the nostrils of all good people:

"*Be it resolved by the house of representatives of the State of Florida (the senate concurring)*, That our Senators and Representatives in the United States Congress be, and they are hereby, requested to cause to be instituted in the Congress of the United States proper proceedings for the investigation of the proceedings of the United States circuit and districts court for the northern district of Florida by Charles Swayne as United States judge for the northern district of Florida, and of his acts and doings as such judge, to the end that he may be impeached and removed from such office.

"*Be it resolved further*, That the secretary of state of the State of Florida be, and is hereby, instructed to certify to each Senator and Representative in the Congress of the United States, under the great seal of the State of Florida, a copy of this resolution and its unanimous adoption by the legislature of the State of Florida.

"STATE OF FLORIDA, OFFICE OF THE SECRETARY OF STATE.

"UNITED STATES OF AMERICA, *State of Florida, ss:*

"I, H. Clay Crawford, secretary of state of the State of Florida, hereby certify that the foregoing is a true and exact copy of senate joint resolution in reference to Charles Swayne, judge of the United States court for the northern district of Florida, passed by the legislature of Florida, session of 1903, and on file in this office.

"Given under my hand and the great seal of the State of Florida at Tallahassee, the capital, this the 7th day of September, A. D. 1903.

[L. S.] "H. CLAY CRAWFORD, *Secretary of State.*

"*Resolved*, That the Committee on the Judiciary be directed to inquire and report whether the action of this House is requisite concerning the official misconduct of Charles Swayne, judge of the United States district court for the northern district of Florida and say whether said judge has held terms of his court as required by law; whether he has continuously and persistently absented himself from the said State, and whether his acts and omissions in his office of judge have been such as in any degree to deprive the people of that district of the benefits of the court therein to amount to a denial of justice; whether the said judge has been guilty of corrupt conduct in office, and whether his administration of his office has resulted in injury and wrong to litigants of his court.

"And in reference to this investigation the said committee is hereby authorized and empowered to send for persons and papers, administer oaths, take testimony, and to employ a clerk and stenographer, if necessary, to send a subcommittee whenever and wherever it may be necessary to take testimony for the use of said committee. And the said subcommittee while so employed shall have the same powers in respect to obtaining testimony as are herein given to said Committee on the Judiciary, with a sergeant-at-arms, by himself or deputy, who shall serve the processes of said committee and subcommittee and execute its orders, and shall attend the sittings of the same as ordered and directed thereby. And that the expense of such investigation shall be paid out of the contingent fund of the House."

Mr. Charles H. Grosvenor, of Ohio, raised the question that the specifications made by the Member from Florida were not sufficiently specific; and after debate Mr. Lamar said:

I charge this judge, first, with continued, persistent, and, if you please, pernicious absenteeism from his district; second, with corrupt official conduct, based upon several matters. * * * Third, I charge Judge Swayne with maladministration of judicial matters in his court, so much so as to embarrass bankrupts and annihilate the assets of litigants and others appearing within his jurisdiction.

Renewed objection being made that charges should be more definite and better substantiated in order to initiate proceedings so important, Mr. John F. Lacey, of Iowa, moved that the resolution be referred to the Committee on the Judiciary.

After debate the motion of Mr. Lacey was disagreed to, ayes 53, noes 129.

The resolution was then agreed to without division.

2470. The Swayne impeachment continued.

The resolution impeaching Judge Swayne was reported from a divided committee.

The committee investigating Judge Swayne took testimony in the Judge's district as well as in Washington.

In the investigation of the conduct of Judge Swayne the accused was present in person with counsel and argued his own case.

In investigating the conduct of Judge Swayne both complainants and accused were permitted to introduce sworn testimony.

On March 25, 1904, Mr. Henry W. Palmer, of Pennsylvania, from the Committee on the Judiciary, presented the report [3] of that committee. The report says:

Testimony was taken in Pensacola, Tallahassee, and Jacksonville, Fla., and in the city of Washington upon several days. At all the hearings the Hon. Charles Swayne was present himself and by counsel, except at the last hearings in Washington, when he appeared in propria persona and argued his case before the subcommittee. All the witnesses asked for by the complainants and the respondent were sworn. Their evidence was reduced to writing and is presented with this report.

Specifications of the particular matters covered by the general charges were furnished the committee by the complainants. They were as follows:

Specification 1.—That the said Charles Swayne, judge of the United States court in and for the northern district of Florida, for ten years, while he has been such judge, was a nonresident of the State of Florida, and resided in the State of Delaware. That he never pretended to reside in Florida until May, 1903. That during said time of his nonresidence, by such nonresidence, he has caused great inconvenience, annoyance, injury, and expense to litigants in his court, not so much by failure to hold terms of court as by failing to be in reach for the disposition of admiralty and chancery matters and other matters arising between terms of court needing disposition.

Specification 2.—That said Charles Swayne, as such judge, appointed one B. C. Tunison as United States commissioner; that it was charged that it was an improper appointment, and that testimony was offered to such effect before said appointment.

Specification 3.—That the said Charles Swayne, as such judge, appointed and maintains one John Thomas Porter as United States commissioner at Marianna, but that said Porter does not reside at Marianna, but at Grand Ridge, 16 miles away, and is never at Marianna or at his office except when notified of an arrest, necessitating people having business with the United States commissioner, often at expense and inconvenience, to go to Grand Ridge, and necessitating the holding of prisoners often for a day or two, at their inconvenience, and in imprisonment at the expense of the Government, until said Porter sees fit to come to Marianna.

[3] House Report No. 1905.

The said Swayne, although there is great necessity for a commissioner at Marianna, has refused to appoint such.

Specification 4.—That said Swayne, in the administration of his court, has been guilty of great partiality and favoritism to one B. C. Tunison, mentioned in specification No. 2, and a practicing attorney in said court. That so great and well known has this partiality and favoritism become that it has created the general impression that to succeed in that court before the said Swayne it is necessary to retain the said Tunison.

Specification 5.—That said Swayne has been guilty of oppression and tyranny in his office, incorrectly and oppressively and without just cause imprisoning one W. C. O'Neal, one E. T. Davis, and one Simeon Belding upon feigned, fictitious, and false charges of contempt of his said court.

Specification 6.—That said Charles Swayne has willfully, negligently, and corruptly maladministered bankruptcy cases in his court, to the extent that the assets of bankrupts have, in all or nearly all cases, been squandered and dissipated in paying extraordinary fees and expenses, and never paying any dividends to creditors.

Specification 7.—That said Charles Swayne was guilty of oppression and tyranny in his office to one Charles Hoskins, upon an alleged contempt resulting in the suicide of the said Hoskins, and said alleged contempt proceedings being brought for the purpose of breaking down and injuring one W. R. Hoskins, who was charged in said court with involuntary bankruptcy, but who was defending and resisting such charge.

Specification 8.—That said Swayne corruptly purchased a house and lot in the city of Pensacola while the said house and lot was in litigation in his court.

Specification 9.—Ignorance and incompetency to hold said position. Under this specification many illustrations could be given, among them a case in which he took jurisdiction in admiralty in violation of the treaty between the United States and Sweden and Norway; and in one case, that of Sweet *v.* Owl Commercial Company, in which he charged the jury to exactly and diametrically conflicting theories of law.

Specification 11.—That said Swayne, by reason of his absence from the State, failed to hold the term of court which should have been held at Tallahassee in the fall of the year 1902, during the months of November and December.

Specification 12.—That the said Charles Swayne has been guilty of conduct unbecoming an upright judge, in that he has procured as indorsers on his note, for the purpose of borrowing money, attorneys and litigants having cases pending in his court.

Specification 13.—That the said Charles Swayne has been guilty of maladministration in the affairs of the conduct of his office; that he has discharged people convicted of crime in his court. Illustration, case of Alonzo Love, convicted in the year of 1902, of perjury.

The committee found that the evidence sustained the first, fourth, fifth, and seventh specifications, and concluded:

The charges and specifications not covered by the foregoing findings were not proved by sufficient evidence to warrant action upon them.

Upon the whole case it is plain that Judge Swayne has forfeited the respect and confidence of the bar of his court and of the people of his district who do business there. He has so conducted himself as to earn the reputation of being susceptible to the malign influence of a man of notoriously bad character. He has shown himself to be harsh, tyrannical, and oppressive, unmindful of the common rule of a just and upright judge. He has continuously and persistently violated the plain words of a statute of the United States, and subjected himself to punishment for the commission of a high misdemeanor. He has fined and imprisoned members of his bar for a constructive contempt without the authority of law and without a decent show of reason, either through inexcusable ignorance, a malicious intent to injure, or a wanton disposition to exercise arbitrary power. He has condemned to a term of imprisonment in the county jail a reputable citizen of the State of Florida over whom he had no jurisdiction, who was guilty of no thought of a contempt of his court, for no offense against him or in the presence of the court, or "in obstruction of any order, rule, command, or decree," and after the accused had purged himself on oath.

For all those reasons Charles Swayne has been guilty of misbehavior in his office of judge and grossly violated the condition upon which he holds this honorable appointment. The honor of the judiciary, the orderly and decent adminis-

tration of public justice, and the welfare of the people of the United States demand his impeachment and removal from the high place which his conduct has degraded.

It is vitally necessary to maintain the confidence of the people in the judiciary. A weak executive or an inefficient or even dishonest legislative branch may exist, for a time at least, without serious injury to the perpetuity of our free institutions, but if the people lose faith in the judicial branch, if they become convinced that justice can not be had at the hands of the judges, the next step will be to take the administration of the law into their own hands and do justice according to the rule of the mob, which is anarchy, with which freedom can not coexist.

The Committee on the Judiciary recommend the adoption of the following resolution:

"*Resolved*, That Charles Swayne, judge of the district court of the United States in and for the northern district of Florida, be impeached of high misdemeanor."

A minority of the committee composed of Messrs. J. N. Gillett, of California, Robert M. Nevin, of Ohio, D. S. Alexander, of New York, George A. Pearre, of Maryland, Charles E. Littlefield, of Maine, and Richard W. Parker, of New Jersey, joined in minority views dissenting from the conclusions of the committee, and holding that the evidence did not justify impeachment.

2471. The Swayne impeachment continued.

The impeachment of Judge Swayne was postponed to the next session of Congress for further investigation.

In the second investigation Judge Swayne testified on his own behalf and was cross-examined.

The rule as to the pertinency of evidence to the charges was enforced in the investigation of Judge Swayne's conduct.

The closing arguments in the Swayne investigation were heard before the subcommittee which had taken the evidence.

On April 7, 1904,[4] Mr. Palmer offered as a question of privilege the following, which was agreed to without division:

Resolved, That the consideration of the resolution (No. 274) reported by the Committee on the Judiciary in the matter of the impeachment of Charles Swayne, judge of the district court of the United States in the northern district of Florida, be postponed until the 13th day of December, 1904, and that the Committee on the Judiciary be, and it is hereby, authorized to take such further testimony as may be offered by the complainants or the respondent, and report the same to the House, with its conclusions thereon. The said committee and subcommittee shall have all the authority conferred by the original resolution (No. 86), and the further authority to take testimony when Congress is not in session.

In accordance with this resolution a subcommittee composed of Messrs. Palmer, Clayton, and Gillett took testimony at various times from February 13 to November 29, 1904.[5] In the course of these proceedings [6] Judge Swayne, besides having counsel, also appeared for himself, offered evidence, and cross-examined witnesses; and Hon. B. S. Liddon appeared for the complainants. In the course of the testimony Judge Swayne made "a statement to the stenographer," which is published with the evidence, and later it appears that "Charles Swayne, having been recalled, testified as follows." [7] After he had concluded his direct statement he was cross-examined by Mr. Liddon at length.[8]

[4] Record, p. 4431.
[5] See published evidence, "Washington: Government Printing Office, 1904."
[6] See page 211 of testimony.
[7] Pages 240, 578.
[8] Page 591.

As to the character of the testimony permitted in the examination before the subcommittee, the chairman, Mr. Palmer, stated [9] that no testimony would be received on irrelevant questions or on charges which, if proven, would not be considered grounds of impeachment. Hearsay testimony was, on objection, ruled out.[10] On the question of relevancy one notable ruling was made.[11] Judge Swayne was charged with having certified as expenses sums greater than he had actually expended. His counsel attempted to introduce documents to show that other Federal judges did likewise. This evidence was excluded by the subcommittee on the ground that it was not relevant to Judge Swayne's case. In the course of the proceedings a question arose as to whether the briefs or arguments should be heard before the subcommittee or before the whole Judiciary Committee.[12] In fact, they were heard before the subcommittee.

On December 9, 1904,[13] Mr. Palmer reported from the Judiciary Committee the testimony, with the following resolution, adopted by a majority of the committee:

Resolved, That the Committee on the Judiciary respectfully report to the House the testimony taken in the case of Charles Swayne since Congress adjourned, with the conclusion that in their opinion said testimony strengthens the case against the said Charles Swayne.

The minority views, submitted by Mr. Richard Wayne Parker, of New Jersey, and concurred in by Messrs. John J. Jenkins, of Wisconsin; D. S. Alexander, of New York; Vespasian Warner, of Illinois; Charles E. Littlefield, of Maine; Lot Thomas, of Iowa; J. N. Gillett, of California, and George A. Pearre, of Maryland, contended that the additional evidence weakened rather than strengthened the case, except as to the charge as to false certificates of expenses of travel. On this point the minority say:

Evidence as to the alleged practice of other judges in this respect was offered and excluded, and we think properly. It would have been competent for him, when a witness in his own behalf, to have stated why he made those certificates. As a witness he answered and explained every other charge. This charge he made no effort as a witness to answer or explain. The inference from the record, on general principles, is that the charge is admitted to be true and that he has no answer or explanation thereto. Whether a satisfactory explanation can be made we do not say. We must take the record as it stands.

Upon this record, unanswered and unexplained, we are of the opinion that in this particular an impeachable offense has been made out.

2472. The Swayne impeachment continued.

Form of resolutions impeaching Judge Swayne directing that the impeachment be carried to the bar of the Senate.

The House decided that the articles impeaching Judge Swayne should be prepared by a select committee.

Constitution of the committee to carry the Swayne impeachment to the Senate.

The Speaker, in the committee to draw the articles in the Swayne case, gave minority representation to those opposed generally to the impeachment.

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[9] Page 7 of testimony; also p. 240.
[10] Pages 8, 46.
[11] Pages 433–435.
[12] Pages 242, 243.
[13] House Report No. 3021, third session Fifty-eighth Congress.

On December 13, 1904,[14] the reports were considered in the House, the pending resolution being:

Resolved, That Charles Swayne, judge of the district court of the United States in and for the northern district of Florida, be impeached of high misdemeanor.

At the conclusion of the debate, on motion of Mr. Palmer, the House agreed to the following amendment:

Amend by striking out all after the word "*Resolved*" and inserting "That Charles Swayne, judge of the district court of the United States in and for the northern district of Florida, be impeached of high crimes and misdemeanors."

The previous question was then ordered on the amendment and original resolution by a vote of ayes 198, noes 61. The amendment was then agreed to, and then the resolution as amended was agreed to without division.

Then, on motion of Mr. Palmer, it was—

Resolved, That a committee of five be appointed to go to the Senate and at the bar thereof, in the name of the House of Representatives and of all the people of the United States, to impeach Charles Swayne, judge of the district court of the United States for the northern district of Florida, of high crimes and misdemeanors in office, and to acquaint the Senate that the House of Representatives will in due time exhibit particular articles of impeachment against him and make good the same; and that the committee do demand that the Senate take order for the appearance of said Charles Swayne to answer said impeachment.

Mr. Palmer then offered[15] the following:

Resolved, That a committee of seven be appointed to prepare and report articles of impeachment against Charles Swayne, judge of the district court of the United States for the northern district of Florida, with power to send for persons, papers, and records.

Mr. Palmer explained that this resolution was in accordance with all the precedents except that of the Belknap case, wherein the Judiciary Committee had framed the articles.

Mr. Charles E. Littlefield, of Maine, proposed this amendment:

Strike out "a committee of seven is appointed" and insert "the Committee on the Judiciary be empowered."

The question being taken, the amendment was disagreed to, ayes 113, noes 140. Then the original resolution was agreed to without division.

On the same day[16] the Speaker[17] appointed the following committee to carry the impeachment to the bar of the Senate: Messrs. Henry W. Palmer, of Pennsylvania; John J. Jenkins, of Wisconsin; J. N. Gillett, of California; Henry D. Clayton, of Alabama, and David H. Smith, of Kentucky. All of these were members of the Committee on the Judiciary, two of them belonged to the minority party in the House, and two had signed the minority views which accompanied the report from the Judiciary Committee.

On December 14[18] the Speaker announced the appointment of the following committee to prepare articles of impeachment: Messrs. Henry W. Palmer, of Pennsylvania; J. N. Gillett, of California; Richard Wayne Parker, of New Jersey; Charles E. Littlefield, of

[14] Third session Fifty-eighth Congress; Record, pp. 214–249.
[15] House Journal, p. 51; Record, p. 248.
[16] House Journal, p. 51; Record, p. 249.
[17] Joseph G. Cannon, of Illinois, Speaker.
[18] House Journal, p. 55; Record, p. 277.

Maine; Samuel L. Powers, of Massachusetts; Henry D. Clayton, of Alabama, and David A. De Armond, of Missouri. Three of these gentlemen had signed the minority views on the question of impeachment. The minority party in the House was also represented by three members of the committee.

2473. The Swayne impeachment continued.

Forms and ceremonies of presenting the Swayne impeachment in the Senate.

On December 14,[19] in the Senate, a message from the House of Representatives by Mr. W. J. Browning, its Chief Clerk, was delivered, as follows:

Mr. President, I am directed by the House of Representatives to communicate to the Senate the following resolution:

"*Resolved*, That a committee of five be appointed to go to the Senate, and, at the bar thereof, in the name of the House of Representatives and of all the people of the United States, to impeach Charles Swayne, judge of the district court of the United States, for the northern district of Florida, of high crimes and misdemeanors in office, and to acquaint the Senate that the House of Representatives will in due time exhibit particular articles of impeachment against him and make good the same, and that the committee do demand that the Senate take order for the appearance of said Charles Swayne to answer said impeachment.

"The Speaker announced the appointment of Mr. Palmer of Pennsylvania, Mr. Jenkins of Wisconsin, Mr. Gillett of California, Mr. Clayton of Alabama, and Mr. Smith of Kentucky, members of said committee."

The Assistant Sergeant-at-Arms (B. W. Layton) announced the presence of the committee from the House of Representatives.

The President pro tempore [20] said:

The Senate will receive the committee from the House of Representatives.

The committee from the House of Representatives was escorted by the Sergeant-at-Arms (D. M. Ransdell) to the area in front of the Vice-President's desk, and its chairman, Mr. Palmer, said:

Mr. President, in obedience to the order of the House of Representatives we appear before you, and in the name of the House of Representatives and of all of the people of the United States of America we do impeach Charles Swayne, judge of the district court of the United States for the northern district of Florida, of high crimes and misdemeanors in office; and we do further inform the Senate that the House of Representatives will in due time exhibit articles of impeachment against him and make good the same. And in their name we demand that the Senate shall take order for the appearance of the said Charles Swayne to answer the said impeachment.

The President pro tempore said:

Mr. Chairman and gentlemen of the committee of the House of Representatives, the Chair begs to assure you that the Senate will take proper order in the premises, notice of which will be given to the House.

The committee of the House of Representatives thereupon retired from the Chamber.

On the same day, in the Senate,[21] Mr. Orville H. Platt, of Connecticut, presented the following resolution, which was agreed to:

Resolved, That the message of the House of Representatives relating to the impeachment of Charles Swayne be referred to a select committee to consist of five Senators to be appointed by the President pro tempore.

The President pro tempore thereupon appointed Messrs. Platt, of Connecticut; Clarence D. Clark, of Wyoming; Charles W. Fairbanks,

[19] Senate Journal, p. 38; Record, p. 257.
[20] William P. Frye, of Maine, President pro tempore.
[21] Senate Journal, p. 39; Record, p. 265.

of Indiana; Augustus A. Bacon, of Georgia, and Edmund W. Pettus, of Alabama.

In the House of Representatives, on the same day,[22] the committee appointed to go to the Senate and at the bar thereof and, in the name of the House of Representatives and of all the people of the United States, to impeach Judge Charles Swayne, appeared at the bar of the House.

Mr. Palmer being recognized, reported verbally:

Mr. Speaker, in obedience to the order of the House, we proceeded to the bar of the Senate, and, in the name of this body and of all the people of the United States, we impeached, as we were directed to do, Charles Swayne, judge of the district court of the United States for the northern district of Florida, of high crimes and misdemeanors in office, and we demanded that the Senate should take orders to make him appear before that body to answer for the same; and announced that the House would soon present articles of impeachment and make them good, to which the response was: "Order shall be taken."

On December 15,[23] in the Senate, Mr. Platt, from the select committee, reported the following, which was agreed to by the Senate:

Whereas the House of Representatives, on the 14th day of December, 1904, by five of its Members (Mr. Palmer, of Pennsylvania; Mr. Jenkins, of Wisconsin; Mr. Gillett, of California; Mr. Clayton, of Alabama, and Mr. Smith, of Kentucky), at the bar of the Senate impeached Charles Swayne, judge of the district court of the United States for the northern district of Florida, of high crimes and misdemeanors in office, and informed the Senate that the House of Representatives will in due time exhibit particular articles of impeachment against him and make good the same; and likewise demanded that the Senate take order for the appearance of the said Charles Swayne to answer the said impeachment: Therefore,

Ordered, That the Senate will, according to its standing rule and orders in such cases provided, take proper order thereon (upon the presentation of the articles of impeachment), of which due notice shall be given to the House of Representatives.

Ordered, That the Secretary acquaint the House of Representatives herewith.

On the same day,[24] in the House, the message was received, and having been read, was ordered to lie on the table.

2474. The Swayne impeachment continued.

The articles impeaching Judge Swayne were reported from a divided committee and agreed to by a divided House.

On January 10, 1905,[25] Mr. Palmer, from the select committee appointed to prepare articles of impeachment, presented the report of the majority of that committee as follows:

The select committee appointed to prepare and report articles of impeachment against Charles Swayne, judge of the district court of the United States for the northern district of Florida, appointed December 13, 1904, submit the following report:

That the evidence heretofore taken in the matter of the impeachment of Charles Swayne, judge of the district court of the United States in and for the northern district of Florida, sustain twelve articles of impeachment, which are submitted herewith, with the recommendation that they be adopted by the House and exhibited to the Senate. [Here followed the articles.]

Messrs. Littlefield, Parker, and Gillett filed minority views. Messrs. Littlefield and Parker in their views said:

The House must establish the truth of these articles, by competent testimony, beyond reasonable doubt.

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[22] House Journal, p. 56; Record, p. 281.
[23] Senate Journal, p. 60; Record, pp. 295, 296.
[24] House Journal, p. 69; Record, p. 321.
[25] House Journal, p. 115; Record, pp. 665–667; House Report, No. 3477.

The only articles which, in our judgment, the record as it now stands would sustain are based upon the certificates of expenses. As to these it was claimed in the hearings that other judges have construed the law as it was construed by Judge Swayne, and evidence was offered to establish that claim and excluded.

We dissent from all the other articles, and especially as to those based upon the contempt proceedings in the Davis, Belden, and O'Neal cases. These cases clearly involved willful and marked contempt of court and demanded exemplary and summary punishment from any self-respecting court.

The charge as to nonresidence is not supported by such evidence as warrants the adoption of articles in that regard.

The use of the private car, which is the proper subject of adverse criticism, taking into account the fact that there is no intimation or claim that any judicial act was influenced, or attempted to be influenced thereby, is not of such gravity as to justify impeachment proceedings therefor.

The car incident occurred more than ten years ago, and no residence question has existed for more than four years. No statute of limitation can apply, but the great proceeding of impeachment is not to be used as to stale charges not affecting the moral character or the present fitness of the officer to perform his duty.

Mrs. Gillett concurred in these views except as to the certificates of expenses, saying:

I concur in all that is said in the foregoing "Views of the minority" except as to the certificates for expenses. At the hearing before the committee Judge Swayne offered to prove the custom and practice of the Federal judges in making certificates for their reasonable expenses for travel and attendance when holding court out of their district, the purpose being to show a judicial construction of the statute under which these expenses were allowed. This offer was denied by the committee and all inquiry upon this subject shut off.

Therefore, for this reason, the record is silent upon matters which, in my judgment, should have been submitted to the consideration of this House. The record is silent as to the custom and practice of other judges in this particular as to the construction which they placed upon the statute, and as to the construction which the disbursing and auditing officers of the Government gave it.

The intent with which Judge Swayne made these certificates is of controlling importance, and all of the facts and circumstances surrounding the matter, the practice and customs of other judges, and the construction placed upon the statute by them and by the Government, if any, are and were proper subjects of inquiry. While the record is silent on these questions, for the reason above stated, still it appears from official records, some of which have been furnished to me by the Treasury Department, that a majority of the district and circuit judges in five circuits, selected at random, make out certificates for $10 a day, and in two of these districts every judge made out such certificates.

I am inclined to believe that where a practice has been so general these judges acted in good faith with an honest belief that a fair construction of the statute gave them $10 a day for an allowance for travel and attendance while attending court out of their district, and I also feel that this House would with great reluctance pass a resolution impeaching them all; and if not all, why one?

On this article my mind is not satisfied beyond a reasonable doubt that Judge Swayne, in following a practice so well established by so many honorable men, committed a criminal offense for which he should either be prosecuted or impeached, and giving him the benefit of this doubt I can not consent to any impeachment on that ground.

On January 12, 13, 16, 17, and 18,[26] the articles were debated at length, and on the latter day the question was taken first on a motion of Mr. Charles E. Littlefield, of Maine, to lay the first three articles on the table. This motion was disagreed to,[27] yeas 159, nays 167.

Then the question was taken on agreeing to the first three articles (relating to the false certificates), and they were agreed to—yeas 165, nays 160.

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[26] Record, pp. 754–764, 806–822, 925–950, 972–993, 1021–1058.
[27] House Journal, pp. 158–163; Record, pp. 1053–1058.

The question was next taken on the fourth and fifth articles, a division of the question being demanded so as to vote on those two articles separated from the remaining articles.

Then, by unanimous consent, it was permitted that the House, by a single vote, should pass on two similar amendments which Mr. Marlin E. Olmsted, of Pennsylvania, proposed, the one to article 4 and the other to article 5. Mr. Olmsted explained the amendments as follows:

The change which I propose is perhaps not very material; but it may be. He is charged in article 4 and again in article 5, as they now stand, with having appropriated to his own use, under a claim of right, the car of a certain railroad company and the provisions therein under the claim that, being in the hands of a receiver, he had a right to use them. Now, the facts are, according to the testimony of Judge Swayne himself and of Mr. Axtell, attorney for the receiver, that Judge Swayne did not appropriate the car, nor demand it, nor claim it as a right. It was the receiver's own suggestion. The receiver tendered Judge Swayne the car and the provisions therein, and Judge Swayne accepted them.

The question being taken, Mr. Olmsted's amendments were disagreed to without division.

Then, by yeas 162, nays 138, articles 4 and 5 were agreed to.

Articles 6 and 7 were then agreed to, yeas 159, nays 136.

Articles 8, 9, 10, and 11, were agreed to, without division.

Also articles 12 and 13 were agreed to without division.

2475. The Swayne impeachment continued.

Forms of resolutions authorizing the appointment of managers of the Swayne impeachment and directing the articles to be exhibited in the Senate.

Constitution of the managers of the Swayne impeachment.

Then, on motion of Mr. Palmer, the following resolutions were severally agreed to.[28]

Resolved, That seven managers be appointed by the Speaker of this House to conduct the impeachment against Charles Swayne, judge of the district court of the United States in and for the northern district of Florida.

Resolved, That the articles agreed to by this House to be exhibited in the name of themselves and of all the people of the United States against Charles Swayne, judge of the district court of the United States in and for the northern district of Florida, in maintenance of their impeachment against him of high crimes and misdemeanors in office be carried to the Senate by the managers appointed to conduct said impeachment.

On January 21,[29] the Speaker announced the appointment of the following managers:

Messrs. Henry W. Palmer, of Pennsylvania; Samuel L. Powers, of Massachusetts; Marlin E. Olmsted, of Pennsylvania; James B. Perkins, of New York; Henry D. Clayton, of Alabama; David A. De Armond, of Missouri, and David H. Smith, of Kentucky.

Four of the managers belonged to the majority party in the House and three to the minority. All but two were members of the Judiciary Committee. The entire number were favorable to the impeachment, and all had voted for all the articles of impeachment so far as appeared by record votes, except Mr. Powers, who was absent, and Mr. Olmsted, who answered present on the roll call on articles 4 and 5. He voted for the other articles. Mr. Powers was of the committee which framed the articles, and joined in the report favorable to them.

[28] House Journal, pp. 162, 163; Record, p. 1058.
[29] House Journal, p. 183; Record, p. 1202.

The managers having been appointed, Mr. Palmer offered this resolution, which was agreed to:

Resolved, That a message be sent to the Senate to inform them that this House has appointed Mr. Palmer, Mr. Powers, of Massachusetts, Mr. Olmsted, Mr. Perkins, Mr. Clayton, Mr. De Armond, and Mr. Smith, of Kentucky, managers to conduct the impeachment against Charles Swayne, judge of the district court of the United States in and for the northern district of Florida, and have directed the said managers to carry to the Senate the articles agreed upon by the House to be exhibited for maintenance of their impeachment against said Charles Swayne, and that the Clerk of the House do go with said message.

On the same day [30] the message was transmitted to the Senate and received there. Thereupon, on motion of Mr. Platt, of Connecticut, it was

Ordered, That the Secretary inform the House of Representatives that the Senate is ready to receive the managers appointed by the House for the purpose of exhibiting articles of impeachment against Charles Swayne, judge of the district court of the United States for the district of Florida, agreeably to the notice communicated to the Senate.

On January 23,[31] Mr. Palmer, in the House, claiming the floor for a matter of privilege, offered the following resolution, which we agreed to by the House:

Resolved, That the managers on the part of the House in the matter of the impeachment of Charles Swayne, district judge of the United States in and for the northern district of Florida, be, and they are hereby, authorized to employ a clerk, stenographer, and messenger, and to incur such expense as may be necessary in the preparation and conduct of the case, to be paid out of the contingent fund of the House.

2476. The Swayne impeachment continued.

Ceremonies of the exhibition of the articles impeaching Judge Swayne.

The articles of impeachment of Judge Charles Swayne.

Having exhibited in the Senate the articles impeaching Judge Swayne, the managers reported verbally to the House.

On January 24,[32] in the Senate, at 12 o'clock and 30 minutes p.m. the managers of the impeachment, on the part of the House of Representatives, of Judge Charles Swayne appeared below the bar of the Senate, and the Assistant Sergeant-at-Arms (Alonzo H. Stewart) announced their presence as follows:

I have the honor to announce the managers on the part of the House of Representatives to conduct the impeachment against Charles Swayne, judge of the United States district court for the northern district of Florida.

The PRESIDENT pro tempore. The managers on the part of the House will be received, and the Sergeant-at-Arms will assign them their seats.

The managers were thereupon escorted by the Assistant Sergeant-at-Arms of the Senate to the seats assigned to them in the area in front of the Chair.

The PRESIDENT pro tempore. The Sergeant-at-Arms will make proclamation.

The Sergeant-at-Arms (D. M. Ransdell) made proclamation as follows:

Hear ye, hear ye, hear ye. All persons will keep silence, on pain of imprisonment, while the House of Representatives is exhibiting to the Senate of the

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[30] Senate Journal, p. 108; Record, p. 1176.
[31] House Journal, p. 186; Record, p. 1246.
[32] Senate Journal, p. 119; Record, pp. 1261–1283.

United States articles of impeachment against Charles Swayne, judge of the district court of the United States for the northern district of Florida.

Mr. Manager PALMER. Mr. President.

The PRESIDENT pro tempore. Mr. Manager.

Mr. Manager PALMER. The managers on the part of the House of Representatives are ready to exhibit articles of impeachment against Charles Swayne, district judge of the United States in and for the northern district of Florida, as directed by the House, in the words and figures following: [38]

Articles exhibited by the House of Representatives of the United States of America, in the name of themselves and of all the people of the United States of America, against Charles Swayne, a judge of the United States, in and for the northern district of Florida, in maintenance and support of their impeachment against him for high crimes and misdemeanor in office.

ARTICLE 1. That the said Charles Swayne, at Waco, in the State of Texas, on the 20th day of April, 1897, being then and there a United States district judge in and for the northern district of Florida, did then and there, as said judge make and present to R. M. Love, then and there being the United States marshal in and for the northern district of Texas, a false claim against the Government of the United States in the sum of $230, then and there knowing said claim to be false, and for the purpose of obtaining payment of said false claim, did then and there as said judge, make and use a certain false certificate then and there knowing said certificate to be false, said certificate being in the words and figures following:

"UNITED STATES OF AMERICA, *Northern District of Texas, ss:*

"I, Charles Swayne, district judge of the United States for the northern district of Florida, do hereby certify that I was directed to and held court at the city of Waco, in the northern district of Texas, twenty-three days, commencing on the 20th day of April, 1897; also, that the time engaged in holding said court, and in going to and returning from the same, was twenty-three days, and that my reasonable expenses for travel and attendance amounted to the sum of two hundred and thirty dollars and —— cents, which sum is justly due me for such attendance and travel.

"CHAS. SWAYNE, *Judge.*

"WACO, *May 15,1897.*

"Received of R. M. Love, United States marshal for the northern district of Texas, the sum of 230 dollars and no cents in full payment of the above account.

"$230.

"CHAS. SWAYNE."

when in truth and in fact, as the said Charles Swayne then and there well knew, there was then and there justly due the said Swayne from the Government of the United States and from said United States marshal a far less sum, whereby he has been guilty of a high crime and misdemeanor in his said office.

ART. 2. That the said Charles Swayne, having been duly appointed, confirmed, and commissioned as judge of the United States in and for the northern district of Florida, entered upon the duties of his office, and while in the exercise of his office as judge, as aforesaid, the said Charles Swayne was entitled by law to be paid his reasonable expenses for travel and attendance when lawfully directed to hold court outside of the northern district of Florida, not to exceed $10 per diem, to be paid upon his certificate by the United States marshal for the district in which the court was held, and was forbidden by law to receive compensation for such services. Yet the said Charles Swayne, well knowing these provisions, falsely certified that his reasonable expenses for travel and attendance were $10 per diem while holding court at Tyler, Tex., twenty-four days commencing December 3, 1900, and seven days going to and returning from said Tyler, Tex., and received therefor from the Treasury of the United States, by the hand of John Grant, the United States marshal for the eastern district of Texas, the sum of $310, when the reasonable expenses incurred and paid by the said Charles Swayne for travel and attendance did not amount to the sum of $10 per diem.

Wherefore the said Charles Swayne, judge as aforesaid, misbehaved himself and was and is guilty of a high crime, to wit, the crime of obtaining money from the United States by a false pretense, and of a high misdemeanor in office.

[38] The articles were enrolled on parchment, following the practice of the early trials. In the later trials of Johnson and Belknap the articles had been engrossed on ordinary white paper.

ART. 3. That the said Charles Swayne having been duly appointed, confirmed, and commissioned as judge of the United States in and for the northern district of Florida, entered upon the duties of his office, and while in the exercise of his office of judge as aforesaid was entitled by law to be paid his reasonable expenses for travel and attendance when lawfully directed to hold court outside of the northern district of Florida, not to exceed $10 per diem, to be paid upon his certificate by the United States marshal of the district in which the court was held, and was forbidden by law to receive any compensation for such services. Yet the said Charles Swayne, well knowing these provisions, falsely certified that his reasonable expenses for travel in going to and coming from and attendance were $10 per diem while holding court at Tyler, Tex., thirty-five days from January 12, 1903, and six days going to and returning from said Tyler, Tex., and received therefor from the Treasury of the United States, by the hand of A. J. Houston, the United States marshal for the eastern district of Texas, the sum of $410, when the reasonable expenses of the said Charles Swayne incurred and paid by him during said period were much less than said sum.

Wherefore the said Charles Swayne, judge as aforesaid, misbehaved himself and was and is guilty of a high crime, to wit, obtaining money from the United States by a false pretense, and of a high misdemeanor in office.

ART. 4. That the said Charles Swayne having been duly appointed, confirmed, and commissioned as judge of the United States in and for the northern district of Florida, entered upon the duties of his office, and while in the exercise of his office as judge as aforesaid heretofore, to wit, A.D. 1893, did unlawfully appropriate to his own use, without making compensation to the owner, a certain railroad car, belonging to the Jacksonville, Tampa and Key West Railroad Company, for the purpose of transporting himself, his family, and friends from Guyencourt, in the State of Delaware, to Jacksonville, Fla., the said railroad company being at the time in the possession of a receiver appointed by said Charles Swayne, judge as aforesaid, on the petition of creditors.

The said car was supplied with provisions by the said receiver, which were consumed by said Swayne and his friends, and was provided with a conductor or porter at the cost and expense of said railroad company, and with transportation over connecting lines. The expenses of the trip were paid by the said receiver out of the funds of the said Jacksonville, Tampa and Key West Railroad Company, and the said Charles Swayne, acting as judge, allowed the credit claimed by the said receiver for and on account of the said expenditure as a part of the necessary expenses of operating said road. The said Charles Swayne, judge as aforesaid, used the said property without making compensation to the owner, and under a claim of right, for the reason that the same was in the hands of a receiver appointed by him.

Wherefore the said Charles Swayne, judge as aforesaid, was and is guilty of an abuse of judicial power and of a high misdemeanor in office.

ART. 5. That the said Charles Swayne was duly appointed, commissioned, and confirmed as judge of the United States in and for the northern district of Florida, and entered upon the duties of said office, and while in the exercise of his office of judge as aforesaid heretofore, to wit, A. D. 1893, did unlawfully appropriate to his own use, without making compensation to the owner, a certain railroad car belonging to the Jacksonville, Tampa and Key West Railroad Company for the purpose of transporting himself, his family, and friends from Jacksonville, Fla., to California, said railroad company being at the time in the possession of a receiver appointed by the said Charles Swayne, judge as aforesaid, on the petition of creditors.

The car was supplied with some provisions by the said receiver, which were consumed by the said Swayne and his friends, and it was provided with a porter at the cost and expense of the railroad company and also with transportation over connecting lines. The wages of said porter and the cost of said provisions were paid by the said receiver out of the funds of the Jacksonville, Tampa and Key West Railroad Company, and the said Charles Swayne, acting as judge as aforesaid, allowed the credits claimed by the said receiver for and on account of the said expenditures as a part of the necessary expenses of operating the said railroad. The said Charles Swayne, judge as aforesaid, used the said property without making compensation to the owner under a claim of right, alleging that the same was in the hands of a receiver appointed by him and he therefore had a right to use the same.

Wherefore the said Charles Swayne, judge as aforesaid, was and is guilty of an abuse of judicial power and high misdemeanor in office.

ART. 6. That the said Charles Swayne, having been duly appointed and confirmed, was commissioned district judge of the United States in and for the northern district of Florida on the 1st day of April, A.D. 1890, to serve during good behavior, and thereafter, to wit, on the 22d day of April, A.D. 1890, took the oath of office and assumed the duties of his appointment, and established his residence at the city of St. Augustine, in the State of Florida, which was at that time within the said northern district. That subsequently, by an act of Congress approved the 23d of July, A.D. 1894, the boundaries of the said northern district of Florida were changed, and the city of St. Augustine and contiguous territory were transferred to the southern district of Florida; whereupon it became and was the duty of the said Charles Swayne to change his residence and reside in the northern district of Florida and to comply with the five hundred and fifty-first section of the Revised Statutes of the United States, which provides that—

"A district judge shall be appointed for each district, except in cases hereinafter provided. Every judge shall reside in the district for which he is appointed, and for offending against this provision shall be deemed guilty of a high misdemeanor."

Nevertheless the said Charles Swayne, judge as aforesaid, did not acquire a residence, and did not, within the intent and meaning of said act, reside in his said district, to wit, the northern district of Florida, from the 23d day of July, A.D. 1894, to the 1st day of October, A.D. 1900, a period of about six years.

Wherefore the said Charles Swayne, judge as aforesaid, willfully and knowingly violated the aforesaid law and was and is guilty of a high misdemeanor in office.

ART. 7. That the said Charles Swayne, having been duly appointed and confirmed, was commissioned district judge of the United States in and for the northern district of Florida on the 1st day of April, A.D. 1890, to serve during good behavior, and thereafter, to wit, on the 22d day of April, A.D. 1890, took the oath of office and assumed the duties of his appointment, and established his residence at the city of St. Augustine, in the State of Florida, which was at that time within the said northern district. That subsequently, by an act of Congress of the United States approved the 23d day of July, A.D. 1894, the boundaries of the said northern district of Florida were changed, and the city of St. Augustine, with the contiguous territory, was transferred to the southern district of Florida, whereupon it became and was the duty of the said Charles Swayne to change his residence and reside in the northern district of Florida, as defined by said act of Congress, and to comply with section 551 of the Revised Statutes of the United States, which provides that—

"A district judge shall be appointed for each district, except in cases hereinafter provided. Every judge shall reside in the district for which he is appointed, and for offending against this provision shall be deemed guilty of a high misdemeanor."

Nevertheless, the said Charles Swayne, judge as aforesaid, totally disregarding his duty as aforesaid, did not acquire a residence, and within the intent and meaning of said act did not reside in his said district, to wit, the northern district of Florida, from the 23d day of July, A.D. 1894, to the 1st day of January, A.D. 1903, a period of about nine years.

Wherefore the said Charles Swayne, judge as aforesaid, willfully and knowingly violated the aforesaid law, and was and is guilty of a high misdemeanor in office.

ART. 8. That the said Charles Swayne, having been appointed, confirmed, and duly commissioned as judge of the district court of the United States in and for the northern district of Florida, entered upon the duties of said office, and while in the exercise of his office as judge, as aforesaid, to wit, while performing the duties of a judge of a circuit court of the United States, heretofore, to wit, on the 12th day of November, A.D. 1901, at the city of Pensacola, in the county of Escambia, in the State of Florida, did maliciously and unlawfully adjudge guilty of a contempt of court and impose a fine of $100 upon and commit to prison for a period of ten days E. T. Davis, an attorney and counselor at law, for an alleged contempt of the circuit court of the United States.

Wherefore the said Charles Swayne, judge as aforesaid, misbehaved himself in his office of judge, and was and is guilty of an abuse of judicial power and of a high misdemeanor in office.

ART. 9. That the said Charles Swayne, having been appointed, confirmed, and duly commissioned as judge of the district court of the United States in and

for the northern district of Florida, entered upon the duties of said office, and while in the exercise of his office as judge as aforesaid, to wit, while performing the duties of a judge of a circuit court of the United States heretofore, to wit, on the 12th day of November, A.D. 1901, at the city of Pensacola, in the county of Escambia, in the State of Florida, did knowingly and unlawfully adjudge guilty of a contempt of court and impose a fine of $100 upon and commit to prison for a period of ten days E. T. Davis, an attorney and counselor at law, for an alleged contempt of the circuit court of the United States.

Wherefore the said Charles Swayne, judge as aforesaid, misbehaved himself in his office of judge and was and is guilty of an abuse of judicial power and of a high misdemeanor in office.

ART. 10. That the said Charles Swayne, having been appointed, confirmed, and duly commissioned as judge of the district court of the United States in and for the northern district of Florida, entered upon the duties of said office, and while in the exercise of his office as judge as aforesaid, to wit, while performing the duties of a judge of a circuit court of the United States heretofore, to wit, on the 12th day of November, A.D. 1901, at the city of Pensacola, in the county of Escambia, in the State of Florida, did maliciously and unlawfully adjudge guilty of a contempt of court and impose a fine of $100 upon and commit to prison for a period of ten days Simeon Belden, an attorney and counselor at law, for an alleged contempt of the circuit court of the United States.

Wherefore the said Charles Swayne, judge as aforesaid, misbehaved himself in his office of judge and was and is guilty of an abuse of judicial power and of a high misdemeanor in office.

ART. 11. That the said Charles Swayne, having been appointed, confirmed, and duly commissioned as judge of the district court of the United States in and for the northern district of Florida, entered upon the duties of said office, and while in the exercise of his office as judge as aforesaid, to wit, while performing the duties of a circuit judge of the United States heretofore, to wit, on the 12th day of November, A.D. 1901, at the city of Pensacola, in the county of Escambia, in the State of Florida, did knowingly and unlawfully adjudge guilty of contempt of court and impose a fine of $100 upon and commit to prison for a period of ten days Simeon Belden, an attorney and counselor at law, for an alleged contempt of the circuit court of the United States.

Wherefore the said Charles Swayne, judge as aforesaid, misbehaved himself in his office as judge and was and is guilty of an abuse of judicial power and of a high misdemeanor in office.

ART. 12. That the said Charles Swayne, having been duly appointed, confirmed, and commissioned as judge of the United States in and for the northern district of Florida, entered upon the duties of his office, and while in the exercise of his office of judge heretofore, to wit, on the 9th day of December, A.D., 1902, at Pensacola, in the county of Escambia, in the State of Florida, did unlawfully and knowingly adjudge guilty of contempt and did commit to prison for the period of sixty days one W. C. O'Neal, for an alleged contempt of the district court of the United States for the northern district of Florida.

Wherefore the said Charles Swayne, judge as aforesaid, misbehaved himself in his office as judge, as aforesaid, and was and is guilty of an abuse of judicial power and of a high misdemeanor in office.

And the House of Representatives by protestation, saving to themselves the liberty of exhibiting at any time hereafter any further articles of accusation or impeachment against the said Charles Swayne, judge of the United States court for the northern district of Florida, and also of replying to his answers which he shall make unto the articles herein preferred against him, and of offering proof to the same and every part thereof, and to all and every other article or accusation or impeachment which shall be exhibited by them as the case shall require, do demand that the said Charles Swayne may be put to answer the high crimes and misdemeanors in office herein charged against him, and that such proceedings, examinations, trials, and judgments may be thereupon had and given as may be agreeable to law and justice.

J. G. CANNON,
Speaker of the House of Representatives.

Attest:
A. MCDOWELL, *Clerk.*

The articles of impeachment were handed to the Secretary of the Senate.

The PRESIDENT pro tempore. The Senate will take proper order in the matter of the impeachment of Judge Swayne, and communicate to the House of Representatives its action.

The managers thereupon withdrew from the Chamber.

Having returned to the House,[34] the managers appeared at the bar, and Mr. Palmer reported orally:

Mr. Speaker, the managers of impeachment beg leave to report to the House that the articles of impeachment prepared by the House of Representatives against Charles Swayne, district judge of the United States in and for the northern district of Florida, have been exhibited and read to the Senate, and the Presiding Officer of that body stated to the managers that the Senate would take order in the premises, due notice of which would be given to the House of Representatives.[35]

2477. The Swayne impeachment continued.

The organization of the Senate for the Swayne impeachment trial.

The oath to the Senators for the Swayne trial was administered by the Chief Justice.

At the request of the President pro tempore the Senate elected a Presiding Officer for the Swayne impeachment trial.

The Senate being organized for the Swayne impeachment, the House was notified by message.

In the Senate, after the retirement of the managers, Mr. Platt, of Connecticut, offered the following resolutions, which were severally agreed to:[36]

Ordered, That the articles of impeachment presented this day by the House of Representatives be printed for the use of the Senate.

Ordered, That at 2 o'clock this afternoon the Senate will proceed to the consideration of the articels of impeachment of Charles Swayne, judge of the United States district court for the northern district of Florida, presented this day.

Ordered, That a committee of two Senators be appointed by the Chair to wait upon the Chief Justice of the United States and invite him to attend in the Senate Chamber at 2 o'clock this day, to administer to Senators the oath required by the Constitution, in the matter of the impeachment of Charles Swayne, or in case of his inability to attend, any one of the associate justices.

In accordance with the last resolution, Messrs. Charles W. Fairbanks, of Indiana, and Augustus O. Bacon, of Georgia, were appointed as the committee.

Later, on the same day, in the Senate,[37] the President pro tempore [38] requested that he be relieved of the duty of presiding at the trial. Thereupon, Mr. John C. Spooner, of Wisconsin, offered this resolution, which was agreed to:

Resolved, That in view of the statement just made to the Senate by the President pro tempore of his inability, because of recent illness, to discharge the duties of his office, other than those involved in presiding over the Senate in legislative and executive session, the Hon. Orville H. Platt, Senator from the State of

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[34] House Journal, p. 195; Record, p. 1310.

[35] The House itself did not attend its managers to the Senate on this occasion or at any other time during the trial.

[36] Senate Journal, p. 121; Record, p. 1283.

[37] Senate Journal, p. 121; Record, p. 1289.

[38] William P. Frye, of Maine, President pro tempore.

Connecticut, be, and he is hereby, appointed presiding officer on the trial of the impeachment of Charles Swayne, district judge of the United States for the northern district of Florida.

A message announcing this action was transmitted to the House.[39]

At 2 o'clock p. m., on motion of Mr. Platt, of Connecticut, Rule III of the Senate, sitting for impeachment trials, providing that the presiding officer should administer the oath, was suspended.[40]

Then [41] the presence of the Chief Justice of the United States, Hon. Melville W. Fuller, was announced by the Assistant Sergeant-at-Arms.

The Chief Justice entered the Senate Chamber, escorted by Mr. Fairbanks and Mr. Bacon, the committee appointed for the purpose, and was conducted by them to a seat by the side of the President pro tempore.

Mr. FAIRBANKS. Mr. President, the committee appointed by the Senate to wait upon the Chief Justice of the Supreme Court of the United States and request him to administer to Senators the oath required by the Constitution in the matter of the impeachment of Judge Charles Swayne report that they have discharged that duty. The Chief Justice of the Supreme Court, complying with the request of the Senate, is now present in the Senate and ready to administer the oath required to be administered to the members of the Senate sitting in the trial of impeachments.

The Chief Justice administered the oath to the President pro tempore as follows:

You do solemnly swear that in all things appertaining to the trial of the impeachment of Charles Swayne, judge of the district court of the United States for the northern district of Florida, now pending, you will do impartial justice according to the Constitution and laws. So help you God.

The PRESIDENT pro tempore. The Senator from Connecticut will please present himself as Presiding Officer of the Senate while in court and take the necessary oath.

Mr. Platt, of Connecticut, advanced to the Vice-President's desk, and the oath was administered to him by the Chief Justice.

The PRESIDENT pro tempore. The Secretary will call the roll, and as their names are called Senators will present themselves at the desk in groups of ten, and the oath will be administered to them.

The oath having been administered to all the Senators present, Mr. Platt, of Connecticut, thereupon took the chair, and announced:

Senators, the Senate is now sitting for the trial of the impeachment of Charles Swayne, judge of the United States district court in and for the northern district of Florida.

Then, on motion of Mr. Charles W. Fairbanks, of Indiana, the following resolution was agreed to:

Ordered, That the Secretary notify the House of Representatives that the Senate is now organized for the trial of articles of impeachment against Charles Swayne, judge of the United States district court for the northern district of Florida, and is ready to receive the managers on the part of the House at its bar.

This message was delivered in the House soon after.[42]

2478. The Swayne impeachment continued.

Ceremonies of demanding that process issue in the Swayne impeachment.

[39] House Journal, p. 195; Record, p. 1312.
[40] The Senate had overlooked the law relating to this subject.
[41] Senate Journal, pp. 122, 346; Record, pp. 1289–1290.
[42] House Journal, p. 185; Record, p. 1310.

The Senate having ordered, on demand of the managers, that process issue against Judge Swayne, the managers returned and reported verbally to the House.

Then, on the same day,[43] in the Senate, at 2 o'clock and 27 minutes p.m., the managers of the impeachment on the part of the House of Representatives appeared at the bar and their presence was announced by the Sergeant-at-Arms.

The PRESIDING OFFICER. The Sergeant-at-Arms will conduct the managers to the seats provided for them within the bar of the Senate.

The managers were conducted to the seats assigned them within the space in front of the Secretary's desk.

The PRESIDING OFFICER. Gentlemen managers, the Senate is now organized for the trial of the impeachment of Charles Swayne, United States judge in and for the northern district of Florida.

Mr. Manager Palmer rose and said:

Mr. President, we are instructed by the House of Representatives, as its managers, to demand that the Senate shall issue process against Charles Swayne, district judge of the United States in and for the northern district of Florida, that he answer at the bar of the Senate the articles of impeachment heretofore exhibited by the House of Representatives through its managers.

Then, on motion of Mr. Fairbanks, the following resolutions were severally agreed to:

Ordered, That a summons be issued, as required by the rules of procedure and practice in the Senate when sitting for the trial for impeachment of Charles Swayne, returnable on Friday, the 27th day of the present month, at 1 o'clock in the afternoon.

Ordered, That the Senate, sitting for the trial of impeachment of Charles Swayne, adjourn until Friday, the 27th instant, at 1 o'clock in the afternoon.

The Presiding Officer then said:

The order having been agreed to, the Senate, sitting for the trial of the impeachment, stands adjourned until 1 o'clock on Friday, the 27th instant. The Senate will resume its legislative session.

Mr. Platt, of Connecticut, thereupon vacated the chair, which was resumed by the President pro tempore.

On January 20,[44] in the House, Mr. Palmer, on behalf of the managers, reported orally:

Mr. Speaker, I have the honor to report on behalf of the managers in the matter of the impeachment of Charles Swayne, district judge of the United States in and for the northern district of Florida, that the Senate has organized for the trial of the impeachment; that in the name of the House of Representatives and in behalf of all the people of the United States, the managers have demanded of the Senate that process be issued against Charles Swayne, judge as aforesaid, to answer to the articles hereinbefore exhibited against him at the bar of the Senate, and that the Senate has advised us that process will be issued against him in that behalf returnable on the 27th instant, at 1 o'clock p.m.

2479. The Swayne impeachment continued.

Proceedings on the return of the writ of summons in the Swayne impeachment.

In response to the writ of summons, Judge Swayne entered appearance by his counsel.

In the Swayne impeachment, in response to the motion of respondent's counsel, the Senate granted time after the appearance to present the answer.

[43] Senate Journal, p. 346; Record, p. 1290.
[44] House Journal, p. 205; Record, p. 1415.

The managers and respondent in the Swayne case were directed to furnish a list of their witnesses to the Sergeant-at-Arms of the Senate.

The oath to Senators in the Swayne impeachment trial was administered by the Presiding Officer after the organization was completed.

On January 27,[45] in the Senate, the President pro tempore said:

The hour of 1 o'clock, to which the Senate sitting as a court in the impeachment of Judge Charles Swayne adjourned, has arrived. Will the Senator from Connecticut [Mr. Platt] please take the chair?

Mr. Platt, of Connecticut, thereupon took the chair as Presiding Officer.

The PRESIDING OFFICER. The Sergeant-at-Arms will make the opening proclamation.

The SERGEANT-AT-ARMS. Hear ye, hear ye, hear ye. All persons are commanded to keep silence on pain of imprisonment while the Senate of the United States is sitting for the trial of the articles of impeachment exhibited by the House of Representatives against Charles Swayne, judge of the district court of the United States in and for the northern district of Florida.

The PRESIDING OFFICER. The Secretary will now call the names of those Senators who have not been sworn, and such of those Senators as are present in the Chamber will, as their names are called, advance to the desk and take the oath.

The Secretary called the names of the Senators who had not been heretofore sworn, whereupon Senators Blackburn, Depew, Dryden, Knox, and McLaurin advanced to the area in front of the Secretary's desk, and the oath was administered to them by the Presiding Officer.[46]

Mr. Charlesa W. Fairbanks, of Indiana, then offered this resolution, which was agreed to, as follows:

Resolved, That the Secretary inform the House of Representatives that the Senate is sitting in its Chamber and ready to proceed with the trial of the impeachment of Charles Swayne.[47]

At 1 o'clock and 7 minutes p.m. the Assistant Sergeant-at-Arms announced the managers on the part of the House of Representatives.

The PRESIDING OFFICER. The managers will be admitted and conducted to the seats provided for them within the bar of the Senate.

The managers were conducted to seats provided in the space in front of the Secretary's desk on the left of the Chair, namely: Hon. Henry W. Palmer, of Pennsylvania; Hon. Marlin E. Olmsted, of Pennsylvania; Hon. James B. Perkins, of New York; Hon. Henry D. Clayton, of Alabama; Hon. David A. De Armond, of Missouri, and Hon. David H. Smith, of Kentucky.

At 1 o'clock and 14 minutes p. m. Hon. Anthony Higgins and Hon. John M. Thurston, counsel for the respondent, Charles Swayne, entered the Senate Chamber and were conducted to the seats assigned them in the space in front of the Secretary's desk on the right of the Chair.

The PRESIDING OFFICER. The Secretary will read the minutes of the proceedings of the last session of the Senate while sitting in the trial of the impeachment of Charles Swayne.

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[45] Senate Journal, p. 346; Record, pp. 1449–1451.

[46] The House managers called the attention of the Senate to the law permitting the Presiding Officer to administer the oath.

[47] This message was duly received in the House, Record, p. 1479.

The Secretary read the Journal of proceedings of the Senate, sitting for the trial of the impeachment, of Tuesday, January 24, 1905.

The PRESIDING OFFICER. The Secretary will now read the return of the Sergeant-at-Arms to the summons directed to be served.

The Secretary read the following return appended to the writ of summons:

The foregoing writ of summons, addressed to Charles Swayne, and the foregoing precept, addressed to me, were duly served upon the said Charles Swayne by delivery to and leaving with him true and attested copies of the same at 1215 Tatnall street, Wilmington, Del., the residence of Henry G. Swayne, on Tuesday, the 24th day of January, 1905, at 7 o'clock and 45 minutes in the afternoon of that day.

DANIEL M. RANSDELL,
Sergeant-at-Arms United States Senate.

The PRESIDING OFFICER. The Secretary will now administer to the Sergeant-at-Arms an oath in support of the truth of his return.

The Secretary (Mr. Charles G. Bennett) administered the following oath to the Sergeant-at-Arms:

You, Daniel M. Ransdell, Sergeant-at-Arms of the Senate of the United States, do solemnly swear that the return made by you upon the process issued on the 24th day of January, 1905, by the Senate of the United States against Charles Swayne, is truly made and that you have performed such service as therein described: So help you God.

The SERGEANT-AT-ARMS. I do so swear.

The PRESIDING OFFICER. The Sergeant-at-Arms will make proclamation.

The SERGEANT-AT-ARMS. Charles Swayne, Charles Swayne, Charles Swayne, judge of the district court of the United States for the northern district of Florida: Appear and answer to the articles of impeachment exhibited by the House of Representatives against you.

Mr. HIGGINS. Mr. President, on behalf of the respondent, Charles Swayne, I beg to enter the following appearance:

To the honorable the Senate of the United States, sitting as a Court of Impeachment:

I, Charles Swayne, judge of the district court of the United States in and for the northern district of Florida, now present in the city of Washington, having been served with a summons to be in the city of Washington on the 27th day of January, 1905, at 1 o'clock afternoon, to answer certain articles of impeachment presented against me by the honorable the House of Representatives of the United States, do hereby enter my appearance by my counsel, Anthony Higgins and John M. Thurston, who have my warrant and authority therefor, and who are instructed by me to ask this court for a reasonable time for the preparation of my answer to said articles.

CHARLES SWAYNE.

Dated at Washington, D.C., this 27th day of January, A. D. 1905.

I ask this be filed, and I submit a copy for the managers.

The PRESIDING OFFICER. It will be placed on file.

Mr. THURSTON. On behalf of the respondent we make the following motion:

In the Senate of the United States, sitting as a court of impeachment. The United States of America *v.* Charles Swayne. Upon articles of impeachment presented by the House of Representatives of the United States of America.

The respondent, by his counsel, now comes and moves the court to grant him the period of seven days in which to prepare and present his answer to the articles of impeachment presented against him herein.

ANTHONY HIGGINS.
JOHN M. THURSTON.

Then, on motion of Mr. Fairbanks, it was

Ordered, That the respondent present his answer to the articles of impeachment at 12 o'clock and 30 minutes post meridian on the 3d day of February next.

Also, on motion of Mr. Fairbanks, at the suggestion of the managers, it was

Ordered, That lists of witnesses be furnished the Sergeant-at-Arms by the managers and the respondent, who shall be subpoenaed by him to appear on the 10th day of February, at 1 o'clock post meridian.

A proposition of the managers that the trial proceed on the 13th of February was objected to by counsel for respondent, who suggested the 10th of February instead, and it was not pressed.

Then, on motion of Mr. Fairbanks, the Senate, sitting for the trial of the impeachment, adjourned until Friday, February 3, 1905, at 12:30 o'clock p.m.

The managers on the part of the House and the counsel for the respondent withdrew from the Chamber.

The President pro tempore resumed the Chair.

2480. The Swayne impeachment continued.

Forms and ceremonies in the Senate at the session for receiving respondent's answer in the Swayne case.

Proclamation of the Sergeant-at-Arms at opening of session of the Senate sitting for the Swayne impeachment trial.

At the presentation of the answer in the Swayne case the respondent was represented by his counsel.

Rule of the Senate in the Swayne trial for submitting of requests or applications by managers or counsel.

Rule governing the Senators in the Swayne trial as to colloquys and questions.

On Februray 3,[48] in the Senate,

The PRESIDENT pro tempore (at 12 o'clock and 30 minutes p.m.). The hour has arrived to which the Senate sitting as a court of impeachment adjourned, and the Senator from Connecticut will please take the chair.

Mr. Platt, of Connecticut, assumed the chair.

The PRESIDING OFFICER (Mr. Platt, of Connecticut). The Senate is now sitting for the trial of the impeachment of Charles Swayne, a judge of the United States in and for the northern district of Florida. The Sergeant-at-Arms will make proclamation.

The Sergeant-at-Arms made proclamation as follows:

Hear ye, hear ye, hear ye. All persons are commanded to keep silence, on pain of imprisonment, while the Senate of the United States is sitting for the trial of the articles of impeachment exhibited by the House of Representatives of the United States against Charles Swayne, judge of the district court of the United States in and for the northern district of Florida.

The oath was then administered to certain Senators not previously sworn.

The PRESIDING OFFICER. The Sergeant-at-Arms will notify the managers, if they are in waiting, that the Senate is ready to proceed.

At 12 o'clock and 32 minutes p.m. the managers on the part of the House of Representatives were announced, and they were conducted by the Assistant Sergeant-at-Arms to the seats assigned them in the area in front of the Secretary's desk.

The PRESIDING OFFICER. The Sergeant-at-Arms will also notify the counsel for the respondent.

Mr. Anthony Higgins and Mr. John M. Thurston, counsel for the respondent, entered the Chamber and were assigned to the seats provided for them in the area in front of the Secretary's desk.

[48] Senate Journal, p. 347; Record, pp. 1818–1832.

The PRESIDING OFFICER. The Journal of the proceedings of the last session of the Senate sitting for the trial of the impeachment of Charles Swayne will now be read.

The Journal of the proceedings of the Senate sitting as a court on Friday, January 27, 1905, was read and approved.

Then, on motion of Mr. Augustus O. Bacon, a Senator from Georgia, it was—

Ordered, That in all matters relating to the procedure of the Senate sitting in the trial of the impeachment of Charles Swayne, judge of the district court of the United States in and for the northern district of Florida, whether as to form or otherwise, the managers on the part of the House, or the counsel representing the respondent, may submit a request or application orally to the Presiding Officer, or, if required by him or requested by any Senator, shall submit the same in writing.

In all matters relating immediately to the trial, such as the admission, rejection, or striking out of evidence, or other questions usually arising in the trial of causes in courts of justice, if the managers or counsel for the respondent desire to make any application, request, or objection, the same shall be addressed directly to the Presiding Officer and not otherwise.

It shall not be in order for any Senator to engage in colloquy, or to address questions either to the managers on the part of the House or the counsel for the respondent, nor shall it be in order for Senators to address each other, but they shall address their remarks directly to the Presiding Officer.

2481. The Swayne impeachment continued.

The answer of Judge Swayne to the articles of impeachment.

Judge Swayne's answer was signed by himself and his counsel.

The answer of Judge Swayne as to the first seven articles raised a question as to the jurisdiction of the Senate to try the charges.

Then Mr. Thurston, of counsel for the respondent, said:

Mr. President, counsel for the respondent now come, and for answer of said Charles Swayne under impeachment herein say:

And the said Charles Swayne, named in said articles of impeachment, comes before the honorable Senate of the United States, sitting as a court of impeachment, and says that this honorable court ought not to have or take further cognizance of the first of said articles of impeachment so exhibited and presented against him, because, he says, the facts set forth in said first article do not, if true, constitute an impeachable high crime and misdemeanor as defined in the Constitution of the United States.

And now, not waiving the foregoing plea to the jurisdiction of the honorable Senate of the United States, sitting as a court of impeachment, as to said first article, the said respondent, saving to himself all advantages of exception to said first article, for answer thereto saith:

He admits that on the 20th day of April, 1897, at Waco, in the State of Texas, acting as United States judge in and for the northern district of Florida, he made and presented to R. N. Love, the United States marshal in and for the northern district of Texas, the certificate in writing as set forth in the said first article, and did then and there receive from the said R. N. Love, United States marshal as aforesaid, the sum of $230 in full payment of the account certified to as aforesaid, and the respondent says that he then and there believed, and still believes and insists, that, under the true meaning and intent of the statutes of the United States allowing the expenses of a district judge of the United States for travel and expenses while holding court outside of his own district, the said claim was just and in strict accordance with the provisions of the law of Congress in that respect enacted; and he denies that he then and there knew or believed said claim to be false, as set forth in said article; and he denies that he signed and presented the said certificate for the purpose of obtaining payment of any false claim; and he denies that he then and there made and used a false certificate knowing or believing said certificate to be false. [Etc., specifying at length.]

* * * And respondent says that he attaches to this, his answer to the said article 1, copies of certificates of the honorable the Secretary of the Treasury, marked, respectively, Exhibits A et seq., and asks that the same be accepted and taken as a part of this his answer to the said article 1. * * *

These exhibits were attached, not at the end of the answer, but at the end of article first.

To articles second and third, which related to the offense set forth in article 1, answer was made in similar form.

As to article 4, the answer says:

And the said Charles Swayne, named in the articles of impeachment, says that this honorable court ought not to have or take further cognizance of the fourth of said articles of impeachment so exhibited and presented against him, because, he says, the facts set forth in the said fourth article do not, if true, constitute an impeachable high crime and misdemeanor as defined in the Constitution of the United States.

And now, not waiving the foregoing plea to the jurisdiction of the honorable Senate of the United States, sitting as a court of impeachment, as to said fourth article, the said respondent, saving to himself all advantages of exception to said fourth article, for answer thereto saith:

He admits that he was duly appointed, confirmed, and commissioned as a district judge of the United States in and for the northern district of Florida, and that he had entered upon the duties of his office prior to 1893 and had continued in the performance of the duties and in the exercise of his office of judge up to the present time.

He denies that at the time specified in said article 4, to wit, A.D. 1893, he did unlawfully appropriate to his own use, without making compensation to the owner, a certain railway car belonging to the Jacksonville, Tampa and Key West Railroad Company, for the purposes stated in said article 4, or for any other purpose or purposes whatsoever; and as to the true facts of the transaction referred to in said article 4, he says, etc.

To article 5, which related to the same offense as article 4, a similar answer was given.

As to article 6 the answer was:

And the said Charles Swayne, named in said articles of impeachment, says that this honorable court ought not to have or take further cognizance of the sixth of said articles of impeachment so exhibited and presented against him, because, he says, the facts set forth in said sixth article do not, if true, constitute an impeachable high crime and misdemeanor as defined in the Constitution of the United States.

And now, not waiving the foregoing plea to the jurisdiction of the honorable Senate of the United States, sitting as a court of impeachment, as to said sixth article, the said respondent, saving to himself all advantages of exceptions to said sixth article, for answers thereto saith:

He admits that prior to the year 1900 he had been duly appointed, confirmed, and commissioned as judge of the United States in and for the northern district of Florida, and had entered upon the duties of his office, and that he was in the exercise of his office as judge as aforesaid at all times in the said article specified and as therein alleged.

The respondent denies that he did not acquire a residence in the northern district of Florida and did not, within the intent and meaning of the five hundred and fifty-first section of the Revised Statutes of the United States, reside in said district from the 23d day of July, 1894, to the 1st day of October, 1900; and denies that he violated said section; and denies that he was and is guilty of a high misdemeanor in office as charged in said article 6.

The respondent further says, etc.

As to article 7, which related to the same offense as set forth in article 6, the answer is similar.

As to the remaining articles, relating to the contempt cases, the answer begins as to each with a saving clause, and proceeds generally as follows:

And the said respondent, saving to himself all advantages of exception or otherwise to article 8 of the said articles of impeachment, for answer thereto saith:

He admits that prior to the 12th day of November, A.D. 1901, he had been duly appointed, confirmed, and commissioned as a district judge of the United States

in and for the northern district of Florida, and had entered upon the duties of his office prior to said date, and continued in the performance of the duties and in the exercise of his office of judge up to the present time, and he says that at all the times mentioned in said article 8 he was exercising and performing the duties of a district judge in and for the northern district of Florida, and that on the 12th day of November, A.D. 1901, he was holding a session of the district and circuit court of said district at the city of Pensacola, in the State of Florida, and he admits that on said date he did adjudge guilty of contempt of court and impose a fine of $100 upon and commit to prison for a period of ten days one E. T. Davis, an attorney and counselor at law, as set forth in said article 8, but he denies that said judicial action on his part was malicious or unlawful, and, on the contrary, he insists and asserts that said judgment was rendered and said sentence imposed by him from a high sense of judicial and public duty, and that upon the proceedings then pending and heard before him he could not have done otherwise than to have adjudge the said E. T. Davis guilty of the contempt of court stated in said article 8.

Respondent, further answering, says, etc.

And in conclusion the form of the answer was:

And this respondent, in submitting to this honorable court this his answer to the articles of impeachment exhibited against him, respectfully reserves leave to amend and add to the same from time to time as may become necessary or proper and when said necessity and propriety shall appear.

CHAS. SWAYNE.

ANTHONY HIGGINS,
JOHN M. THURSTON,
Of Counsel for Respondent.

2482. The Swayne impeachment continued.

Forms of procedure of authorizing, preparing, and presenting the replication in the Swayne impeachment trial.

Mr. Manager Palmer then asked [49] that the following order be agreed to:

Ordered, That the managers have time until Monday next, at 2 p.m., to consult the House of Representatives on the subject of filing exceptions, demurrer, or replication to the answer of the respondent, and that they be furnished with a copy of the said answer.

Mr. Charles W. Fairbanks, a Senator from Indiana, proposed instead an order which, after a reference to the precedent of the Belknap trial, and some modification as to time, was agreed to as follows:

Ordered, That the managers on the part of the House be allowed until the 6th day of February instant at 2 o'clock in the afternoon, to present a replication, or other pleading, of the House of Representatives to the answer of the respondent. That any subsequent pleadings, either on the part of the managers or of the respondent, shall be filed with the Secretary of the Senate, of which notice shall be given to the House of Representatives and the respondent respectively, so that all pleadings shall be closed on or before the 9th day of February instant, and that the trial shall proceed on the 10th day of February instant, at 2 o'clock p.m.

Then, on motion of Mr. Manager Palmer, the following order was agreed to:

Ordered, That the Secretary of the Senate communicate to the House of Representatives an attested copy of the answer of Charles Swayne, judge of the United States in and for the northern district of Florida, to the articles of impeachment, and also a copy of the foregoing order.

After an order had been made for printing the articles and the answer as documents, the Senate, "sitting as a court of impeachment," [50] adjourned until Monday, February 6, 1905, at 2 o'clock p.m.

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[49] Senate Journal, p. 359; Record, p. 1831.
[50] These words appear in the Record. The Senate Journal (p. 359) speaks of the "Senate sitting for the trial."

The managers on the part of the House and the counsel for the respondent retired from the Chamber.

The President pro tempore resumed the chair.

On February 4 [51] a message from the Senate transmitted to the House an attested copy of the respondent's answer, which was referred to the managers.

The message also transmitted the resolution of the Senate fixing a time for the filing of the replication and further pleadings.

On February 6 [52] in the House, Mr. Palmer, from the managers, reported the following replication, which was agreed to without debate or division:

Replication of the House of Representatives of the United States of America to the answer of Charles Swayne, judge of the United States in and for the northern district of Florida, to the articles of impeachment exhibited against him by the House of Representatives.

The House of Representatives of the United States have considered the several answers of Charles Swayne, district judge of the United States in and for the northern district of Florida, to the several articles of impeachment against him by them exhibited in the name of themselves and of all the people of the United States, and reserving to themselves all advantage of exception to the insufficiency, irrelevancy, and impertinency of his answers to each and all of the several answers of impeachment exhibited against the said Charles Swayne, judge as aforesaid, do deny each and every averment in said several answers, or either of them, which denies or traverses the acts, intents, crimes, or misdemeanors charged against Charles Swayne in said articles of impeachment or either of them; and for replication to said answer, do say that said Charles Swayne, district judge of the United States in and for the northern district of Florida, is guilty of the high crimes and misdemeanor mentioned in said articles, and that the House of Representatives are ready to prove the same.

Then, on motion of Mr. Palmer, it was also—

***Resolved*, That a message be sent to the Senate by the Clerk of the House informing the Senate that the House of Representatives has adopted a replication to the answer of Charles Swayne, judge of the northern district of Florida, to the articles of impeachment exhibited against him and that the same will be presented to the Senate by the managers on the part of the House.**

And also, that the managers have authority to file with the Secretary of the Senate, on the part of the House, any subsequent pleadings they shall deem necessary.

This message was communicated to the Senate very soon thereafter,[53] and received during the legislative session.

On the same day, at 2 p.m., the Senate [54] went into session for the trial in the usual form, and after the reading of the Journal, the Presiding Officer laid before the Senate sitting for the trial the message which had been received during the legislative session.

Thereupon Mr. Palmer, for the managers, who were in attendance, presented and read the replication.

Thereupon the Presiding Officer asked:

Have the managers anything further to offer?

Mr. Manager Palmer replied:

Nothing to offer to-day, sir.

The Presiding Officer then said:

Have counsel for the respondent anything to offer?

[51] House Journal, p. 259; Record, p. 1887.
[52] House Journal, p. 262; Record, p. 1939.
[53] Senate Journal, p. 174; Record, p. 1915.
[54] Senate Journal, p.360; Record, p. 1922.

Mr. Higgins replied:

Should we be advised there is anything further to offer we assume it can be done without a formal meeting of the Senate. It would be merely to join issue, in technical phrase.

The Presiding Officer rejoined:

It may, under the order which has already been adopted, be filed with the Secretary.

Then, on motion of Mr. Augustus O. Bacon, a Senator from Georgia, it was—

Ordered, That the Senate sitting in the trial of impeachment of Charles Swayne adjourn until Friday, the 10th instant, at 1 o'clock p.m.

2483. The Swayne impeachment continued.

Forms and ceremonies in the Swayne trial during the presentation of testimony.

The House of Representatives, although invited by the Senate, did not at any time attend the Swayne trial.

The respondent attended during the presentation of testimony and the arguments in the Swayne trial.

Instance wherein a witness was examined on the question of issuing process for a witness in the Swayne trial.

On February 10,[55] in the Senate sitting for the trial, Mr. Augustus O. Bacon, a Senator from Georgia, presented the following resolution, which was agreed to:

Ordered, That the pleadings in the matter of the impeachment of Charles Swayne having been closed, the Secretary inform the House of Representatives that the Senate is ready to proceed with the trial of said impeachment according to the rule heretofore communicated to the House, and that provision has been made for the accommodation of the House of Representatives and its managers in the Senate Chamber.[56]

At 1 o'clock and 5 minutes p.m. the managers on the part of the House of Representatives were announced, and they were conducted by the Assistant Sergeant-at-Arms to the seats assigned them in the area in front of the Secretary's desk.

The respondent, Charles Swayne, accompanied by his counsel, Mr. Anthony Higgins and Mr. John M. Thurston, entered the Chamber and took the seats provided for them in the area in front of the Secretary's desk.

The Presiding Officer. The Journal of the proceedings of the last session of the Senate sitting for the trial of the impeachment of Charles Swayne will now be read.

The Journal of the proceedings of the Senate sitting as a court on Monday, February 6, 1905, was read and approved.

The Presiding Officer. The Presiding Officer will inquire of the Sergeant-at-Arms whether the names of the witnesses have been furnished him by the managers on the part of the House and by the counsel for the respondent, and whether these witnesses have been summoned for attendance at this time?

The Sergeant-at-Arms. Mr. President, the names of the witnesses for both the managers on the part of the House of Representatives and the respondent have been furnished me and have been served, and many of the witnesses are now in the city.

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[55] Senate Journal, p. 360; Record, p. 2229.

[56] No action was taken by the House, and it did not attend the proceedings at any time.

Then, on motion of Mr. Charles W. Fairbanks, a Senator from Indiana, the following orders were severally agreed to:

Ordered, That the proceedings of the Senate sitting in the trial of impeachment of Charles Swayne be printed daily for the use of the Senate as a separate document.

Ordered, That the daily sessions of the Senate sitting in the trial of impeachment of Charles Swayne, shall, unless otherwise ordered, commence at 2 o'clock in the afternoon and continue until 5 o'clock in the afternoon.

Then, on suggestion of Mr. Manager Palmer, the names of the witnesses were called over to acertain their presence.

Then Mr. Manager Palmer stated:

Mr. President, in the case of Joseph H. Durkee, of Jacksonville, Fla., we have a certificate of a physician stating that he is not able to attend. The certificate was sent to the Presiding Officer and by him handed to me, and it has been exhibited to counsel on the other side.

Mr. Durkee is a witness who has been subpoenaed by both sides, and is a material and important witness. I have a witness present who will testify with respect to Mr. Durkee's present condition, and I ask that Mr. B. S. Liddon be summoned to testify what Mr. Durkee's present condition is, for the purpose of moving for an attachment.

Thereupon Mr. Liddon was examined under oath; and then the Presiding Officer announced that the Senate would take into account the issuance of an attachment.

Then Mr. Manager Palmer opened the case for the House of Representatives, setting forth what the managers expected to prove.

Then the introduction of testimony on behalf of the managers began.

This presentation of testimony continued until February 20,[57] when Mr. Manager Marlin E. Olmsted, of Pennsylvania, announced that the case of the managers was in.

Immediately thereafter Mr. Anthony Higgins, of counsel for the respondent, proceeded [58] with the opening address in respondent's case. He not only outlined the defense, but entered somewhat into argument on the legal features of the case. Mr. Higgins consumed the remainder of the session on that day, and spoke some time the next day.[59]

The introduction of testimony on behalf of the respondent then began and continued from day to day.

On February 23 [60] the Senate agreed to the following:

Ordered, That the session of the Senate sitting this day in the trial of the impeachment of Charles Swayne shall continue until 6 o'clock, when a recess shall be taken until 8 o'clock, and the session shall be continued until 10 o'clock unless otherwise ordered.

2484. The Swayne impeachment continued.

The Senate limited the time of the final arguments in the Swayne impeachment trial.

The Senate, after deliberation, permitted written arguments to be filed in the Swayne case, but only in such way as would permit reply.

Rebuttal evidence was offered by the managers in the Swayne trial.

Order of final arguments in the Swayne case.

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[57] Senate Journal, p. 383; Record, p. 2909.
[58] Record, pp. 2909–2915.
[59] Record, pp. 2975–2979.
[60] Record, p. 3142.

On the same day,[61] Mr. Charles W. Fairbanks, a Senator from Indiana, offered the following:

Ordered, That the managers be allowed five hours for the argument of the case, the time to be divided between them as they may agree, but the concluding oral argument shall be by one manager and shall not exceed one hour.

Ordered, That counsel for the respondent be allowed five hours for the argument of the case, the time to be divided between them as they may agree.

These orders were agreed to, but presently the vote was reconsidered on suggestion that the managers would prefer a different division of their time, so that the closing argument might be longer than an hour. So an amendment was adopted to provide that the closing argument by the manager should not exceed one hour and forty minutes. As amended the order was then agreed to.

Thereupon Mr. Manager Henry W. Palmer, of Pennsylvania, offered the following motion:

That any of the managers or counsel for respondent having all or any portion of his argument in manuscript, may deliver a copy of the same to the reporter, and any portion thereof which for lack of time or to save the time of the Senate the managers or counsel shall omit to deliver or read shall be incorporated by the reporter as part of the argument delivered, and any manager who does not address the court may file an argument before the close of the discussion.

Mr. Palmer explained the reasons for this motion:

I wish to explain the reason why we ask for this privilege. We have made no objection to curtailing the time, though this is the first time in the history of impeachment trials where the time of the managers has been curtailed. To be sure, the rule of the Senate provides that a case shall be closed by two managers, but there has never been any limit of time. We have consented to curtail the time of the gentlemen who are to speak in this case so that some of them shall have forty-five, some fifty, and some sixty minutes. Of course they will not be able to go over the case and do themselves or the case justice in that length of time. Their arguments can be printed in the Record and can be read afterwards by anybody who desires to read them.

Again, it was ordered by the Senate the other day that a brief on the part of the counsel for respondent should be printed, and a brief of 48 pages was printed about ten days ago, but we never got a chance to look at it until this morning, when it was printed in the Record. That brief pertains to jurisdictional affairs, and it is particularly desired to print a brief of the law of the case to meet the brief on the part of the gentlemen on the other side.

In the course of argument by Senators, Mr. John C. Spooner, of Wisconsin, said:

I can see no objection to the publication or the printing in the Record of any argument on one side which the other side seasonably will have opportunity to pursue and to answer.

This is a case which involves, of course, the interests of the people. It involves vitally the interests of the respondent. Whether technically this is a court or not, it pronounces a sentence or judgment. It is a court or a tribunal of first instance and of last resort. There is no appeal from its decision. If it commits an error, there is no reviewing tribunal.

Nowhere in any judicial tribunal in the country, I think, in a matter involving not simply the right to hold an office, but the right ever to hold an office of honor, trust, or emolument, would it be tolerated that an argument should be made and communicated to the court without opportunity to counsel on the other side to reply to it as fully as they might be advised.

Now, if the managers have some argument to submit in answer to the brief which is printed in the Record this morning, that, I should think, would be entirely proper to be printed, but that the managers shall be permitted to submit to the Senate, after the counsel for the respondent have finished their argument,

[61] Record, pp. 3142–3145.

further argument on any of these charges or these articles I think is against the justice of judicial procedure.

Mr. John W. Daniel, of Virginia, said:

Mr. President, my disposition would be to vote for any reasonable request made by the managers or by counsel for the respondent here, but I could under no circumstances vote affirmatively on that request. In my opinion it violates the fundamental principles of English and American law. Every accused person is entitled to be present with his counsel, to have an opportunity to hear every charge and every word of argumentative speech that is made against him, and also to have opportunity to respond thereto. It seems to me that a statement of the case carries enforcement of its justice. If that request were granted a most serious and grave argument might appear in print after his case was heard, presenting it in aspects which had not occurred either to the accused, to his counsel, or to any of his judges.

In response to these suggestions the proposed order was modified and agreed to as follows:

That any of the managers or counsel for respondent having all or any portion of his argument in manuscript may deliver a copy of the same to the reporter, and any portion thereof, which for lack of time or to save the time of the Senate, the managers or counsel shall omit to deliver or read, shall be incorporated by the reporter as part of the argument delivered, and any manager who does not address the court may file an argument before the close of the discussion: *Provided*, That all briefs and arguments shall be printed before the closing argument for the respondent begins.

On February 23,[62] at the evening session, counsel for the respondent announced that their case was closed.

The managers then began the presentation of rebuttal evidence.

The rebuttal evidence being concluded, and the managers having, in accordance with permission already given, submitted a brief to be printed, Mr. John M. Thurston, of counsel for the respondent, on this day (February 23)[63] offered on behalf of the respondent, and by reason of the approaching end of the Congress with consequent pressure of legislative business, to submit the case without argument. This offer was declined by the managers.

Mr. Manager Marlin E. Olmsted, of Pennsylvania, then began the arguments in closing.

On February 24[64] Mr. Manager James B. Perkins, of New York, argued; and was followed by Messrs. Managers Henry D. Clayton, of Alabama, and Samuel L. Powers, of Massachusetts, and they were followed on the same day by Mr. Anthony Higgins, of counsel for the respondent.

On February 25[65] Mr. John M. Thurston, of counsel for the respondent, argued; and then, on the same day, Mr. Manager David A. De Armond, of Missouri, closed the case for the House of Representatives and the people.

2485. The Swayne impeachment continued.

The Senate in secret session framed the rule for voting on the articles impeaching Judge Swayne.

The respondent did not attend when the articles in the Swayne case were voted on in the Senate.

Forms of voting on the articles and declaring the result in the Swayne impeachment.

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[62] Record, p. 3178.
[63] Record, p. 3181.
[64] Record, pp. 3246–3265.
[65] Record, pp. 3365–3383.

Judgment of acquittal entered in the Swayne case by direction of the Presiding Officer.

The Swayne trial being concluded, the Senate, on motion, adjourned without day.

The Senate announced to the House by message the acquittal of Judge Swayne.

Then, on the same day,[66] on motion of Mr. Charles W. Fairbanks, a Senator from Indiana, it was ordered that the doors be closed for deliberation.

The managers on the part of the House, the respondent, and counsel for the respondent retired from the Chamber.

The Senate proceeded to deliberate with closed doors, and at the expiration of one hour and thirty-five minutes the doors were reopened.

While the doors were closed,

Mr. Augustus O. Bacon, of Georgia, submitted the following resolution, which was agreed to:

Resolved, That on Monday next, the 27th day of February, at 10 o'clock a. m., the Senate shall proceed to vote, without debate, on the several articles of impeachment. The Presiding Officer shall direct the Secretary to read the several articles of impeachment in their regular order. After the reading of each article the Presiding Officer shall put the question following: "Senators, how say you, is the respondent, Charles Swayne, guilty or not guilty as charged in this article?" The Secretary will proceed to call the roll for the response of Senators.

Whereupon, when his name is called, each Senator shall arise in his place and give his response "guilty" or "not guilty," and the Secretary shall record the same.

Resolved, That the Secretary notify the House of Representatives of the foregoing.

On February 27,[67] in the Senate, the following occurred:

The PRESIDENT pro tempore. The hour of 10 o'clock having arrived, to which the Senate sitting in the impeachment trial adjourned, the Senator from Connecticut will please take the chair.

Mr. Platt, of Connecticut, assumed the chair.

The PRESIDING OFFICER. (Mr. Platt, of Connecticut). The Senate is now sitting in the impeachment trial of Charles Swayne. The Sergeant-at-Arms will make proclamation.

The Sergeant-at-Arms made the usual proclamation.

The PRESIDING OFFICER. The Sergeant-at-Arms will see if the managers on the part of the House are in attendance.

The managers on the part of the House (with the exception of Mr. Powers, of Massachusetts, and Mr. Perkins) appeared and were conducted to the seats assigned them.

The PRESIDING OFFICER. The Sergeant-at-Arms will see if the respondent and his counsel are in attendance.

Mr. Higgins and Mr. Thurston, the counsel for the respondent, entered the Chamber and took the seats assigned them.

The PRESIDING OFFICER. The Journal of the last trial day will be read.

The Journal of the proceedings of the Senate sitting for the trial of the impeachment of Charles Swayne Friday, February 24, was read.

The PRESIDING OFFICER. The Secretary will read the first article of impeachment exhibited by the House of Representatives against Charles Swayne.

The Secretary read the first article of impeachment, as follows: * * *

The article having been read, the Presiding Officer put the question:

Senators, how say you, is the respondent, Charles Swayne, guilty or not guilty as charged in this article?

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[66] Senate Journal, p. 365; Record, p. 3383.
[67] Senate Journal, pp. 365–369; Record, pp. 3467–3472.

The roll was then called, Senators answering "guilty" or "not guilty." In the same manner the verdict was taken on each article, with result as follows:

	Guilty	Not guilty
Article I	33	19
Article II	32	5[illegible]
Article III	32	5[illegible]
Article IV	13	6[illegible]
Article V	13	6[illegible]
Article VI	31	5[illegible]
Article VII	19	4[illegible]
Article VIII	31	5[illegible]
Article IX	31	5[illegible]
Article X	31	5[illegible]
Article XI	31	5[illegible]
Article XII	35	4[illegible]

After the vote on the first article the Presiding Officer announced:

Senators, upon Article 1 of the impeachment of Charles Swayne 33 Senators have voted "guilty" and 19 Senators have voted "not guilty." Two-thirds of the Senators present not having voted "guilty," Charles Swayne, the respondent, stands acquitted of the charges contained in the first article.

A similar announcement was made after the vote on each article.

At the conclusion of the voting, after the result on the twelfth article had been recorded, the Presiding Officer said:

The Presiding Officer, following the precedent in the Belknap impeachment case, calls the attention of the Senate to the twenty-second rule of procedure and practice in the trial of impeachments, which provides:

"And if the impeachment shall not, upon any of the articles presented, be sustained by the votes of two-thirds of the members present, a judgment of acquittal shall be entered; but if the person accused in such articles of impeachment shall be convicted upon any of said articles by the votes of two-thirds of the members present, the Senate shall proceed to pronounce judgment, and a certified copy of such judgment shall be deposited in the office of the Secretary of State."

If there is no objection, the Presiding Officer will direct the Secretary to enter a judgment of acquittal according to the rule. The Chair hears no objection. The Secretary will read it.

The Secretary read as follows:

The Senate having tried Charles Swayne, judge of the district court of the United States for the northern district of Florida, upon twelve several articles of impeachment exhibited against him by the House of Representatives, and two-thirds of the Senators present not having found him guilty of the charges contained therein: It is therefore

Ordered and adjudged, That the said Charles Swayne be, and he is, acquitted of the charges in said articles made and set forth.

Mr. Charles W. Fairbanks, of Indiana, said:

Mr. President, I move that the Senate sitting for the trial of the impeachment of Charles Swayne adjourn without day.

The motion was agreed to; and (at 11 o'clock and 40 minutes a.m.) the Senate sitting upon the trial of the impeachment of Charles Swayne adjourned without day.

The managers on the part of the House and the counsel for the respondent retired from the Chamber.

The President pro tempore resumed the chair.

On the same day,[88] in the House, this message was received:

IN THE SENATE OF THE UNITED STATES,
FEBRUARY 27, 1905.

The Senate having tried Charles Swayne, judge of the district court of the United States for the northern district of Florida, upon twelve several articles of impeachment exhibited against him by the House of Representatives, and two-thirds of the Senators present not having found him guilty of the charges contained therein: It is therefore.

Ordered and adjudged, That the said Charles Swayne be, and he is, acquitted of the charges in said articles made and set forth.

Attest:

CHARLES G. BENNETT, *Secretary*.

The managers made no report to the House.

[88] House Journal, p. 393; Record, 3593.

Impeachment Proceedings Not Resulting in Trial [1]

2486. The inquiry into the conduct of Judge George Turner in 1796.

In 1796 the House discontinued impeachment proceedings against a Territorial judge on assurance that he would be prosecuted in the courts.

Opinion of Attorney-General Charles Lee as to impeachment of a Territorial judge holding office during good behavior.

Advice of Attorney-General Lee as to mode of instituting and continuing impeachment proceedings.

On receipt of a petition containing charges against a judge, the House, in 1796, instituted an investigation.

On April 25, 1796,[2] a petition was presented in the House from sundry inhabitants of the county of St. Clair, in the Territory northwest of the Ohio River, stating certain grievances and inconveniences to which they had been subjected by the unwarrantable conduct of George Turner, one of the judges of the said Territory, in the exercise

[1] Hinds' Precedents, vol. 3, p. 981 (1907).
[2] First session Fourth Congress, Journal, p. 522; American State Papers (miscellaneous), Vol. I, p. 151.

of his official duties, and praying that such relief might be granted in the premises as should seem meet to the wisdom of Congress. This petition specified that the judge held a court "unknown to and contrary to the laws of the Territory" at a remote and inconvenient place; that he imposed heavy fines and forfeitures; that he denied the right reserved to the people by the constitution of the Territory, especially as regarded the descent and conveyance of property, and the use of the French language; and that he managed the affairs of interstate persons to the damage of the heirs and creditors.

The House referred to petition to a committee composed of Messrs. Theophilus Bradbury, of Massachusetts; Nichols Gilman, of New Hampshire; Thomas Hartley, of Pennsylvania; John Heath, of Virginia, and Alexander D. Orr, of Kentucky.

On May 5,[3] the committee was discharged from further consideration of the petition and the same was referred to the Attorney-General for his opinion thereon.

On May 9[4] Charles Lee, the Attorney-General, transmitted his opinion:

That the charges exhibited in the petition against Judge Turner, and especially the first, second, and fifth, are of so serious a nature as to require that a regular and fair examination into the truth of them should be made, in some judicial course of proceeding; and if he be convicted thereof, a removal from office may and ought to be a part of the punishment. His official tenure is during good behavior; and, consequently, he cannot be removed until he be lawfully convicted of some malversation in office. A judge may be prosecuted in three modes for official misdemeanors or crimes: by information, or by an indictment before an ordinary court, or by impeachment before the Senate of the United States. The last mode, being the most solemn, seems, in general cases, to be best suited to the trial of so high and important an officer; but, in the present instance, it will be found very inconvenient, if not entirely impracticable, on account of the immense distance of the residence of the witnesses from this city [Philadelphia]. In the prosecution of an impeachment, such rules must be observed as are essential to justice; and, if not exactly the same as those which are practiced in ordinary courts, they must be analogous, and as nearly similar to them as forms will permit. Thus, before an impeachment is sent to the Senate, witnesses must be examined, in solemn form, respecting the charges, before a committee of the House of Representatives, to be appointed for that purpose, as in a case of indictment witnesses are examined by a grand jury. Upon the trial the witnesses must give their testimony before the Senate, as in a case of indictment they do before the ordinary court and petit jury; so, also, perhaps, it would be proper that some responsible person or persons should undertake to answer the costs of trial to the accused, in the event of his acquittal. It ought to be remarked that, if the mode of impeachment be deemed preferable, the aforesaid petition, subscribed by forty-nine citizens, may be regarded as sufficient inducement to the House to appoint a committee of inquiry, with authority to examine witnesses and report the substance of their testimony respecting the charge therein set forth, at the present or next session; and, if the report of the testimony will warrant an impeachment, articles are to be directed to be drawn and presented to the Senate, who will appoint a time of trial, giving reasonable notice thereof to the accused and to the accusers, etc.

However, the Attorney-General is of opinion that it will be more advisable, on account of the expense, the delay, the certain difficulty, if not impossibility, of obtaining the attendance here of the witnesses who reside in the Territory northwest of the Ohio, about the distance of 1,500 miles, that the prosecution should not be carried on by impeachment, but by information on indictment before the supreme court of that Territory, which is competent to the trial; and he prays leave to inform the House that, in consequence of affidavits stating complaints against Judge Turner, of oppressions and gross violations of private

[3] Journal, p. 539.
[4] American State Papers (miscellaneous), Vol. I, p. 151.

property, under color of his office, which have been lately transmitted to the President of the United States, the Secretary of State has been by him instructed to give orders to Governor St. Clair to take the necessary measures for bringing that officer to a fair trial, respecting those charges, before the court of that Territory, according to the laws of the land; which course is also recommended to be pursued relative to the matters charged in said petition.

Judge Turner was one of three supreme court judges, "any two of whom to form a court, who shall have a common-law jurisdiction, * * * and their commissions shall continue in force during good behavior." [5]

The report of the Attorney-General was, on May 10,[6] referred to a committee composed of the same members originally appointed to consider the petition, and they were directed to "examine the matter thereof, and report the same, with their opinion thereupon, to the House."

On February 16, 1797,[7] a memorial was presented from Judge Turner praying that the House enter upon an investigation of the allegations and charges brought against him in the petition. On February 22 [8] this memorial was referred to the same committee.

On February 27 [9] that committee reported that the case should come to a hearing before the court of the Territory, where the judge would have an opportunity of defending himself.

The report was laid on the table and not acted on further.[10]

2487. The inquiry into the conduct of Judge Peter B. Bruin, in 1808.

Instance of proceedings looking to the impeachment of a judge of a Territory.

The investigation of Judge Bruin's conduct was set in motion by charges preferred by a Territorial legislature.

The House in the Bruin case declined to impeach before it had made an investigation by its own committee.

Instance wherein a Delegate was made chairman of a committee to investigate the conduct of a judge.

On April 11, 1808 [11] the Speaker presented to the House sundry resolutions of the legislative council and house of representatives of the Mississippi Territory, preferring certain charges against Peter B. Bruin, presiding judge of the Territory, and instructing Mr. George Poindexter, Delegate in Congress from the said Territory, to impeach the said judge, and pledging themselves, "in behalf of the people of this Territory, to substantiate and make good" the said charges, which were specified as "neglect of duty and drunkenness on the bench."

Mr. Poindexter thereupon presented resolutions as follows:

Resolved, That a committee be appointed to prepare and report articles of impeachment against Peter B. Bruin, one of the judges of the superior court of the Mississippi Territory; and that the said committee have power to send for persons, papers, and records.

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[5] Organic law of Northwest Territory, 1 Stat. L., pp. 51, 286.
[6] Journal, p. 548.
[7] Second session, Journal, p. 701.
[8] Journal, p. 714.
[9] Journal, p. 724: Annals, p. 2320, 8.
[10] It appears that Jonathan Return Meigs was appointed Judge on February 12, 1798, but the records of the State Department do not show whose place he took. The appointment of Judge Meigs was made two years after the proceedings in the House against Judge Turner.
[11] First session Tenth Congress, Journal, p. 204; Annals, p. 2068; American State Papers miscellaneous), Vol. I, pp. 921, 922.

In the debate it was objected by Mr. Timothy Pitkin, jr., of Connecticut, that it would hardly be dignified for the Congress to proceed to an impeachment on the authority of a resolution of the legislature of a State or Territory. A committee should first be appointed to inquire into the propriety of impeaching. Mr. John Rhea, of Tennessee, drew a distinction between the legislature of a State and that of a Territory, and, furthermore, did not consider the resolutions of a legislature conclusive evidence of fact.

Thereupon Mr. Poindexter modified his resolution by striking out the words "prepare and report," and inserting the words "inquire into the expediency of preferring." He further stated that he had seen Judge Bruin on the bench in a state of intoxication.

On April 18 [12] the House further amended the resolution, and agreed to it, as follows:

Resolved, That a committee be appointed to inquire into the conduct of Peter B. Bruin, a judge of the superior court of the Mississippi Territory, and report whether, in their opinion, he hath so acted, in his official capacity, as to require the interposition of the Constitutional powers of this House; and that the said committee have power to send for persons, papers, and records.

The committee were appointed as follows: Messrs. Poindexter, Samuel W. Dana, of Connecticut; Jesse Wharton, of Tennessee; Benjamin Howard, of Kentucky; Jeremiah Morrow, of Ohio; Joseph Calhoun, of South Carolina; and John Campbell, of Maryland.

On April 21,[13] Mr. Morrow reported a resolution which, after amendment, was agreed to as follows:

Resolved, That George Poindexter, chairman of the said committee, be authorized to cause to be taken before a magistrate or other proper officer such depositions in relation to the official conduct of the said judge as, in his judgment, may be material to the inquiry, having first notified the said Bruin of the time and place, or places, of taking such depositions, so that he may give his attendance; and that the depositions so taken be laid before the Congress at their next session.

On April 25 this session of Congress adjourned.

It does not appear that the matter was again taken up. On March 7, 1809, as the records of the State Department show, Francis Xavier Martin was appointed judge, indicating the death or resignation of Judge Bruin.

It appears that the judges of the court of Mississippi Territory, like the judges of the territory northwest of the Ohio, held office "during good behavior," such being the provision of the statutes.[14]

2488. The inquiry into the conduct of Judge Harry Toulmin, in 1811.

Instance of proceedings looking to the impeachment of a judge of a Territory.

The inquiry as to Judge Toulmin was set in motion by action of a grand jury forwarded by a Territorial legislature.

In Judge Toulmin's case the House, after investigating in a preliminary way, declined to order a formal investigation.

On December 16, 1811,[15] the Speaker laid before the House a letter from Cowles Mead, speaker of the house of representatives of the Mis-

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[12] Journal, p. 277; Annals, p. 2189.
[13] Journal, p. 286; Annals, p. 2251.
[14] 1 Stat. L., pp. 51, 550.
[15] First session Twelfth Congress, Journal p. 67; Annals, p. 522; American State Papers, Vol. II (Miscellaneous), p. 162; Annals, p. 2162.

sissippi Territory, inclosing the copy of a presentment against Harry Toulmin, judge of the superior court for the Washington district, in said Territory,[16] made by the grand jury of Baldwin County, specifying charges against the said judge, which were read and ordered to lie on the table.

Mr. George Poindexter, Delegate from Mississippi Territory, also presented a copy of the same presentment; which was ordered to lie on the table.

On December 19[17] Mr. Poindexter submitted this resolution:

Resolved, That a committee be appointed to inquire into the conduct of Harry Toulmin, judge of the district of Washington, in the Mississippi Territory, and report whether, in their opinion, he hath so acted, in his official capacity, as to require the interposition of the constitutional powers of this House; and that said committee have power to send for persons and papers.

On December 21[18] Mr. Poindexter withdrew the resolution, and moved that the letter of Cowles Mead, with the accompanying papers, be referred to a select committee to consider and report thereon to the House.

The committee was appointed as follows: Messrs. Poindexter, John Rhea, of Tennessee, John C. Calhoun, of South Carolina; John Taliaferro, of Virginia; Abijah Bigelow, of Massachusetts, and Epaphroditus Champion, of Connecticut.

On January 14, 1812,[19] sundry documents in refutation of the charges were presented and referred to the committee. Also on February 1[20] other papers of a similar tenor were presented and referred. On March 19 and 25 also, similar papers were referred.

On March 11[21] a motion of Mr. Rhea that the committee be discharged from consideration of the subject was decided in the negative, and on April 13 a motion that the committee be directed to report was likewise decided in the negative.

On May 21[22] Mr. Poindexter, from the committee, reported—

That the charges contained in the presentment aforesaid have not been supported by evidence: and from the best information your committee has been enabled to obtain on the subject it appears that the official conduct of Judge Toulmin has been characterized by a vigilant attention to the duties of his station, and an inflexible zeal for the preservation of the public peace and tranquillity of the country over which his judicial authority extends. They therefore recommend the following resolution:

"*Resolved*, That it is unnecessary to take any further proceeding on the presentment of the grand jury of Baldwin County, in the Mississippi Territory, against Judge Toulmin."

This report was concurred in by the House.

2489. The inquiry into the conduct of Judges William P. Van Ness, Mathias B. Tallmadge, and William Stephens, in 1818.

Judge William Stephens having resigned his office, the House discontinued its inquiry into his conduct.

In 1818 the House inquired into the official conduct of Judges William P. Van Ness and Mathias B. Tallmadge, of the district courts of New York, and William Stephens of the district court of Georgia.[23]

[16] The Mississippi judges were created by statute which made the tenure during good behavior. (1 Stat. L., pp. 51, 550; 2 Stat. L., pp. 301, 564.)
[17] Journal, p. 78; Annals, p. 559.
[18] Journal, p. 87; Annals, p. 567.
[19] Journal, p. 125.
[20] Journal, pp. 155, 255, 265.
[21] Journal, pp. 242, 288.
[22] Journal, p. 347; Annals, p. 1436.
[23] First session Fifteenth Congress, Journal, p. 447; Annals, p. 1715.

The committee found that Judge Van Ness had shown some remissness in not exercising constant vigilance over the money of the court, which had been purloined by the clerk, and in not vigorously enforcing the provisions of the law and rules of the court. There were also complaints against some decisions and orders of Judge Van Ness, "but the respect which this committee entertains for the constitutional rights of a judge, and for the laws which provide adequate remedies for any errors he may commit, forbids their questioning any judicial opinions." The committee say that they have discovered nothing which furnishes "any ground for the constitutional interposition of the House." [24] The inquiry into the conduct of Judge Van Ness was instituted by a resolution reported from the Judiciary Committee, who had been examining the conduct of the clerk of the court, and found some circumstances connected with the judge's conduct which justified investigation.[25] And the names of Judges Tallmadge and Stephens had been added by way of amendment to the resolution of inquiry.

On November 24, 1818,[26] on motion of Mr. John C. Spencer, of New York, it was

Ordered, That the committee appointed at the last session of Congress, to inquire into the official conduct of certain judges of the courts of the United States, be discharged from so much of their duty as relates to the conduct of William Stephens, who has resigned his office of judge of the court of the United States for the district of Georgia.

On February 17, 1819,[27] Mr. Spencer reported on the case of Judge Tallmadge, who was charged with having omitted to hold the terms of the district court for which he was appointed, according to law. The committee found that at certain times he had omitted sessions, but say:

It appears satisfactorily, from the testimony of several physicians, and of the Hon. Nathan Sanford, given on a former inquiry into the conduct of Judge Tallmadge, that in 1810 his health became extremely delicate, and that very great exertion of body, or any unusual agitation of mind, invariably produced severe sickness, so as to disqualify him for any official duties; and that his life was prolonged by visiting a more genial climate in the winter season.

On entering upon the duties of his office in 1805, Judge Tallmadge encountered a mass of business which had accumulated from the ill health and the death of his predecessor, and from the want of any judge in the court for the time immediately preceding his appointment. The sickness of Judge Patterson, who should have presided in the circuit court, materially increased the labors of the district judge.

The committee are of opinion that there is nothing established in the official conduct of Judge Tallmadge to justify the constitutional interposition of the House.

The report was laid on the table.

2490. The investigation into the conduct of Judge Joseph L. Smith, in 1825 and 1826.

The House decided to investigate the conduct of Judge Smith, on assurance of a Territorial Delegate that the person making the charges was reliable.

Instance wherein charges were presented against a judge in three Congresses.

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[24] Second session Fifteenth Congress, Report No. 136.
[25] Annals, p. 1715.
[26] Second session Fifteenth Congress, Journal, p. 35; Annals, p. 313.
[27] Journal, p. 279; Annals, p. 1222.

On February 3, 1825,[28] Mr. Richard K. Call, Delegate from Florida Territory, presented this resolution:

Resolved, That the Committee on the Judiciary be instructed to inquire whether either of the judges of the district courts of Florida have received fees for their services not authorized by law; and, if any, what other malpractices have been committed by the said judges, or either of them; and that the said committee be authorized to compel the attendance of persons and the production of papers to promote this investigation.

In support of this resolution Mr. Call presented a letter addressed to himself by Edgar Macon, United States attorney for East Florida, in response to a request made by Mr. Call for information.

At the May term of the superior court of East Florida—

Says Mr. Macon's letter—

in 1824 Judge Smith established a number of rules for the government of the practice of his court, by which provision is made for the transacting and doing of much business in vacation, which previously had been done in term, viz, such as making orders for commissions to take foreign testimony, and hearing and deciding on motions for amending pleadings, etc., and other matters and questions generally aiding in the usual progress of a suit; for all which services, when performed, Judge Smith has charged fees. I have paid them, and I believe every attorney of his (Judge Smith's) court has done the same. It is proper to mention that in the United States and Territorial cases Judge Smith has never charged fees.

Mr. Call vouched for the reliability of Mr. Macon's word, and asked that the resolution be agreed to.

The House, without division, agreed to the resolution.

On February 28,[29] Mr. William Plumer, jr., of New Hampshire, from the Committee on the Judiciary, submitted a report, saying that the committee were—

not able to perceive how any law of the Territory can authorize the judge to receive any compensation in the shape of fees for his official services in the place which he holds under the authority of the United States. The distance of the parties, however, from the seat of government, renders it wholly impracticable to make any investigation into the particular circumstances of the case during the present session of Congress. The committee therefore pray that they may be discharged from any further consideration of the resolution.

The report was read and laid on the table.

At the beginning of the next Congress on December 27, 1825,[30] Mr. Joseph M. White, Delegate from Florida, presented the petition of Joseph L. Smith, judge of the supreme court of said Territory, praying that his conduct as judge might be inquired into, and that his character might be freed from the public inputation to which it had been subjected.

Mr. White also presented the petition of Edgar Macon charging Judge Smith with malfeasance and corruption in office, and praying that the charges might be investigated by Congress.

These papers were ordered referred to the Judiciary Committee.

On January 9[31] Mr. White presented a memorial of the legislative council of Florida soliciting an investigation of the charges preferred against Judge Smith.

This paper also was referred to the Judiciary Committee.

On February 7, 1826,[32] Mr. John C. Wright, of Ohio, from the

[28] Second session, Eighteenth Congress, Journal, pp. 197, 198; Debates, pp. 438, 439.
[29] Journal, p. 279; Report No. 87.
[30] First session, Nineteenth Congress, Journal, p. 93.
[31] Journal, p. 129.
[32] Journal, p. 233.

Committee on the Judiciary, reported that the committee had examined the petition, memorial, and evidence offered, and asked that they be discharged from the further consideration of the subject.

This report was agreed to by the House.

On January 11, 1830,[33] Mr. White presented a memorial addressed to the President of the United States, and sundry documents signed by the citizens of East Florida, charging Judge Smith with tyrannical and oppressive conduct, and imploring his removal from the office of judge.

These papers were referred to the Judiciary Committee, but it does not appear that they were ever reported on.[34]

2491. The investigations into the conduct of Judge Buckner Thurston, in 1825 and 1837.

The investigations into the conduct of Judge Thurston were set in motion by memorials.

Form of memorial praying for the impeachment of Judge Thurston, in 1837.

The House sometimes refers for preliminary inquiry a memorial praying impeachment and sometimes orders investigation at once.

In 1825 the House preferred that charges against a judge should be investigated by a committee.

During the investigation of Judge Thurston with a view to impeachment he was present and cross-examined witnesses.

On February 21, 1825,[35] Mr. James Strong, of New York, presented a petition of John P. Van Ness complaining of the official conduct of Buckner Thurston, one of the associate judges of the Circuit Court of the United States for the District of Columbia, and praying that the subject of his complaint might be inquired into by Congress.

The petition was referred to the Committee on the District of Columbia, but on February 24 the reference was changed to the Judiciary Committee.

On February 28[36] Mr. William Plumer, jr., of New Hampshire, from the Judiciary Committee, submitted a report that the committee—

> Having investigated the matter of the memorial, they are unanimously of opinion that there is nothing in the conduct of Judge Thurston which requires the interposition or reprehension of this House. They therefore ask to be discharged from the further consideration of this memorial.

The report was laid on the table.

On January 30, 1837,[37] the Speaker presented a memorial of Richard S. Coxe and William L. Brent, of the District of Columbia, praying an investigation into the judicial conduct of Judge Thurston. The memorial in part was as follows:

> Should this memorial be referred to the appropriate committee we pledge ourselves to prove to the satisfaction of Congress—
>
> 1. That Judge Thurston is grossly and avowedly ignorant and regardless of the law which it is his duty to administer.

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[33] First session Twenty-first Congress, Journal, p. 146.

[34] The judge of the supreme court of Florida held his office by virtue of a statute, and for the term of four years. (3 Stat. L., p. 753; 4 Stat. L., p. 45.)

[35] Second session Eighteenth Congress, Journal, pp. 254, 267.

[36] Journal, p. 279; Report, No. 85.

[37] Second session Twenty-fourth Congress, Journal, pp. 316, 317.

2. That he is habitually inattentive and neglectful in the discharge of his official duties.

3. That his deportment on the bench is rude, insolent, and undignified, and calculated to bring the administration of the law into contempt.

4. That he is habitually rude and insolent toward his brethren on the bench, to their great annoyance and to the hindrance of justice.

5. That he is habitually rude, insolent, and quarrelsome toward the members of the bar; constantly in a state of irritation and excitement, applying to them, without cause or provocation, the most harsh and vulgar epithets in our vocabulary.

6. That, in these different modes, he incessantly interferes with the administration of justice, gratifies his own personal passions at the expense of truth and justice, involves the Government and the community in enormous expenses and vexatious delays, and employs his official power and station in outraging the feeling and illegally and unjustly injuring those who may accidentally become the objects of his infuriate resentment.

7. That on several occasions he has, from the bench, actually invited members of the bar to leave the court and enter into a personal encounter with him.

8. That he is, from want of professional information, from his neglect of his duties, from his furious and ungovernable temper, wholly unfit for the station he occupies.

These general heads of accusations, with all the necessary details of time, place, person, and circumstance, we tender ourselves ready and prepared to establish by the most plenary proof.[38]

On January 31[39] Mr. Francis Thomas, of Maryland, proposed this resolution, which was agreed to by the House:

Resolved, That the Committee on the Judiciary be authorized to send for persons and papers, and to inquire into the truth of the charges made in the memorial of William L. Brent and Richard S. Coxe, complaining of the official conduct of Buckner Thruston, one of the judges of the circuit court of the United States for the District of Columbia.

On March 3,[40] the last day of the Congress, Mr. Thomas reported from the committee, without recommendation of any kind, the testimony taken before the committee. The report was ordered to lie on the table and be printed.

The report shows that many witnesses were examined, and that Judge Thurston was permitted to cross-examine.

Judge W. Cranch, an associate of Judge Thurston, having been called upon to testify in this case, objected on behalf of himself and Judge Morsell to giving testimony, on account of their official relations to the respondent, but the committee overruled this objection.

It does not appear that any action was taken further than the printing of the report.

The records of the State Department indicate that Judge Thurston remained in office until he died, on August 30, 1845. On October 3, 1845, James Dunlop was appointed judge.

2492. The investigation into the conduct of Judge Alfred Conkling in 1829.

In the case of Judge Conkling the memorial preferring charges was referred to the Judiciary Committee for examination before an investigation was ordered.

Views of the minority of the Judiciary Committee, in 1830, as to offenses amounting to high misdemeanor.

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[38] The memorialists subscribed their names to the memorial, but the signatures were not attested.

[39] Journal, p. 332.

[40] Journal, p. 586; Report No. 327.

On February 16, 1829,[41] Mr. Selah R. Hobbie, of New York, presented a memorial of Martha Bradstreet, of the State of New York, preferring charges against Alfred Conkling, judge of the district court of the United States for the northern district of New York, as grounds for an impeachment of the said judge.

This memorial was referred to the Committee on the Judiciary.

On February 23 the House ordered the committee discharged from consideration of the memorial and gave the memorialist leave to withdraw.

In the next Congress, on February 22, 1830,[42] on motion of Mr. Churchill C. Cambreleng, of New York, it was ordered that the memorial of Martha Bradstreet in relation to Judge Conkling be referred to the Committee on the Judiciary.

On March 22 [43] Mr. Cambreleng presented a memorial of Martha Bradstreet, preferring additional charges and praying to be permitted to substantiate them. This memorial was referred to the Judiciary Committee.

On March 26 [44] the Judiciary Committee were granted leave to sit during sessions of the House for the purpose of investigating the matters set forth in the memorial.

On April 3 [45] Mr. Charles A. Wickliffe, of Kentucky, from the Committee on the Judiciary made an unfavorable report on the memorial, finding no cause for impeachment. This report was concurred in by all the members of the committee except Mr. Warren R. Davis, of South Carolina. Presumably those concurring were Messrs. James Buchanan, of Pennsylvania; Henry R. Storrs, of New York; Thomas T. Bouldin, of Virginia; William W. Ellsworth, of Connecticut; and Edward D. White, of Louisiana. Mr. Davis dissented, and on April 8 [46] filed minority views. He states in his views that the memorialist presented thirty-three charges for misdemeanors in office. The majority had concluded that there was nothing in the charges or in the testimony adduced to support them that required the constitutional interposition of the House. The minority believed that two charges were supported by adequate testimony, and if true amounted to a high misdemeanor:

(*a*) His causing the name of John L. Tillinghast to be struck from the rolls of the said court, for having expressed out of court his opinion of the said Judge Conkling.

(*b*) His having thereby illegally and unconstitutionally assumed to himself the power to act as judge in his own cause. And, in pursuit of his object, violated the immemorial course and practice of courts of justice, and disregarded even the form of law. And this for the mere gratification of his private revenge.

Mr. Davis argued at some length in support of his claim that the two specifications, as supported by the evidence, contained matter amounting to misdemeanor in office.

The report of the majority was laid on the table, and no further action appears.

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[41] Second session Twentieth Congress, Journal, pp. 291, 292, 324.
[42] First session Twenty-first Congress, Journal, 319.
[43] Journal, p. 447.
[44] Journal, p. 462.
[45] Journal, p. 494.
[46] Journal, p. 514; Report No. 342.

2493. The investigation of the conduct of Benjamin Johnson, a judge of the superior court of the Territory of Arkansas, in 1833.

In 1833 the Judiciary Committee held that a Territorial judge was not a civil officer of the United States within the meaning of the Constitution.

On January 15, 1833,[47] the Speaker submitted to the House a letter from Egbert Harris, of the Territory of Arkansas, inclosing charges and specifications made by William Cummins against Benjamin Johnson, one of the judges of the superior court of the Territory of Arkansas.

Mr. Ambrose H. Sevier, Delegate from Arkansas, presented sundry documents exculpatory of Judge Johnson.

The letter of Mr. Harris and the other papers were referred to the Committee on the Judiciary.

On February 8 [48] Mr. John Bell, of Tennessee, presented the report of the committee on the memorial. The committee included besides Mr. Bell, Messrs. William W. Ellsworth of Connecticut; Henry Daniel, of Kentucky; Thomas F. Foster of Georgia; Wm. F. Gordon, of Virginia; Samuel Beardsley, of New York, and Richard Coulter, of Pennsylvania.

The report first dealt with a preliminary question:

A majority of the committee are strongly inclined to the opinion that such an officer is not a proper subject of trial by impeachment. Some of the reasons upon which that opinion may be supported will be stated.

The Constitution, in Article II, section 4, provides that "all civil officers of the United States shall be removed from office by impeachment." The institution by Congress of those political corporations, denominated, in the language of our legislation upon that subject, Territorial governments, is only authorized by a very liberal construction of the general power given by the Constitution to Congress over the public domain. But, admitting that exercise of power to be well enough founded, still, can a judge of such a government be said to be an officer of the United States within the meaning of the clause already quoted? Should the doubt thrown out by the committee upon this point appear to the House to be without reasonable foundation, they think they will be fully sustained in the opinion, that, whether liable to impeachment or not the practice of impeaching subordinate officers, and especially such as hold their offices by a tenure not more firm and durable than the judge of a Territorial court would soon be found highly inconvenient and injurious to the public interest. The judge whose conduct in the present instance is alleged to be such as to call for the exercise of the impeaching power of the House, holds his office for a term of four years only, and may, by the express provision of the act of Congress establishing his office, be removed at any time within that term by the President. The trial by impeachment is the highest and most solemn in its nature known in the administration of public justice. It is established for high political purposes, and would seem to be proper only against judges who hold their offices during good behavior, and other high officers of the Government, for such crimes or misdemeanors as the public service and interest require to be punished by removal from office.

Proceeding to the merits of the case, the report says:

The general charges against him are favoritism or partiality to particular counsel in the trial of causes, irritability of temper and rudeness on the bench toward his brother judges and the bar; incapacity, manifested by a vacillating and inconsistent course of judicial decision, and habitual intemperance.

The committee did not find these charges well sustained, and furthermore they found decided and unequivocal testimony in favor of the judge.

[47] Second session Twenty-second Congress, Journal, p. 179.
[48] Journal, p. 290; Report No. 88.

The report was laid on the table.

2494. The investigation into the conduct of Judge P. K. Lawrence, in 1839.

The proceedings in the case of Judge Lawrence were set in motion by a memorial setting forth specific charges.

The memorial setting forth charges against Judge Lawrence was referred for examination before an investigation was ordered.

The House referred the charges made against Judge Lawrence, in 1839, to a select committee instead of to the Judiciary Committee.

A select committee recommended the impeachment of Judge P. K. Lawrence, in 1839.

The investigation into the conduct of Judge P. K. Lawrence, in 1839, was entirely ex parte.

On January 7, 1839,[49] Mr. Henry Johnson, of Louisiana, presented a memorial of Duncan N. Hennen, a citizen of the State of Louisiana, making charges of high crimes and misdemeanors agains P. K. Lawrence, judge of the district court of the United States for the eastern district of Louisiana, and praying that the House of Representatives would inquire into the facts whether the said Judge Lawrence, in the exercise of the high trust and confidence reposed in him, had not been guilty of corrupt, malicious, and dangerous abuses of power.

The memorial set forth specifically that the memorialist had been appointed clerk of the said court in 1834, and had served until May 18, 1838, when Judge Lawrence sent him a letter of removal and informing him that John Winthrop had been appointed in his place; that the memorialist, being advised that Judge Lawrence had acted without power, refused to deliver the records of the court to the said Winthrop; that Judge Lawrence had issued a writ without authentication of the seal of the court, commanding the marshal to seize the records; that the memorialist, as clerk of the district court, became ex officio clerk of the circuit court for the ninth circuit; that on May 21, 1838, both the memorialist and the said Winthrop presented themselves, each as clerk, before the circuit court, Judge John McKinley and the aforesaid Judge Lawrence, sitting; that the memorialist objected, when arguments were to be heard on the rival claims, to Judge Lawrence sitting in the matter, (*a*) because he professed to have formed and delivered an opinion on the question; (*b*) because, from expressions in the letter of removal, he had confessed partiality toward the said Winthrop; (*c*) because there was no need of the said Judge Lawrence passing on the case since memorialist was willing to acquiesce if Judge McKinley held the removal legal; (*d*) and because a difference of opinion between the judges would lead to adjournment of court until a final decision by the Supreme Court of the United States; that Judge Lawrence persisted in sitting, and there resulted a difference of opinion between him and his associates; that Judge McKinley held that the removal was illegal and that the memorialist was de jure and de facto clerk, to which Judge Lawrence dissented; that the circuit court adjourned without transaction of business; that the memorialist continued in possession of the seals and records of both courts, and that the records of the district court

[49] Third session Twenty-fifth Congress, Journal p. 222; Globe, p. 404; Report, No. 272.

were not seized by the marshal under the writ until the next June; that in November 19, 1838, at the holding of the circuit court, in the absence of Judge McKinley, Judge Lawrence declined to allow the memorialist's deputy to perform the duties of clerk, but made a rule in a civil cause calling upon the deputy to produce the records, and on the succeeding day committed the deputy to prison for alleged contempt; that after release by habeas corpus the deputy was a second time committed for refusing to deliver the records; that the said proceedings were in violation of the act of April 29, 1802, providing "that imprisonment is not allowed, nor punishment in any case inflicted, where the judges of the said court are divided in opinion upon the question touching such imprisonment;" that the said proceedings of Judge Lawrence to take the records were made after the Supreme Court of the United States had granted a rule requiring Judge Lawrence to show cause why the memorialist should not be allowed to discharge the duties of the office; that Judge Lawrence had caused a new seal, not in form required by law, to be made; that Judge Lawrence, on November 26, 1838, had issued a writ authorizing the seizure of the records of the circuit court wheresoever found, thus illegally authorizing a seizure out of his district; that Judge Lawrence had refused to obey a mandate of the Supreme Court in a certain case, giving out that the Supreme Court had grossly mistaken the law; that he had illegally absented himself from his district; that he had for five years been notoriously and inveterately addicted to the intemperate use of ardent spirits, and that by his course in regard to the clerkship he had suspended the administration of justice for a judicial year.

This memorial was signed by the memorialist, but the signature was not attested.

Mr. Johnson asked that the memorial be referred to a select committee. Although it was suggested that the Judiciary Committee should consider it, Mr. Johnson's motion was agreed to, and the committee was composed of Mr. Johnson and Messrs. John Pope, of Kentucky; Thomas T. Whittlesey, of Connecticut; John Campbell, of South Carolina; George W. Owens, of Georgia; William B. Calhoun, of Massachusetts; and George C. Dromgoole, of Virginia.

On January 21,[50] on motion of Mr. Johnson, it was:

Resolved, That the select committee appointed to inquire into the charges of high crimes and misdemeanors against P. K. Lawrence, judge of the district court of the United States for the State of Louisiana, be authorized to send for persons and papers.

On February 11,[51] Mr. Johnson submitted the report of the committee. This report consisted largely of affidavits and records of testimony taken in Louisiana. It is all ex parte. The report concludes:

That, in consequence of the evidence * * * they are of the opinion that Philip K. Lawrence, judge of the district court of the United States for the eastern and western districts of Louisiana, be impeached for high misdemeanors in office.

It was ordered that the report be considered on February 21, but the Congress was nearing its close and no action by the House appears.

[50] Journal, p. 332.
[51] Journal, p. 521; Report, No. 272.

On September 3, 1841, as the records of the State Department show, Theodore H. McCaleb was appointed judge of this district.

2495. The investigations into the conduct of John C. Watrous, United States Judge for the district of Texas.

The House, in 1852, on the strength of a memorial setting forth charges, investigated the conduct of Judge Watrous with a result favorable to him.

In the investigation of 1852 Judge Watrous, the accused, was permitted to appear before the committee with counsel. (Footnote.)

The conduct of Judge Watrous was the subject of reports, favorable and unfavorable, in four Congresses.

On February 13, 1852,[52] Mr. Abraham W. Venable, of North Carolina, from the committee on the Judiciary reported a resolution as follows:

Resolved, That the Committee on the Judiciary be authorized to send for persons and papers, with authority to examine witnesses,[53] under oath, in relation to the charges made against John C. Watrous, judge of the United States for the district of Texas.

Mr. Venable explained that a memorial of William Alexander, a lawyer of Texas, had been presented to the House, charging Judge Watrous with practicing law and receiving fees in the State of Texas touching matters which had come before and been decided upon by himself, with adjudicating cases in which he was personally interested, and with certain violations of the laws of Texas militating against his judicial purity.

The resolution was agreed to by the House.

On August 27 [54] the Speaker laid before the House a letter from Judge Watrous, wherein he stated that the pending inquiry was preventing the decision of important cases in his court, and asked for speedy action by the House. This communication was referred to the Committee on the Judiciary, and then, on motion of Mr. Richardson Scurry, of Texas, it was

Ordered, That the Committee on the Judiciary have leave to report upon the case of the said Judge John C. Watrous at any time.

At the next session of Congress, on January 13, 1853,[55] Mr. William A. Howard, of Michigan, presented additional evidence in the case, which was referred to the Judiciary Committee.

On February 28,[56] Mr. Venable submitted the report of the committee, which was as follows:

That after an examination of much documentary evidence, as well as many witnesses, summoned from Texas, they do not recommend that articles of impeachment be directed by this House against the said John C. Watrous.

This report was laid on the table.

2496. The Watrous investigation continued.

In the investigation of 1856 the Judiciary Committee made a report favoring impeachment on the strength of memorials and without the power to compel testimony being given by the House.

[52] First session Thirty-second Congress, Journal, p. 348; Globe, p. 560.
[53] In his answer filed with the Judiciary Committee in 1858 (first session Thirty-fifth Congress, House Report No. 540, p. 18) Judge Watrous makes a statement which shows that during these proceedings in 1852 he was present with counsel before the committee. It also appears that witnesses were examined at that time (p. 487 of Report No. 540).
[54] Journal, p. 1087; Globe, p. 2382.
[55] Second session Thirty-second Congress, Journal, p. 125.
[56] Journal, p. 350; Globe, p. 927; Report No. 7.

The memorials submitting the charges against Judge Watrous, in 1856, were accompanied by a large amount of documentary evidence.

The investigation of the conduct of Judge Watrous, in 1856, was conducted entirely ex parte, but the evidence was documentary and voluminous.

In the Watrous investigation of 1856 the Judiciary Committee, following precedents, reported the evidence but made no specific charges.

The Watrous report of 1856 led to a debate as to the propriety of ex parte investigations and to a citation of English and American precedents.

It appears that a report impeaching a civil officer was not considered, in 1856, privileged to be made at any time. (Footnote.)

On July 30, 1856,[57] Mr. Miles Taylor, of Louisiana, presented the memorial of Jacob Mussina, a citizen of Louisiana, praying for an investigation into the conduct of Judge Watrous; and on August 6, Mr. Peter H. Bell, of Texas, presented a memorial of Eliphas Spencer, of Texas, asking for the impeachment of Judge Watrous. These papers were referred to the Judiciary Committee.

The memorial of Jacob Mussina, who was a party to a chancery suit litigated in Judge Watrous's court in Galveston, set forth in detail charges of conduct oppressive and partial and in entire disregard of the well-established rules of law and evidence and the rights of litigants. The memorial of Eliphas Spencer, who was interested in a tract of land in Texas, charged Judge Watrous with entering into a conspiracy for the purpose of fraudulently and corruptly adjudicating and determining the validity of a certain grant, by means of which the said judge himself secured the title of a portion of the land, or the proceeds of the sale of it.

The two memorials were accompanied by a mass of records and documents, among which was a joint resolution of the legislature of Texas, approved March 20, 1848, charging Judge Watrous with improper conduct, and suggesting corrupt acts, and requesting him to resign his office.

It is not wholly certain from the report of the Judiciary Committee whether or not they sought evidence beyond the documents furnished with the memorials. If they did, it was purely documentary. It does not appear that they asked the House for authority to take testimony, and they did not take any, unless documentary.

On February 2, 1857,[58] Mr. Lucian Barbour, of Indiana, asked a suspension of the rules to enable him to report from the Committee on the Judiciary,[59] and on February 9, by a vote of yeas 156, nays 32, the rules were suspended and the report was made, accompanied by this resolution:

Resolved, That John C. Watrous, United States district judge for the district of Texas, be impeached of high crimes and misdemeanors.

In their report, which was unanimous with the exception of one dissenting member, two members being absent, the committee say:

[57] Second session Thirty-fourth Congress, Journal, pp. 1326, 1376; Globe, p. 1818.
[58] Third session Thirty-fourth Congress, Journal pp. 347, 381, 507; Globe, pp. 542, 627–630, 797, 798; Report No. 175.
[59] At that time such a report does not seem to have been held privileged.

Upon referring to the proceedings in cases of former impeachments, the committee find that specific charges of impeachment have not been preferred in the report of the committee to the House; but in most cases they have simply reported the testimony, with a resolution that the accused be impeached of high crimes and misdemeanors. Specific charges have been preferred afterwards, when the Senate has signified its readiness to proceed with the trial. The committee would, however, state very briefly the substance of the charges in the petitions and the grounds upon which they have resolved to report the resolution.

After reviewing the charges, the report concludes:

The committee have examined numerous records, consisting of pleadings, orders of court, affidavits, and depositions, and after a patient and laborious research they have reluctantly come to the conclusion that the conduct of Judge Watrous in the cases above referred to can not be explained without supposing that he was actuated by other than upright and just motives; that in his disregard of the well-established rules of law and evidence he has put in jeopardy and sacrificed the rights of litigants, and in acquiring a title to property in litigation, or held by adverse possession, he has given just cause of alarm to the citizens of Texas for the safety of private rights and property, and of their public domain, and has debarred them from the rights of an impartial trial in the Federal courts of their own district.

The report having been read, two questions at once arose. Mr. Howell Cobb, of Georgia, asked if the testimony had been printed and declared that he should be unwilling to act on the resolution presented by the committee until he had been enabled to read the testimony.

Mr. Humphrey Marshall, of Kentucky, desired, as a member of the Judiciary Committee, to state that he had had nothing to do with the proceedings resulting in the report, since he had come to the conclusion that the investigation ought not to proceed without notice to the party. Mr. John A. Quitman, of Mississippi, said he was unwilling to assist in bringing on the expense and trouble of an impeachment trial without the strongest probable cause, and he was not willing to take as probable cause the strongest ex parte testimony where the opposite party had not been heard. Mr. John S. Caskie, of Virginia, cited the precedents in the cases of Judge Peck and Warren Hastings, and while not claiming that it was absolutely incumbent for a committee charged with the consideration of a memorial praying an impeachment to give notice to the person against whom the charges were made and allow him to cross-examine witnesses before them, yet such was evidently the fair and judicious course.

Mr. George A. Simmons, of New York, speaking for the committee, said:

I am perfectly aware that in many such cases, in perhaps the majority of cases of impeachment, the party accused has been before the committee just as both parties are sometimes examined before magistrates. But there have been one or two cases in the House where the party accused has not been before the committee. It seems to me to be the opinion of the House—and probably well-founded on the Constitution—that a judge can not be displaced incidentally by remodeling his jurisdiction, or anything of that sort, although it was once done by Mr. Jefferson on a very large scale, to the satisfaction of the Democratic party. Notwithstanding that, the committee have come to the conclusion that it is the sense of the House, as it is undoubtedly the opinion of commentators, such as Judge Story, that there is no way to get rid of a judge, however unpopular he may be, however destitute he may be of the confidence of the people, unless by impeachment. The committee think that an impeachment ought to lie in all cases where there is a want of good behavior. It is not necessary to prove him guilty of high treason, or of highway robbery, or of some indelicate crime. It is enough that he has not fulfilled his duty as a judge in all respects so as to entitle himself to the confidence of the people. * * * It does not always follow that a man must be present when he is indicted by a grand jury. Neither

does it always follow that because he is indicted he must be convicted. There undoubtedly should be prima facie evidence sufficient before the grand jury to satisfy them that the man whom they indict is guilty of the crime, just as there should be sufficient prima facie evidence in cases of impeachment—which are analogous—to show that the judge has failed in good official behavior.

Mr. Abram Wakeman, of New York, said:

The evidence is almost entirely of a documentary character, and if there is no other reason that alone would absolve the committee from the necessity of calling Judge Watrous before them. They are also of opinion that it was not within their province or their duty, in reference to the charge placed in their hands, to compel or require the attendance of Judge Watrous at this stage of the proceeding. They were called upon to inquire whether there was a prima facie case of corruption against him. If there was, they considered it their duty to present him before the Senate of the United States, where his case could be properly heard and tried. If * * * we were under an obligation to investigate and pronounce a decision upon this case, Judge Watrous would have two trials—first, before the Committee on the Judiciary, where he would be under the necessity of calling witnesses and counter witnesses, and the committee would stand in the capacity of judges, in the first instance, to try the guilt of innocence of Judge Watrous. * * * In one case of impeachment alone, where a judge was charged with high crimes or misdemeanors, was he summoned before the committee prior to the presentation of his case to the House.

Mr. Wakeman later stated this case specifically—that of Judge Pickering.

The House, without division, decided that the testimony should be printed, and that the consideration of the resolution should be postponed to Saturday, February 21.

On that day it was announced that a delay had occurred at the printing office and the testimony had not yet been printed. Mr. Caskie urged that the matter should be allowed to go over to the next Congress. A few days only remained of this Congress, and if they should agree to the resolution of impeachment new men would have to carry on the trial, as very few of this House were elected to the next, and not a single member of the Judiciary Committee had been returned.

Mr. Barbour, however, moved that the matter be postponed to Saturday, February 28, and this motion was agreed to.

But on February 28 only three legislative days remained to the Congress, and the resolution was not considered.

2497. The Watrous investigation continued.

In 1857 memorials before the House in a preceding Congress were reintroduced as a basis for investigation of the conduct of Judge Watrous.

The Watrous investigation of 1857 was limited in its scope by the withdrawal from the Judiciary Committee of a memorial containing certain charges.

In the Watrous investigation of 1857, the committee being equally divided, reported the evidence and two propositions, each supported by minority views.

In the investigation of 1857 the committee formally permitted Judge Watrous to file a written explanation and cross-examine witnesses in person or by counsel.

The committee investigating Judge Watrous, in 1857, appears to have informally permitted the accused to adduce testimony.

Discussion of the proper mode of examination in an investigation with a view to impeachment.

In the Watrous investigation of 1857 the written explanation of the accused was printed as part of the report.

An argument that judges may be impeached for any breach of good behavior.

After the report on his conduct by a committee, Judge Watrous presented to the House a memorial embodying his defense, and it was ordered printed and laid on the table.

At the beginning of the next Congress, on December 17, 1857,[60] Mr. Guy M. Bryan, of Texas, presented the memorial of Eliphas Spencer, praying for the impeachment of Judge Watrous; and on the next day [61] Mr. Miles Taylor, of Louisiana, reintroduced the memorial of Jacob Mussina, which had been presented in the preceding Congress.

On January 15, 1858,[62] Mr. George S. Houston, of Alabama, from the Committee on the Judiciary, presented this resolution, which was agreed to:

Resolved, That the Committee on the Judiciary be authorized to send for persons and papers and examine witnesses on oath in relation to the charges made against John C. Watrous, judge of the United States court for the western district of the State of Texas.

On February 18 [63] Mr. Bryan presented resolutions of the legislature of Texas, which were referred to the Judiciary Committee; and on February 23 [64] Mr. John H. Reagan, of Texas, presented the memorial of William Alexander on the same subject, and it was referred to the same committee.

On May 15 [65] Mr. Horace F. Clark, of New York, from the Committee on the Judiciary, moved that that committee be discharged from the further consideration of the memorial of William Alexander. He said that in investigating the charges made in the memorials of Jacob Mussina and Eliphas Spencer the committee had taken up the matter de novo, as they were not satisfied with the methods of the committee in the preceding Congress. But they found that the allegations in the memorial of Alexander had been investigated by the committee in the Thirty-second Congress, and the committee had reported against impeachment proceedings. Therefore, with the great amount of labor involved in hearing the other charges, the committee did not wish to pursue the Alexander charges. It was urged also that the committee in the preceding Congress had taken no notice of the Alexander charges. Mr. John H. Reagan urged that the Alexander charges should be investigated, especially in the view that articles of impeachment might be prepared.

The House, on May 17, agreed to the motion of Mr. Clark that the committee be discharged.

On June [66] Mr. Houston presented the report of the committee, which was simply to the effect that they were equally divided, one portion recommending a resolution that Judge Watrous be impeached and the other portion a resolution that the testimony did not afford sufficient grounds for impeachment.

On June 7 [67] both portions of the committee, by permission of the

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[60] First session Thirty-fifth Congress, Journal, p. 81.
[61] Journal, p. 85.
[62] Journal, p. 175; Globe, p. 304.
[63] Journal, p. 404; Globe, p. 782.
[64] Journal, p. 412.
[65] Journal, pp. 826, 835, 836; Globe, pp. 2167–2169, 2195.
[66] Journal, p. 1004; Globe, p. 2659; House Report No. 540.
[67] Journal, p. 1045; Globe, p. 2774; House Report No. 548.

House, presented minority views, which gave the respective opinions of the two portions.

The regular report, although giving no opinions, was accompanied by the record of the evidence and also by record of certain proceedings. It appears that on January 8 [68] Mr. Houston, chairman of the committee, addressed a letter to Judge Watrous informing him of the reference of the memorials, and notifying him that the subject-matter would be taken up on February 2, next. To this Judge Watrous replied:

I most respectfully ask to be informed whether, at the approaching investigation by the committee, * * * I may be permitted to be present, together with my counsel. And I also desire to be informed whether the investigation will be confined to the testimony against me, or will be extended to all sources of information which are necessary to a proper understanding of the case. * * * Should a full and fair investigation of both sides of the case be determined on, I should take great pleasure (if permitted to do so) in furnishing a list of witnesses, whose testimony will put the whole case before the committee.

To this the committee replied by this resolution:

Resolved, That Hon. John C. Watrous be informed that the Committee on the Judiciary will, on Tuesday, the 2d day of February, 1858, take up for investigation and action the memorials of Jacob Mussina and Eliphas Spencer, and that the committee will receive from the said John C. Watrous at any time previous to the said 2d day of February any explanation in writing relative to the charges contained in said memorials, and that after having made such communication in answer to said charges, the said John C. Watrous will be permitted by himself or counsel to cross-examine witnesses who may be examined before said committee.

Mr. Horace F. Clark, of New York, one of the four members of the committee who found against impeachment, while concurring with his three associates on the question of fact, filed supplemental views, in which he said: [69]

I am not satisfied to vote an impeachment upon the ascertainment of what is commonly termed probable causes; nor do I regard the principles of common law relative to proceedings before grand juries applicable to cases of impeachment under the Constitution of the United States. The House of Representatives ought, in my judgment, to look beyond a prima facie case, and failing to discover in the evidence disclosed any fact inconsistent with judicial integrity on the part of Judge Watrous, and finding satisfactory explanations of the circumstances from which suspicions of such integrity may have arisen, should decline subjecting the accused to the expense and hazard of an impeachment.

Although the committee did not give in express terms permission for Judge Watrous to call witnesses on his own behalf, yet he did so. One witness, Robert Hughes, was called and examined in chief by Judge Watrous, and afterwards cross-examined by the committee.[70] And also Robert Hughes, apparently the same person, was on March 2 [71] given leave by the committee to appear as counsel for Judge Watrous. With him as counsel was associated Mr. Caleb Cushing.[72]

In the course of a later debate, Mr. Mason W. Tappan, of New Hampshire, a member of the committee, said: [73]

Testimony was taken on both sides. A long and tedious examination was had. Judge Watrous was permitted to come in and defend his cause and to produce witnesses.

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[68] Report No. 540, p. 14.
[69] House Report No. 548, p. 30.
[70] Report No. 540, pp. 38–76.
[71] Page 77 of Report.
[72] Pages 185, 230 of Report.
[73] Globe, second session Thirty-fifth Congress, p. 17.

And Mr. Horace F. Clark, of New York, another member of the committee, said further: [74]

The committee determined that it was their province * * * to look into the facts of the case beyond the point necessary to ascertain whether there did or did not exist that technical probable cause which, under the well-settled principles of the common law, justifies a magistrate in holding a person for trial, or may, perhaps, justify a grand jury in finding a bill of indictment. * * * The committee applied, in its broadest sense, that generous maxim, audi alteram partem. * * * They determined to break down all the barriers which, it is admitted by professional men, the rigid rules of the common law sometimes throw in the way of the search after truth.

Judge Watrous's explanation, which treated only questions of fact, was printed as part of the report.

The minority views signed by the four members favoring impeachment, Messrs. Henry Chapman, of Pennsylvania; Charles Billinghurst, of Wisconsin; Miles Taylor, of Louisiana, and George S. Houston, of Alabama, found from the evidence [75]—

That while holding the office of district judge of the United States he engaged with other persons in speculating in immense tracts of land situated within his judicial district, the titles to which he knew were in dispute, and where litigation was inevitable.

That he allowed his court to be used as an agent to aid himself and partners in speculation in land and to secure an advantage over other persons with whom litigation was apprehended. That he sat as judge on the trial of cases where he was personally interested in questions involved, to which may be added a participation in the improper procurement of testimony to advance his own and partner's interests.

Also they concluded as to another charge urged against him:

Every irregular and wrongful decision of the judge [in the Cavazos case dealt with in the Mussina memorial] was in favor of the complainants and against the defendant, Mussina, and those occupying a similar position, and was to their particular injury. By maintaining the proceeding as one rightfully brought on the chancery side of the court, these defendants were illegally deprived of their right to a trial by jury, and were compelled to submit to an adjudication upon their rights to the property in such a manner that the decision would be final and conclusive as to the title of the property, instead of one upon the right of possession, which would at once have been pronounced, on the law side of the court, in an action of ejectment. By maintaining jurisdiction over the case, when a portion of the defendants as well as plaintiffs were aliens, these defendants were deprived of their rights to have the questions involved in it decided by the courts of Texas, to whose jurisdiction they were rightfully amenable, and whose laws were to govern in that decision. By admitting incompetent witnesses to testify, their rights were affected by evidence given by persons who had an interest in the litigation adverse to theirs. And, finally, they are prevented from having the decision against them reviewed in the appellate court by the failure of the judge to perform his full duty to them in facilitating the exercise of the right of appeal given to them by law, from motives of public policy, for their own private advantage, and that, too, when there is some reason to believe that the decree by the court is not in conformity with the principles of law as recognized in Texas. Such a course of action continued through the whole progress of a cause, in favor of some of the parties and against others, is, to our minds conclusive evidence of the existence of a purpose on the part of the judge to favor one party or set of parties at the expense and to the injury of others, which is inconsistent with an upright, honest, and impartial discharge of the judicial functions. And this, we believe, constitutes a breach of the "good behavior" upon which, by the Constitution, the tenure of the judicial office is made to depend.

The Constitution of the United States declares that "the judges, both of the Supreme and inferior courts shall hold their offices during good behavior." Does not this necessarily imply that their offices are to determine, and they are to be removed when they are guilty of a breach of "good behavior?" Clearly so. But

[74] Globe, p. 39.
[75] Report No. 548, pp. 14, 23, 24.

how are they to be removed? No power of removal is vested in the Executive, nor is there any provision in the Constitution of the United States like that to be found in many if not all the State constitutions, by which the Executive is authorized to remove on the address of two-thirds of the members of the two houses of the legislature. The only mode of removal of judges known to the Constitution is by impeachment, and it therefore necessarily follows that whenever a judge has, in the course of his official conduct, been guilty of actions which are inconsistent with an impartial discharge of the high duties intrusted to him, then it is both the right and duty of this House to proceed in the only way known to the Constitution to effect the removal of the magistrate who misuses or abuses the trust reposed in him for the public good.

The other minority views, concurred in by Messrs. Charles Ready, of Tennessee; Mason W. Tappan, of New Hampshire; Burton Craige, of North Carolina, and Horace F. Clark, of New York, concluded from an examination of the testimony that many of the charges were "utterly frivolous," that some of them were not proven or attempted to be proven, and "that none of them establish, import, or imply, upon the evidence, the commission of any act of malfeasance in office, nor any high crime or misdemeanor." The four members saw nothing in the case but the "resentfulness of two disappointed litigants."

One minority had recommended this resolution:

Resolved, That John C. Watrous, United States district judge for the district of Texas, be impeached of high crimes and misdemeanors.

The other minority recommended:

Resolved, That the testimony taken before the Committee on the Judiciary in the case of the Hon. John C. Watrous, judge of the district court of the United States for the eastern district of Texas, is insufficient to justify the preferment of articles of impeachment against him for high crimes and misdemeanors in office.

On June 10,[76] at the suggestion of the Judiciary Committee, the House postponed further consideration of the subject to the next session of Congress.

At the same time a memorial from Judge Watrous, which had already been placed on the desks of Members and appears to have embodied a defense of his conduct, was ordered to be laid on the table and printed.

2498. The Watrous investigation continued.

In the Watrous case the House discussed whether or not ascertainment of probable cause justified proceeding in impeachment.

As to what are impeachable offenses was a subject of argument in the Watrous case.

After the investigation of 1857 the House decided that the evidence did not justify the impeachment of Judge Watrous.

At the next session the subject was debated at length from December 9 to 15.[77] The principal portion of the debate was on the strength of the evidence to sustain the facts alleged; but two other questions were touched on at some length:

1. Whether the ascertainment of probable cause was sufficient ground for the House to proceed in an impeachment.

Messrs. Chapman and Houston argued [78] at some length in opposition to the views advanced by Mr. Clark. Mr. Clark [79] had argued that

[76] Journal, pp. 1075, 1076; Globe, pp. 2908–2910.
[77] Second session Thirty-fifth Congress, Journal, pp. 56, 69; Globe, pp. 12, 21, 31, 56, 78, 95–102.
[78] Globe, pp. 16, 99.
[79] Mr. Clark's view was upheld by Mr. James A. Stewart, of Maryland, Globe, p. 38.

the case could not be sent to the Senate on proof short of what would be sufficient to convict. Mr. Houston combated that view, referring to the argument of Mr. Wirt in the Peck trial as conclusive on the point that the action of the House was similar to that of a grand jury; that while the investigation of the House was not necesarily ex parte, the office of the House was not to ascertain whether the party was guilty or innocent of the charges preferred against him, but whether the proof was sufficient to make the case worthy of a further trial. Mr. Chapman called attention to the fact that the trial of the case belonged to the Senate under the Constitution and to the Senate alone. If the House advanced one step beyond the ascertainment of probable cause it was plunged into the trial. The House, in the exercise of its discretion, might examine witnesses on both sides, but there must be a boundary line marking the powers of the House and Senate, and there was no line to be observed, except the ascertainment of probable cause. "Such I understand to have been the views," he said, "entertained in the case of Judge Peck and the case of Judge Chase, of Macclesfield in 1705, in the case of Warren Hastings in 1778, and of Lord Melville in 1805. Probable cause in such a state of facts and circumstances as would induce a cautious man to believe that the party charged is guilty of the offense.[80]

2. As to what are impeachable offenses.

The point was argued at considerable length. In his memorial to the House Judge Watrous had made the point that impeachable acts were only such as were punishable by the ordinary laws of the land. This view was sustained in argument by Messrs. James A. Stewart, of Maryland,[81] Clark B. Cochrane, of New York,[82] and Alexander H. Stephens, of Georgia.[83]

On the other hand, Messrs. John Cochrane, of New York, Miles Taylor of Louisiana,[84] Clement L. Vallandigham, of Ohio,[85] and John A. Bingham, of Ohio,[86] argued that the power of impeachment was broader, and went to an ascertainment of whether or not he had offended against the dignity of the people of the United States, transgressed the grave obligations of his office, or soiled the purity of the ermine. Mr. Bingham discussed especially the precedent of the Peck trial in this particular.

On December 15 [87] a motion was made to strike out all after the word "resolved" in the resolution for impeachment, and insert the text of the second minority resolution, declaring the testimony insufficient to justify impeachment. This amendment was agreed to, yeas 111, nays 91. Then the resolution as amended was agreed to, yeas 112, nays 87.

So the House decided that the evidence did not justify impeachment proceedings.

2499. The Watrous investigation continued.

Memorials which had been before preceding Congresses were reintroduced as a basis of the Watrous investigation of 1860.

[80] Mr. Clement L. Vallandigham, of Ohio, held this view also, Globe, p. 85.
[81] Globe, pp. 37, 38.
[82] Globe, p. 84.
[83] Globe, pp. 95, 96.
[84] Globe, pp. 60, 61.
[85] Globe, p. 85.
[86] Globe, p. 90.
[87] Journal, pp. 69–71; Globe, p. 102.

A minority of the Judiciary Committee were introduced to take testimony in the Watrous case.

In the Watrous investigation of 1860 the Judiciary Committee proceeded ex parte.

In the Watrous investigation of 1860 the Judiciary Committee, without special leave, considered the evidence and reports in preceding Congresses relating to this case.

The Judiciary Committee reported, in 1860, in favor of the impeachment of Judge Watrous.

On March 8, 1860,[88] during the next Congress, the memorial of Jacob Mussina was again introduced by Mr. Miles Taylor, of Louisiana, and that of Eliphas Spencer was presented by Mr. Andrew J. Hamilton, of Texas; and on March 12 [89] the memorial of William Alexander, first presented in 1851, was again presented by Mr. Hamilton. All these papers were referred to the Committee on the Judiciary.

On March 28 [90] the House gave the Judiciary Committee authority to send for persons and papers and to examine witnesses on oath or affirmation.

On May 18 [91] Mr. John Hickman, of Pennsylvania, stated that the committee found itself obliged to sit during sessions of the House, and therefore it was very difficult to keep a quorum. Hence he proposed this resolution, which was agreed to by the House without objection:

Resolved, That a minority of the Committee on the Judiciary be, and are hereby, authorized to take the testimony of all witnesses in the matter of the petitions heretofore referred to said committee praying the impeachment of Hon. John C. Watrous, a judge of the United States for the eastern district of Texas.

On May 21 [92] the House empowered the committee to print the memorial and testimony taken and to be taken in the case.

On December 17, 1860,[93] at the second session of the Congress, Mr. John H. Reynolds, of New York, asked unanimous consent to submit the report of the committee.[94] Mr. Horace Maynard, of Tennessee, reviewed the former proceedings in this case, intimated that the Committee on the Judiciary had been organized to further this impeachment, and declared that the time of the session was required for "the gravest and most important questions, going to the very existence and perpetuity of our Union." Therefore he objected.

On December 20 [95] Mr. Reynolds submitted the report, which concluded:

Resolved, That John C. Watrous, United States district judge for the eastern district of Texas, be impeached for high crimes and misdemeanors.

The committee say in their report:

That in view of the previous proceedings touching the matters committed to them, they entered upon the investigation at the first session of the present Congress in the belief that it was of the highest importance to the public interest, as well as to the accused, that some definite result should be reached, and some action taken which should be regarded as final. In the Thirty-fifth Congress much time was expended by the Judiciary Committee in the investigation of the charges

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[87] First session Thirty-sixth Congress, Journal, p. 476.
[88] Journal, p. 493.
[89] Journal, p. 607.
[90] Journal, p. 856; Globe, p. 2171.
[91] Journal, p. 877; Globe, p. 2215.
[92] Second session Thirty-sixth Congress, Globe, p. 105.
[93] In the later practice such reports are privileged.
[94] Journal, p. 106; Globe, p. 159; Report No. 2.

preferred, upon which Judge Watrous was heard by person and by counsel before the committee, a large amount of testimony was taken, and the committee were equally divided on the question of impeachment. The House, upon a consideration of the case, refused to adopt the resolution for an impeachment. Upon the present investigation the committee came to the conclusion to proceed ex parte, and they have accordingly taken additional evidence only in support of the charges against the accused. They have also considered the evidence before them taken during the Thirty-fifth Congress and the reports made to the House thereon, * * * and their proceedings are more properly to be regarded as a continuation of the former investigation than as an entirely original one. The additional evidence taken by the committee during the present Congress in respect to the charges upon which four members of the Judiciary Committee of the Thirty-fifth Congress recommended the adoption of a resolution of impeachment does not materially change the facts as they then appeared. But considerable evidence has been produced showing the connection of Judge Watrous with transactions of a character unfitting a judicial officer or an honest man, and which may not only present an independent ground of misbehavior deserving impeachment, but tends also to shed light upon the nature of his associations and private interests.

The committee adopt the conclusions of the four members who favored impeachment in the preceding Congress as to the charges in the Mussina and Spencer memorials, and then proceed to discuss the charges of the Alexander memorial, which they consider established and as justifying impeachment.

The report was postponed to December 27 but was not taken up on that day, and thereafter successive attempts to take it up on January 16, January 21, and January 28, 1861, failed,[96] through the objections of individual Members.

The Congress expired on March 3 and the report was not considered.

Amos Morrell was appointed judge on February 5, 1872, for the eastern district of Texas, and the records of the State Department show that this was the first appointment after the investigation of Judge Watrous.

2500. The investigation of the conduct of Judge Thomas Irwin in 1859.

Judge Irwin having resigned before the report of an investigation, the House discontinued proceedings.

On January 13, 1859,[97] the House authorized the Judiciary Committee to investigate charges made against Judge Thomas Irwin, of the United States district court of the western district of Pennsylvania. On January 28 [98] Mr. George S. Houston, of Alabama, reported from that committee that pending the investigation, "they had satisfactory evidence before them that the said judge had this day resigned his said office, and that the committee now ask the further direction of the House."

There was some discussion as to the publication of the testimony already taken; but as it had been taken only on one side it was thought best not to print it. Then, on motion of Mr. John S. Phelps, of Missouri, it was—

Ordered, That the said committee be discharged from the further consideration of the subject, and that the same be laid on the table.

2501. The investigation into the conduct of Henry A. Smythe, collector of the port of New York.

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[96] Globe, pp. 411, 499, 599, 600.
[97] Second session Thirty-fifth Congress, Journal, p. 178; Globe, p. 360.
[98] Journal, p. 278; Globe, p. 656.

The House declined to institute impeachment proceedings before a committee had examined specially whether or not there was ground for impeachment.

A question as to the expediency of impeaching an officer removable by the Executive.

It is for the House to say whether or not a person whose conduct is being investigated shall be allowed to appear before the committee by counsel.

The House declined to ask of the Executive the removal of an officer whom a committee had found delinquent.

On March 15, 1867,[99] the House had directed the Committee on Public Expenditures to inquire into the conduct of Henry A. Smythe, collector of the port of New York, and to report thereon to the House if in their opinion the said Smythe had been guilty of bribery or other crimes and misdemeanors.

On March 25, 1867,[100] the Speaker, by unanimous consent, laid before the House a letter from Mr. Smythe, requesting that he might be permitted to appear with counsel to produce and examine witnesses before the committee.

Thereupon, Mr. Samuel J. Randall, of Pennsylvania, proposed the following:

Resolved, That the request of Henry A. Smythe, now collector of the port of New York, asking the privilege and permission to appear by counsel before the Committee on Public Expenditures, in defense of his conduct as collector, now being examined into by said committee, be granted.

Considerable discussion was occasioned by this proposition. It was urged that it was not the custom of the House to allow persons implicated by investigations before a committee to appear, especially by counsel, and Mr. Hulburd, while saying that his committee had allowed any person to come before them and produce witnesses under such circumstances, yet they had not allowed counsel, and should not do so without the consent of the House. Mr. John Covode, speaking from experience as chairman of an important investigating committee, said that he never allowed parties to appear by counsel except in one case, when Judge Black, a member of Mr. Buchanan's cabinet, was allowed counsel in a case where he was indirectly interested. On the other hand, it was recalled that in the Thirty-ninth Congress both Mr. Conkling and General Fry had appeared before the investigating committee by counsel; that in the investigation of the infringement of the privileges of the House by General Houston, he was allowed to appear with counsel; in the Thirty-seventh Congress a Member against whom charges had been made was allowed to appear by counsel; in the Thirty-fifth Congress Judge Watrous had also appeared with counsel, and also in a former Congress Judge Irwin had done the same. Mr. John A. Bingham, of Ohio, argued that the House ought always to judge of the propriety of allowing the official under investigation to appear; but in this case, of a subordinate officer of the Government, incapable in the nature of things of influencing the House or its committee, he should be allowed to appear by counsel.

[99] First session Fortieth Congress, Journal, pp. 51, 111; Globe, pp. 334–336.
[100] Journal, pp. 111, 112; Globe, pp. 334–336.

The House, by a vote of 80 yeas to 35 nays, voted to suspend the rules for the consideration of the resolution, and then agreed to it.

On March 21, 1867,[101] Mr. Calvin T. Hulburd, of New York, from the Committee on Public Expenditures, had reported this resolution:

Resolved, That it is the sense of this House that Henry A. Smythe should be immediately removed from the office of collector of the port of New York, and that the Clerk of the House cause a certified copy of this resolution to be laid before the President of the United States.

Objection was made by Mr. Benjamin F. Butler, of Massachusetts, that the House should not request from the Executive the removal of any officer, but should proceed by impeachment. On March 22 [102] Mr. Thaddeus Stevens, of Pennsylvania, moved to amend by striking out all after the word "Resolved," and inserting—

That it is the sense of this House that Henry A. Smythe, collector of the port of New York, ought to be impeached; and that the Committee on Public Expenditures proceed forthwith to prepare articles of impeachment.

Objection was made to this amendment, especially by Mr. Samuel Shellabarger, of Ohio, that there was no precedent in the history of the Government for proceeding to an impeachment without investigation by a committee charged with finding whether or not there was ground for articles of impeachment. A question was also raised by Mr. Fernando Wood, of New York, as to whether the House ought to proceed to impeach an officer whom the President (or the President and Senate as provided under the tenure of office act) could remove. The right of the House to impeach such an officer was not disputed, but the expediency was questioned.

In accordance with the suggestions made, Mr. Stevens modified his amendment to read as follows:

That the testimony taken by the Committee on Public Expenditures relating to the conduct of Henry A. Smythe, collector of the port of New York, be referred to the said committee, with a view to ascertain whether or not said Smythe has been guilty of high crimes and misdemeanors sufficient to justify his impeachment; and if said committee find from that and other evidence that he has been thus guilty, then to proceed and prepare articles of impeachment, and report the same to this House; and that they have leave to send for persons and papers.

On March 22 and 23 [103] this amendment was considered and agreed to. The resolution as amended was then agreed to also.

On February 20, 1868,[104] on motion of Mr. Hulburd, the House agreed to a resolution empowering the committee to inquire into the receipts of Mr. Smythe in his official capacity, with authority to send for persons and papers.

It does not appear that the committee reported.

2502. The proposition to inquire into the conduct of William B. West, consul at Dublin.

The House declined to order an investigation of Consul West on evidence presented by a Member and referred the subject to a committee.

Mr. Speaker Colfax held that in order to be received as privileged a resolution must positively propose impeachment.

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[101] Journal, p. 80; Globe, pp. 235, 256.
[102] Globe, pp. 282–285.
[103] Journal, pp. 89, 95; Globe, pp. 284, 289, 290.
[104] Second session Fortieth Congress, Journal, pp. 371, 372.

On December 2, 1867,[105] Mr. William E. Robinson, of New York, proposed as a question of privilege this resolution:

Resolved, That the Committee on Foreign Affairs be instructed to inquire into the conduct of William B. West, American consul at Dublin, in Ireland, regarding American prisoners in that city, and to report thereon forthwith, to the end that if he has been guilty of conduct which would be liable to impeachment this House may take measures to have articles of impeachment presented to the Senate.

Mr. John F. Farnsworth, of Illinois, raised the question of order that no question of privilege was involved.

The Speaker [106] held that as the resolution did not positively propose impeachment, it did not present a question of privilege.

Thereupon Mr. Robinson modified the resolution to read as follows:

Resolved, That William B. West, consul of the United States at Dublin, Ireland, be impeached before the Senate.

Mr. Robinson presented copies of correspondence between Mr. West and one Patrick J. Condon, who had been held as a political prisoner in Ireland, and other documents, which he considered as showing that Mr. West had not been sufficiently aggressive in maintaing the rights of American citizens abroad.

After debate on the general question of the rights of citizenship, the resolution was, on motion of Mr. Nathaniel P. Banks, of Massachusetts, referred to the Committee on Foreign Affairs.

It does not appear that further action was taken.

2503. The House, on the strength of a newspaper statement, ordered an investigation looking toward the impeachment of justice of the Supreme Court.—On January 30, 1868,[107] Mr. Glenni W. Scofield, of Pennsylvania, by unanimous consent, presented the following:

Whereas it is editorially stated in the Evening Express, a newspaper published in this city, on the afternoon of Wednesday, January 29, as follows:

"At a private gathering of gentlemen of both political parties, one of the justices of the Supreme Court spoke very freely concerning the reconstruction measures of Congress, and declared in the most positive terms that all these laws were unconstitutional, and that the court would be sure to pronounce them so. Some of his friends near him suggested that it was quite indiscreet to speak so positively, when he at once repeated the views in a more emphatic manner."

And whereas several cases under said reconstruction measures are now pending in the Supreme Court: Therefore,

Resolved, That the Committee on the Judiciary be directed to inquire into the truth of the declarations therein contained, and to report whether the facts as ascertained constitute such a misdemeanor in office as to require this House to present to the Senate articles of impeachment against said "justice of the Supreme Court," and the committee may have power to send for persons and papers, and have leave to report at any time.

Objection was made that a newspaper charge was insufficient ground for action by the House. Mr. Scofield disclaimed any knowledge himself. The House agreed to the preamble and resolution, yeas 97, nays 57.

On June 18 [108] Mr. George S. Boutwell, of Massachusetts, by instructions of the committee, moved that it be discharged from further consideration of the resolution, and that the same be laid on the table. This motion was agreed to without division or debate.

2504. The impeachment of Mark H. Delahay, United States district judge for Kansas.

[105] Second session Fortieth Congress, Journal, p. 9; Globe, pp. 3–9.
[106] Schuyler Colfax, of Indiana, Speaker.
[107] Second session Fortieth Congress, Journal, p. 274; Globe, p. 862.
[108] Journal, pp. 881, 882; Globe, p. 3266.

The House voted to investigate the conduct of Judge Delahay after the Judiciary Committee had examined the charges in a memorial.

The Judiciary Committee was empowered in the Delahay case to take testimony in Kansas through a subcommittee.

In the investigation into the conduct of Judge Delahay he was permitted to present testimony.

On March 19, 1872,[109] Mr. Benjamin F. Butler, of Massachusetts, from the Committee on the Judiciary, proposed a resolution, which was agreed to without debate:

Resolved, That the Committee on the Judiciary be, and they are hereby, authorized to send for persons and papers, to administer oaths, and to take testimony in the matter of the memorial and charges against Mark H. Delahay, district judge of the United States district for the State of Kansas.

On May 28 [110] Mr. John A. Bingham of Ohio from the Judiciary Committee, reported the following resolution, which was agreed to:

Resolved, That the Committee on the Judiciary be directed to further investigate the charges against the character and official conduct of M. H. Delahay, United States district judge for the district of Kansas, and for that purpose a subcommittee shall be authorized to sit during the recess of Congress, and may proceed to Kansas, subpoena witnesses, send for persons and papers, administer oaths, take testimony, and employ a clerk and reporter, the expense of which shall be paid from the contingent fund of the House on the order of the chairman.

In another case, relating to Judge Charles T. Sherman, Mr. Butler, citing the case of Judge Delahay, said that this subcommittee heard in Kansas such witnesses as Judge Delahay chose to have summoned.[111]

2505. Delahay impeachment continued.

The House, without division, voted to impeach Judge Delahay for improper personal habits.

The House voted the impeachment of Judge Delahay at the end of one Congress, intending to present articles in the next.

Forms and ceremonies for carrying of the impeachment of Judge Delahay to the Senate.

The Speaker gave the minority party representation on the committee to carry the impeachment of Judge Delahay to the Senate.

The impeachment of Judge Delahay was carried to the Senate by a committee of three.

On February 28, 1873,[112] Mr. Butler reported this resolution from the Judiciary Committee:

Resolved, That a committee of three be appointed to go to the Senate, and at the bar thereof, in the name of the House of Representatives, and of all the people of the United States, to impeach Mark H. Delahay, judge of the United States district court for the district of Kansas, of high crimes and misdemeanors in office, and acquaint the Senate that the House of Representatives will, in due time, exhibit particular articles of impeachment against him and make good the same, and that the committee do demand that the Senate take order for the appearance of said Mark H. Delahay to answer to said impeachment.

Two questions arose from this report:

1. Mr. Henry L. Dawes, of Massachusetts, asked if the Judiciary Committee, in view of the fact that the Congress was about to expire had settled the question whether or not the next House of Representa-

[109] Second session Forty-second Congress, Journal, p. 538; Globe, p. 1608.
[110] Journal, pp. 980, 990; Globe, p. 3926.
[111] Third session Forty-second Congress, Globe p. 2123.
[112] Third session Forty-second Congress, Journal, p. 512; Globe, pp. 1899, 1900.

tives could present the articles of impeachment of which this House might notify them. Mr. Butler said:

The Committee on the Judiciary do not expect to prepare articles of impeachment against Judge Delahay and present them for trial at this session. In the earliest case of impeachment of a judge in this country, in 1803, the case of Judge Pickering, which was in all respects like this, this exact question arose and was settled. One House presented articles of impeachment to the Senate and another House at the next session prosecuted those articles, as will be done in this case. We do not expect any other action except the formal presentation of the articles of impeachment to the Senate. The Senate is a perpetual court of impeachment, and in presenting these articles we act only as a grand jury.

2. As to the offense for which the impeachment was to be the remedy, Mr. Butler stated that—

The most grievous charge, and that which is beyond all question, was that his personal habits unfitted him for the judicial office; that he was intoxicated off the bench as well as on the bench. This question has also been decided by precedent. That was the exact charge against Judge Pickering, of New Hampshire, who, with one exception, is the only judge who has been impeached.

Mr. Butler then had read testimony showing that the judge had sentenced prisoners when intoxicated, to the great detriment of judicial dignity.

There was also a question as to certain alleged corrupt transactions, but Mr. Daniel W. Voorhees, of Indiana, said it was not proven to the satisfaction of several members of the committee that there was any malfeasance. Mr. Butler said:

The committee agree that there is enough in his personal habits to found a charge upon, and that is all there is in this resolution.

The resolution of impeachment was then agreed to without division.

On March 3 [113] the Speaker announced the appointment of Mr. Butler, Mr. John A. Peters, of Maine, and Mr. Clarkson N. Potter, of New York, members of the committee. Two of these were members of the majority party in the House, and the third represented the minority.

On the same day [114] the committee appeared at the bar of the Senate and, having been announced, advanced toward the area in front of the Secretary's desk, and Mr. Butler said:

Mr. President, in obedience to the order of the House of Representatives, this committee of the House appear at the bar of the Senate of the United States, and do impeach Mark H. Delahay, district judge of the United States district court for the district of Kansas, in the name of the House of Representatives and all the people of the United States, for high crimes and misdemeanors in office. And we do further acquaint the Senate, by the order of the House, that the House will in due time furnish particular articles against said Delahay and make good the same. And this committee is further charged by the House to demand of the Senate that they will take order for the appearance of Mark H. Delahay, as such judge, to answer the same.

The Presiding Officer [115] said:

The Senate will take order in the premises, of which due notice shall be given to the House of Representatives.

Later, on the same day, on motion of Mr. George F. Edmunds, of Vermont, it was

Ordered, That the Secretary inform the House of Representatives that the Senate will receive articles of impeachment against Mark H. Delahay, judge of

[113] Journal, p. 551.
[114] Senate Journal, pp. 542, 543; Globe, pp. 2153, 2165.
[115] Henry A. Anthony, of Rhode Island, presiding officer.

the district court of the United States for the district of Kansas, this day impeached by the House of Representatives before it of high crimes and misdemeanors, whenever the House of Representatives shall be ready to receive the same.

Meanwhile the committee had returned to the House of Representatives, where Mr. Butler, the chairman, submitted the following written report: [116]

That, in obedience to the order of the House, the committee have been to the Senate, and, in the name of the House of Representatives and of all the people of the United States, have impeached Mark H. Delahay, district judge of the United States for the district of Kansas, of high crimes and misdemeanors; and have acquainted the Senate that the House of Representatives will, in due time, exhibit particular articles against him, and make good the same. And further, that the committee have demanded that the Senate take order for the appearance of the said Mark H. Delahay to answer to the said impeachment.

A message was also received [117] in the House from the Senate in these terms:

The Senate is ready to receive articles of impeachment against Mark H. Delahay, judge of the United States district court for the State of Kansas.

No further proceedings took place. On March 10, 1874, as shown by the records of the State Department, Cassius G. Foster was appointed judge to fill a vacancy in this district.

2506. The investigation of the conduct of Edward H. Durell, United States district judge for Louisiana.

Instance wherein the House ordered an investigation of the conduct of a judge without a statement of charges, but in a case wherein common fame had made the facts known.

Instances wherein the House gave authority to prepare articles of impeachment at the time the investigation was ordered.

On January 13, 1873,[118] Mr. William D. Kelley, of Pennsylvania, moved that the rules be suspended so as to enable him to submit and the House to consider and agree to this resolution:

Resolved, That the Judiciary Committee be instructed to inquire into the conduct of Edward H. Durell, judge of the United States district court for the district of Louisiana, and ascertain and report whether, in the opinion of the committee, he has, for the purpose of overthrowing or controlling the government of the State of Louisiana, usurped jurisdiction not vested in the said district court by the Constitution or laws of the United States; and to report articles proposing the impeachment of the said Edward H. Durell if, in the judgment of the committee, he has abused his judicial functions by such usurpation of jurisdiction and unlawful interference with the constitutional privileges and rights of the people of said State; and that the committee have power to send for persons and papers.

The question being put, the rules were suspended, and the resolution was presented. And thereupon it was agreed to, without debate or division.

On January 21 [119] Mr. Jeremiah M. Wilson, of Indiana, from the Committee on the Judiciary, stated that there was some uncertainty in the resolution first adopted, and asked for the adoption of the following:

Resolved, That in addition to the inquiries heretofore directed by the House to be made into the official conduct of Judge E. H. Durell, the Judiciary Com-

[116] House Report No. 92.
[117] House Journal, p. 560.
[118] Third session Forty-second Congress, Journal, p. 164; Globe, p. 541.
[119] Journal, p. 225; Globe, p. 761.

mittee be instructed further to inquire whether said Durell should be impeached for high crimes and misdemeanors in office, and that said committee have leave to report at any time.

The resolution was agreed to by the House without division.

2507. The Durell investigation continued.

Instance wherein a House Committee charged with an investigation examined testimony taken before a Senate committee.

The Durell investigation was postponed in the Forty-second Congress because there was no time to permit Judge Durell to present testimony.

On March 3,[120] the last day of the Congress, Mr. John A. Bingham, of Ohio, submitted the report of the committee:

That they have examined to some extent the voluminous testimony taken before the Committee on Privileges and Elections of the Senate of the United States, and the bills, petitions, processes, and orders pending before said district court, and the action of said E. H. Durell thereon; and upon the legality and propriety of that action the most serious questions arise, and if the time at which this matter was brought before your committee by testimony permitted that proper investigation which ought to be had in a subject of so grave importance, your committee would proceed thereto.

It has been the practice of the Committee on the Judiciary to hear the accused in matters of impeachment whenever thereto requested, by witnesses or by counsel, or by both, as in their discretion would seem proper. Judge Durell has appeared before your committee and asked to be heard. At that hour in the session there was no time in which he could be heard, and for this reason only no further action has been taken by your committee.

We therefore report back the resolution with the recommendation that it be referred to the next House of Representatives for consideration, and that your committee be discharged from the further consideration thereof.

The report was laid on the table and ordered printed by the House.

2508. The Durell investigation continued.

A subcommittee, with power to send for persons and papers, was sent to Louisiana to investigate the conduct of Judge Durell.

A majority of the Judiciary Committee reported in favor of impeaching Judge Durell, principally for usurpation of power.

At the beginning of the next Congress, on December 17, 1873,[121] Mr. Jeremiah M. Wilson, of Indiana, submitted this resolution, which was agreed to:

Resolved, That the Committee on the Judiciary be, and is hereby, authorized and directed to inquire and report to the House whether Judge E. H. Durell, judge of the district court of the United States for the southern district of Louisiana, shall be impeached for high crimes and misdemeanors; and that said committee shall have power to send for persons and papers.

On December 19 [122] Mr. Benjamin F. Butler, of Massachusetts, from the Judiciary Committee, reported the following resolution, which was agreed to by the House:

Resolved, That the Committee on the Judiciary be, and is hereby, authorized to send a subcommittee of two members of said committee to New Orleans for the purpose of taking testimony in the matter of the impeachment of Judge E. H. Durell, heretofore referred to said committee, and that said subcommittee have power to send for persons and papers and to employ a stenographer.

Mr. Butler explained that the charges against Judge Durell related to bankruptcy proceedings, and that unless the committee should be

[120] Journal, p. 583; Globe, p. 2133; House Report No. 96.
[121] First session Forty-third Congress Journal, p. 141; Record, p. 266.
[122] Journal, p. 165; Record, p. 337.

sent it might be necessary to have the bankruptcy records brought to Washington, or have copies of them made. Such a task would be long and expensive.

On June 17, 1874,[128] very near the end of the session, Mr. Wilson submitted the report of the majority of the committee, consisting of Messrs. Benjamin F. Butler, of Massachusetts; Jeremiah M. Wilson, of Indiana; Alexander White, of Alabama; Charles A. Eldredge, of Wisconsin; Clarkson N. Potter, of New York, and Hugh J. Jewett, of Ohio. The report begins:

> Among the charges brought to the notice of your committee were those of drunkenness and the improper procurement of money by means of his judicial office. These charges are not sustained by the testimony, in the opinion of your committee, and therefore will not be further noticed.

The report finds more serious certain charges relating to the bankruptcy business of the court. Judge Durell had appointed E. E. Norton "official assignee in bankruptcy," and the latter had taken possession of the assets and estates of bankrupts in about 1,300 cases. "His charges were outrageously extortionate and seem to have been generally framed to absorb the estate," says the report; and it further cites an order by Judge Durell which prevented scrutiny into such charges. Norton also was found to have collusion with the auctioneers who made sales of bankrupt property, receiving more than $20,000 therefrom. The committee could not trace these facts directly to the knowledge of Judge Durell, although some testimony tended to show such knowledge. After citing evidence the report continues:

> The manner in which Norton was managing these affairs and the extortionate charges he was making were the subject of severe criticism in the newspapers of the city of New Orleans.
>
> The most intimate social relations existed between Judge Durell and Norton during all of this time. Judge Durell spent much of his time at Norton's house in the city of New Orleans. They traveled North together in the summer and spent much of their time together while North, returning South again together when the summer was over.
>
> These facts so notorious in regard to the management of so important trusts as those of the bankrupt estates, when taken in connection with the order hereinbefore referred to, lead to the inevitable conclusion by your committee that Judge Durell must have been cognizant of them, and therefore a corrupt party thereto, or that he was grossly negligent in the discharge of his official duties, so that, quacumque via data, he comes under a like condemnation.

And, finally, the report discusses a charge growing out of the Louisiana election of November 4, 1872. William P. Kellogg, Republican candidate for governor at that election, filed a bill in the United States circuit court against the then Governor Warmouth, McEnery, the Democratic candidate for governor, and certain others, alleging frauds for the purpose of disfranchising colored voters, and such an illegal purging of the State registration board as would enable the destruction of the evidence of the frauds; and therefore Mr. Kellogg prayed that a writ of injunction should issue, enjoining Warmouth from canvassing the returns except in the presence of the unpurged returning board, called the Lynch board. Warmouth filed answer denying the allegations. The motion for an injunction was heard and submitted on December 4, and on December 6 Judge Durell granted the injunction restraining Warmouth as prayed for in the bill. The report, after setting forth these preliminary facts, continues:

[128] Journal, p. 1218; Record, pp. 5124, 5125; House Report No. 732.

In his opinion the judge speaks of Kellogg's bill as a bill "to preserve evidence." Assuming that this court had the power, by virtue of the acts of Congress, to preserve the evidence relating to the election of State officers, that end would have been answered and that power exercised by the injunction which prevented the destruction of the ballots, certificates, and evidences in question; and that was, as the Senate Committee on Privileges and Elections have said in their report of January, 1873, "the utmost that the court had authority upon this bill to do." The Constitution and acts of Congress gave no color of authority to a Federal court to determine what were the proper officers of the State or to restrain those who claimed to be so from action in respect of State matters.

On the 20th of November Warmouth signed an act passed by the last legislature which until that time he had delayed signing, which act appointed Wiltz, Deferiet, and others a returning board, and subsequently he submitted to them the votes and returns, which were compiled by that board, and they returned certifying the McEnery ticket as elected, and Warmouth, as governor, on the 4th of December, made proclamation thereof accordingly.

About these facts there is no dispute whatever.

The legislature thus declared to have been elected were about to assemble in the State house on the 6th of December. About 9 o'clock on the evening of the 5th of December Judge Durell sent for S. B. Packard, the United States marshal for the district. Packard went to his room. The judge told him to send for Mr. Billings and Mr. Beckwith, Kellogg's solicitors; that he proposed issuing an order for the occupation of the State house. The solicitors were sent for; they came, and the judge told them the same thing, and after some consultation the preparation of the order was set about. Judge Durell dictated it to Mr. Billings, who wrote it down, and the marshal's deputy, De Klyne, made a clean copy of the order thus dictated. The judge then signed it and delivered it to Packard, who thereupon set about executing it, which he did by calling on General Emory for a detachment of Federal troops, who occupied the State house that same night. This occupation resulted in securing the State government to Kellogg. This order declared that, whereas Warmouth had, in violation of the restraining order herein, issued the following proclamation and returns of certain persons claiming to be a board of returning officers, all in violation and contempt of the said restraining order, as follows, to wit [setting out the proclamation and returns], and proceeded:

Now, therefore, in order to prevent the further obstruction of the proceedings in this cause, and further to prevent a violation of the orders of this court, to the imminent danger of disturbing the public peace, it is hereby ordered that the marshal of the United States for the district of Louisiana shall forthwith take possession of the building known as the Mechanics' Institute, and occupied as the State house for the assembling of the legislature therein, in the city of New Orleans, and hold the same subject to the further order of this court; and meanwhile to prevent all unlawful assemblage therein under the guise or pretext of authority claimed by virtue of pretended canvass and returns made by said pretended returning officers, in contempt and violation of said restraining order; but the marshall is directed to allow the ingress and egress to and from the public offices in said building of persons entitled to the same.

E. H. DURELL, *Judge.*

NEW ORLEANS, LA., *December 5, 1872.*

And it contained no other pretenses, recitals, or reasons for its issue.

It will be observed that none of the persons who composed the Wiltz and Deferiet board were members of the Lynch board, or named or mentioned in Kellogg's bill or Judge Durell's injunction. The act under which the Wiltz board was appointed seems to have been wholly overlooked, and no effort was made to restrain or prevent action under it; and although the judge declared that his midnight order was intended to prevent the obstruction of the proceedings in the Kellogg suit, and the violation of the orders of the court, the fact was these orders had not been violated nor the proceedings obstructured, nor was it possible that the canvass and return by the Deferiet board could obstruct or defeat the proceedings in that case, unless the object of that case was not, as pretended, to preserve evidences of right, but really to determine the validity of State elections. But the law had conferred and could confer no such power on a Federal court, and any proceedings to that end were necessarily coram non judice and void.

The report discusses at length the alleged usurpation practiced by Judge Durell, concluding:

Such action, from whatever motive, is at variance with every principle of good government, is calculated to confound and subvert the distinctions between the State and Federal governments, and to overthrow the Constitution itself, without which neither Judge Durell nor any other judge has any rightful authority whatever.

Therefore the committee reported these resolutions:

Resolved, That Edward H. Durell, judge of the district court of the United States for the district of Louisiana, be impeached of high crimes and misdemeanors in office.

Resolved, That a committee of two be appointed to go to the Senate, and, at the bar thereof, in the name of the House of Representatives and of all the people of the United States, to impeach Edward H. Durell, judge of the district court of the United States for the district of Louisiana, of high crimes and misdemeanors in office, and acquaint the Senate that the House of Representatives will in due time exhibit particular articles of impeachment and make good the same; and that the committee do demand that the Senate take order for the appearance of said Edward H. Durell to answer to said impeachment.

Resolved, That a committee of seven be appointed to prepare and report articles of impeachment against Edward H. Durell, judge of the district court of the United States for the district of Louisiana, with power to send for persons, papers, and records, and to take testimony under oath.

Mr. Lyman Tremain, of New York, submitted minority views, which were concurred in by Messrs. William P. Frye, of Maine; John Cessna, of Pennsylvania, and Jasper D. Ward, of Illinois, dissenting from the majority report and recommending the discontinuance of all proceedings.

Mr. Luke P. Poland, of Vermont, filed individual views, saying:

First. In relation to the midnight order, although he believes the judge had no proper legal jurisdiction to make it, still he is not able to find that the judge acted corruptly or with any belief that he was going beyond his jurisdiction in making it. The law under which he acted was new and no rules or precedents had been established under it. The whole people were excited, the times were violent and turbulent, and judicial calmness or correctness could hardly be expected.

Second. The evidence seems to establish that some of the officers of Judge Durell's court were guilty of very corrupt practices, and that he was not watchful to scrutinize their conduct, but there is no claim that he ever shared in any of the proceeds of their gains and no direct evidence that he knowingly scantioned or approved their action.

Third. Where the evidence obtained by substantially an ex parte examination only secures a bare majority of the committee, it does not appear to me that the public interest will be furthered by presenting articles of impeachment to the Senate for trial.

A few days after this report was submitted this session of Congress adjourned without further action on it.

2509. The Durell investigation continued.

Judge Durell having resigned, the House discontinued impeachment proceedings.

Discussion of the effect of resignation of the officer upon impeachment proceedings.

Discussion of usurpation of power as a ground for impeachment.

At the next session, on January 7, 1875,[124] the resolutions came before the House, and it was then announced that Judge Durell had resigned his office, and that his resignation had been accepted.

A discussion arose as to two points:

1. As to the sentiments of the committee on the charges against Judge Durell.

[124] Second session Forty-third Congress, Journal, p. 139; Record, pp. 819–824.

Mr. Benjamin F. Butler said that he had favored impeachment solely because of the midnight order. He did not consider the other charges proven. As to the midnight order, he said:

That seemed to me not within the enforcement act. There was no bill under the enforcement act to put that order in action, but simply a proceeding to perpetuate testimony. It seemed to me so gross an exercise of power that if the judge did not know he was exceeding his powers he ought to have known it. And, in either case, if he did know, of course he was wrong; and if he did not know, he ought to have known, and therefore he did not conduct himself well in office. And upon that ground I voted as I did. * * * He acted upon his own motion, without any motion or argument before him, and that is what makes the gravamen of the offense charged against him; for without motion of the counsel for the complainant on this bill of equity, he, upon his own consideration and judgment, acted, and without any moving cause except in his own mind. * * * Now, while I will not hold a judge to be impeachable where he simply makes a mistake, yet if a judge, clearly outside of all possible jurisdiction, interferes with the liberty of a single citizen, I will hold him impeachable.

Mr. Lyman Tremain, of New York, who at the previous session had been one of the minority dissenting from impeachment, said that he had studied the case during the recess and had come to the conclusion that if the resolutions came to a vote he should vote for them, because of the midnight order. After reviewing the history of that order, Mr. Tremain said:

Instead of being a judicial order, it seems to me to be a military order, an order which it seems was afterwards upheld and supported by the troops of the United States, and which it may therefore be fairly assumed was contemplated and intended to be so used. I find also that the marshal testifies that the judge gave him discretionary power by an oral direction to determine what persons should be admitted to the State-house and what persons should be excluded; thus deputing, not in writing, this vast discretionary power, and clothing the marshal with it. I can not believe that such an order as that can be justified by any consideration of charity.

Messrs. Storm and Poland, who had been of the dissenting minority, stated their belief that the order was wrong, but they did not consider that a wrongful intent was established. "Because this judge made an order he had no legal jurisdiction to make," said Mr. Poland, "it by no means follows he is amenable to impeachment, unless it can be established that that order was made corruptly or made with a knowledge on his part—with a belief that he was exceeding his legal jurisdiction."

Mr. Jeremiah M. Wilson stated that he believed the general opinion of those concurring in the majority report, was that Judge Durell was also impeachable for the irregularities in the bankruptcy proceedings.

2. As to the power to impeach a person who has resigned.

Mr. Butler stated that he had no doubt, as the Constitution imposed the punishment of disability for holding office thereafter, that the impeachment might proceed. But Judge Durell was an old man and there would be no practical benefit in going on with this case. Mr. Luke P. Poland stated that, while he had not examined the matter carefully, he had a very strong impression that the resignation would not avail as a legal obstacle to prevent the House from continuing the proceedings. It was a matter for the discretion of the House, according to the circumstances of the case.

Mr. Tremain said he had examined the question with considerable care, and he had very serious doubt "whether the House has any Constitutional power whatever to proceed by impeachment after the officer has resigned, his resignation has been accepted, and his successor

has been appointed. The power to impeach rests entirely upon the Constitution of the United States. The whole system of English parliamentary impeachment, with the tremendous powers possessed by Parliament, has been superseded by our Constitution." Mr. Tremain said that the whole subject had been discussed by Judge Story, whose Commentaries he quoted in support of his view.

The question was taken on laying the resolutions on the table, and the motion was agreed to, yeas 129, nays 69. So the proceedings were discontinued.

2510. The inquiry as to the conduct of Schuyler Colfax, Vice-President of the United States.

In the Colfax case the majority of the Judiciary Committee concluded that the power of impeachment was rather remedial than punitive.

Discussion as to whether or not a civil officer may be impeached for an offense committed prior to his term of office.

A proposition to investigate the conduct of an officer and prepare articles of impeachment was held to be privileged.

On February 20, 1873,[125] Mr. Fernando Wood, of New York, proposed as a question of privilege, the following:

Resolved, That the testimony reported to this House by the special committee appointed under the resolution of the House of Representatives of December 2, 1872, for the investigation of charges of bribery in influencing Members of the House of Representatives, be referred to the Committee on the Judiciary, with instructions to report articles of impeachment against Schuyler Colfax, Vice-President of the United States, if in its judgment there is evidence implicating that officer and warranting impeachment.

Mr. Horace Maynard, of Tennessee, asked if a question of privilege was presented.

The Speaker[126] stated that such a question had been presented.

Mr. James N. Tyner having raised the question of consideration, the House, by a vote of yeas 105, nays 109, voted not to consider it.

Thereupon Mr. Tyner presented this resolution, which was agreed to without debate or division:

Resolved, That the testimony taken by the Committee of this House, of which Mr. Poland, of Vermont, is chairman, be referred to the Committee on the Judiciary, with instructions to inquire whether anything in such testimony warrants articles of impeachment of any officer of the United States not a Member of this House, or makes it proper that further investigation should be ordered in this case.

This resolution was offered as involving a question of privilege, and its status as such was not questioned.

On February 24 Mr. Benjamin F. Butler, of Massachusetts, submitted the report[127] of the committee. This report, so far as it related to the subject of impeachment, was concurred in by Messrs. John A. Bingham, of Ohio, Benjamin F. Butler, of Massachusetts, Charles A. Eldredge, of Wisconsin, John A. Peters, of Maine, Lazarus D. Shoemaker, of Pennsylvania, Daniel W. Voorhees, of Indiana, and Jeremiah M. Wilson, of Indiana. Mr. Clarkson N. Potter, of New York, dissented.

For the purpose of applying the principles and precedents, the committee assumed all that could be inferred from the testimony in

[125] Third session Forty-second Congress, Journal, pp. 451, 452; Globe, pp. 1544, 1545.
[126] James G. Blaine, of Maine, Speaker.
[127] House Report No. 81, third session Forty-second Congress; Globe, p. 1651.

regard to the Vice-President, Schuyler Colfax, who was the official referred to. They assumed that in the winter of 1867–68 he purchased of Oakes Ames stock of the Credit Mobilier at par when it was known to be worth much more than par; and that, from 1867 to 1869, while holding such stock, and while the House was considering subjects affecting the value of that stock, he presided over the House as Speaker. They found it undisputed that Mr. Colfax became interested in the Credit Mobilier before he became Vice-President, and that the motives which impelled the transaction were expected to operate upon him only as a Member of the House. Continuing, the committee say:

> But we are to consider, taking the harshest construction of the evidence, whether the receipt of a bribe by a person who afterwards becomes a civil officer of the United States, even while holding another official position, is an act upon which an impeachment can be grounded to subject him to removal from an office which he afterwards holds. To elucidate this we first turn to the precedents.
>
> Your committee find that in all cases of impeachment or attempted impeachment under our Constitution there is no instance where the accusation was not in regard to an act done or omitted to be done while the officer was in office. In every case it has been heretofore considered material that the articles of impeachment should allege in substance that, being such officer, and while in the exercise of the duties of his offices, the accused committed the acts of alleged inculpation.

The committee then cite briefly the impeachments of Judges Pickering, Chase, Peck, and Humphries, and President Johnson, in each of which the offense charged occurred during the term of office. Of impeachments under the State constitutions the rule seemed to be the same, unless the recent cases of Judges Barnard and McCunn, in New York, might present some exceptional features. In the Parliament of England, also, the committee found the same rule prevailing in all years since the rights of the subject and the principles of law and justice have become established.

From this so nearly "invariable current of precedent and authority" the committee turn to inquire:

> What is the nature and what the objects of impeachments under our Constitution? Are they punitive or remedial? Or, in other words, is impeachment a constitutional remedy for removing obnoxious persons from office and preventing their again filling office, or a power given for punishing an officer, while he is an officer, for some crime alleged to have been committed by him before he was such officer?

The report answers these questions as follows:

> Your committee are very strongly inclined to the opinion that impeachment was intended by the framers of the Constitution to be wholly remedial and not punitive, except as an incident to the judgment, because we find that the Constitution limits the judgment in impeachment by strongly restrictive words: "Judgment in cases of impeachment shall not extend further than to removal from office and disqualification to hold and enjoy any office of honor, trust, or profit, under the United States."
>
> If such judgment is a punishment for an alleged high crime and misdemeanor, then why does the same article provide for the punishment of the accused a second time for the same offense? Because the words we have quoted are followed by the provision: "But the party convicted shall, nevertheless, be subject to indictment, trial, judgment, and punishment according to law."
>
> This, therefore, would leave the party who had been removed from office and disqualified from holding office by the judgment of impeachment, if that is a punishment for his crime, to be the second time punished for the same offense, which is contrary to natural justice, against Magna Charta, and is most positively forbidden by the fifth article of amendment to the Constitution.
>
> This article also throws some further light on this subject, because in its nervous language it enacts that "No person shall be held to answer for a capital

or otherwise infamous crime, unless upon presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger."

Nor does it appear that this view is affected by the exception in section 2, Article III, of the Constitution, that the trial of all crimes, except in cases of impeachment, shall be by jury; this exception being necessary only to make the instrument consistent in all its parts with itself, as it had already provided that the impeached could be tried by jury for his crime.

Again, we find impeachment to be remedial in this, that it only provides, as a further consequence, disqualification for office, by which the evil is cured; that thereafter the Government may not have an officer who has so far forgotten his obligations to his official oath and to his duty as a citizen as to have been removed from office for high crimes and misdemeanors; again, by vote of the electors or appointment by the Executive, put in place of honor or trust.

We are also inclined to believe that proceedings of impeachment were intended to be remedial and not punitive, because we have already seen that if punitive at all an entirely inadequate punishment has been provided by the judgment; because the very highest offenses are triable by impeachment, such as treason and bribery, and the sentence may be only removal from an office whose term extends for a few days only, as in the case under consideration.

Again, we are brought to the conclusion that proceedings of impeachment are remedial and not punitive, because, in the case of Judge Pickering, before referred to, impeached for habitual intoxication, the officer was condemned because he became incapacitated for the performance of the duties of his office, and we find that impeachment is the only means known to our Constitution by which a civil officer of the United States, elected by the people, or a judge appointed by the Executive, can be removed from office. And certainly habitual intoxication, while it may not be a crime at common law or by statute, in a private person, may readily enough seem to be a very high crime and misdemeanor in a high civil officer, wholly incapacitating him from performing all his duties; so much so as to be made by the Articles of War a ground for removing an officer from the military service.

Again, your committee are inclined to believe that impeachment is not punitive, because, although an officer may have been tried and convicted of a high crime, yet he may be impeached for that very crime as a remedy for public mischief, and thus, in the converse of the proposition above stated, be twice punished for the same offense.

If the conclusions to which your committee have arrived in this regard are correct, it will readily be seen that the remedial proceedings of impeachment should only be applied to high crimes and misdemeanors committed while in office, and which alone affect the officer in discharge of his duties as such, whatever may have been their effect upon him as a man, for impeachment touches the office only and qualifications for the office, and not the man himself.

The report was made in the House, February 24, and was briefly debated, after which it was postponed to February 26. But it was not considered that day, and does not appear to have been taken up thereafter.[128]

2511. The investigation into the conduct of Charles T. Sherman, district judge of the United States for the northern district of Ohio.

The House declined to vote the impeachment of a judge who had not been heard before the investigating committee.

Discussion of precedents in relation to ex parte investigations with a view to impeachment, including the case of President Johnson.

On February 22, 1873,[129] Mr. Ellis H. Roberts, of New York, presented as a question of privilege, and at the request of the Committee on Ways and Means, this resolution:

[128] Globe, pp. 1655, 1656; Journal, pp. 472, 473.
[129] Third session Forty-second Congress, Journal, p. 461; Globe, p. 1628.

Resolved, That the evidence taken by the Committee on Ways and Means, under their authority to send for persons and papers in matters under examination pending before said committee, arising out of business referred to them by the House, be referred to the Committee on the Judiciary, with instructions to examine so much thereof as relates to Charles T. Sherman, judge of the district court of the United States for the northern district of Ohio, and determine whether further investigation of the conduct of said Sherman should not be had with a view of presenting articles of impeachment, if such investigation should, in their judgment, justify such action.

Without any question as to whether or not the resolution was privileged, and without division, the House agreed to it.

On March 3,[130] the last day of the Congress, Mr. Benjamin F. Butler, of Massachusetts, from the Committee on the Judiciary, reported that the testimony had come to the committee on the preceding day. There was therefore no time for the accused or his counsel to be heard, and as it had become the established practice of the Judiciary Committee to give such hearings in cases of impeachment, they reported the testimony back, to be placed on file for the consideration of the next House. Therefore Mr. Butler proposed this resolution:

Resolved, That the testimony be placed on file for the consideration of the next House of Representatives, and that the committee be discharged from the further consideration of the same.

Mr. Clarkson N. Potter, of New York, proposed the following as a substitute:

Whereas it appears by the letters of Charles T. Sherman, a judge of the district court of the United States for the northern district of Ohio, that he proposed to corruptly control legislation for money, to be paid to him by the stock exchange of New York, and subsequently insisted on such payment on the ground of such control, and threatened adverse legislation if the same was not paid; and whereas it further appears by the testimony of said Sherman before the Committee on Ways and Means of this House that his said pretenses of power to control legislation and his said a sertions of services he had rendered in this respect were false: Therefore,

Resolved, That a committee of three Members of this House be appointed by the Speaker to go to the Senate and at the bar thereof, in the name of the House of Representatives and of all the people of the United States, to impeach Charles T. Sherman, judge of the district court of the United States for the northern district of Ohio, of high misdemeanors in office, and acquaint the Senate that the House of Representatives will in due time exhibit particular articles of impeachment against him and make good the same; and that said committee do demand that the Senate take further order for the appearance of the said Charles T. Sherman to answer to said impeachment.[131]

The presentation of this proposed substitute caused an issue to be joined as to whether or not an officer ought to be impeached without an opportunity to be heard. It was explained that Judge Sherman had appeared before the Ways and Means Committee only as a witness, to answer such questions as were asked, and without power to explain or adduce evidence in his own behalf.

Those who favored delay to permit Judge Sherman to be heard seemed generally to consider that his conduct merited impeachment, Mr. Henry L. Dawes, of Massachusetts, saying that he did not see how he could make a satisfactory explanation, yet he believed that the opportunity should be given him.

Mr. Butler said that in the cases of Judges Pickering and Chase the opportunity to be heard was not given, but it had been conceded in "the

[130] Journal, pp. 571, 572; Globe, pp. 2122–2127.
[131] At this stage the simple resolution to impeach is usually presented. The above form is used after impeachment has been voted, to provide for taking the charge to the Senate.

case of Judge Watrous, in the case of Judge Peck, in the case even of Andrew Johnson." There was dissent at this statement as to President Johnson, and Mr. Butler qualified it by saying:

He was notified of what was going on but never asked to appear.[130]

Mr. Butler went on to say that in the case of Judge Delahay they did not hear counsel, but sent a subcommittee to Kansas to hear such witnesses as Judge Delahay might choose to summon. Judge Busteed was heard by himself and by counsel. In this case Judge Sherman had made application to be heard, but the committee had no time to hear him.

Mr. Potter read letters of Judge Sherman which appeared to support the allegations of the preamble, and urged the adoption of the substitute.

After further debate the preamble and substitute were disagreed to by a vote of 32 ayes and noes not counted.

Then the resolution proposed by Mr. Butler was agreed to without division.

The records of the State Department show that Martin Walker was appointed judge of this district on November 25, 1873, and the vacancy was occasioned by the resignation and death of Judge Sherman.[133]

2512. The investigation into the conduct of Richard Busteed, United States district judge for Alabama.

The majority of the Judiciary Committee recommended the impeachment of Judge Busteed, principally for nonresidence.

A question as to the authority of Congress to make nonresidence of a judge an impeachable offense.

Judge Busteed having resigned, the House discontinued impeachment proceedings.

On December 15, 1873,[134] Mr. E. Rockwood Hoar, of Massachusetts, by unanimous consent, submitted the following resolution, which was agreed to:

Resolved, That the Committee on the Judiciary be directed to inquire and report whether the action of this House is requisite concerning the official conduct of the judge of the United States district court for the district of Alabama; and especially whether said judge had held terms of his court required by law; whether he has continuously and persistently absented himself from the said State; and whether his acts and omissions in his office of judge have been such as in any degree to deprive the people of that State of the benefit of a district court therein, and amount to a denial of justice.

On December 17,[135] Mr. Jeremiah M. Wilson, of Indiana, submitted the following resolution, which was agreed to:

Resolved, That the Committee on the Judiciary, to whom has been referred[136] the resolution requiring said committee to inquire into the conduct of the judge of the district court of the United States of the district of Alabama, shall have power to send for persons and papers.

On June 20, 1874,[137] Mr. Wilson presented the report of the committee for printing and recommitment.

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[130] Globe, p. 2123.
[133] John Sherman's Recollections, Vol. II, p. 726.
[134] First session Forty-third Congress, Journal, p. 127, Record, p. 209.
[135] Journal, p. 141; Record, p. 266.
[136] This is hardly accurate. The House agreed to the resolution, thereby instructing the committee.
[137] Journal, p. 1262; Record, p. 5316; House Report No. 773.

The official referred to in these proceedings was Judge Richard Busteed.

It appears incidentally from the report that at least one witness was called at Judge Busteed's request, and was examined by "Mr. Busteed," which would suggest that the respondent acted in person or was represented by some attorney of the same name. Some of the testimony elicited shows pretty conclusively that Judge Busteed examined the witness personally.

Three charges appear in this case:

1. That Judge Busteed did not reside in the district as required by the acts of September 24, 1789, and December 18, 1812, the latter of which provided that "any person offending against the injunction or prohibition of this act shall be deemed guilty of a high misdemeanor."

The majority of the committee determined that the residence required by these laws was an actual residence. They say that Judge Busteed was appointed in 1865, being then a resident and large property owner in New York. Soon after his appointment he leased for three years a residence in Mobile, Ala., and removed his family there to reside. The report assumes that this removal was with the intent of becoming a permanent resident of the State. About two years afterwards, the house becoming untenantable, he abandoned his lease, his family came North, and have not since returned to Alabama. For the past seven years his family had not been in Alabama. The testimony showed that Judge Busteed had in New York real estate and personal property to a total value of about $300,000, including a house, but that he had no real estate in Alabama, and that his personal effects consisted of "a carpet, a music box, and a double-barreled gun." He lived with a relative in the New York house much of the year, going to Alabama in the fall to hold court, and returning in June, as soon as the courts were over. From this testimony the majority of the committee concluded that Judge Busteed was no resident of Alabama, "but only a sojourner from time to time for the purpose of holding terms of court."

2. The evidence showed much irregularity in holding courts—that in each division of the district he had frequently failed to hold the courts at the terms created by law. In one of them he had held no court since the spring of 1872, and in none of them had he held any court since the spring of 1873. Besides this, before those dates he held his courts irregularly, sometimes omitting altogether to hold them, being absent from the State. The committee concluded that the plea of ill health was not a sufficient excuse for these numerous and continued absences from duty.

3. It was also charged that Judge Busteed had used improperly the money of the United States and his official position to promote his personal interests. The committee found this charge sustained in respect to the remission of a fine by the judge in his court in order to relieve himself of a libel suit in the State courts.

Therefore the majority of the committee, Messrs. Benjamin F. Butler, of Massachusetts; Jeremiah M. Wilson, of Indiana; Luke P. Poland, of Vermont; Alexander White, of Alabama; Charles A. Eldredge, of Wisconsin; Clarkson N. Potter, of New York, and Hugh J. Jewett, of Ohio, concurred in recommending this resolution:

Resolved, That Richard Busteed, judge of the district court of the United States for the southern, middle, and northern districts of Alabama, be impeached for misdemeanors in office.[138]

Messrs. John Cessna, of Pennsylvania; William P. Frye, of Maine; Jasper D. Ward, of Illinois, and Lyman Tremain, of New York. dissented from the conclusion of the majority of the committee.

Soon after this report was printed the session of Congress ended.

At the next session, on January 7, 1875,[139] the report was taken up. In the meantime Judge Busteed had resigned his office and the resignation had been accepted.

Mr. Tremain expressed a doubt as to whether or not nonresidence was an impeachable offense. "High crimes and misdemeanors" must be taken to mean such offenses as were high crimes and misdemeanors when the Constitution was framed. It might be doubted whether a subsequent law proposing to make a specific offense a high crime or high misdemeanor would be constitutional.

This report being taken up immediately after the disposition of the *Durell* case, Messrs. Butler and Wilson took occasion to emphasize their opposition to the theory that an officer might escape impeachment by resignation.

The question being taken on discharging the Committee on the Judiciary from the consideration of the subject and laying it on the table, the motion was agreed to without division. So the proceedings were discontinued.

2513. The investigation into the conduct of William Story, United States judge for the western district of Arkansas.

Memorials containing charges against Judge Story were referred to the Judiciary Committee for examination before the House voted a formal investigation.

On February 26, 1874,[140] Mr. James G. Blaine, of Maine, presented to the House memorials of James S. Robinson, of Fort Smith, Ark., and of Ben. T. Du Vol, James S. Gage, and others, practicing attorneys of Fort Smith, containing charges and specifications against William Story, judge of the United States district court for the western district of Arkansas. These memorials were presented at the Clerk's desk under the rule, and under the rule were referred to the Committee on the Judiciary.

On April 28 [141] Mr. Jeremiah M. Wilson, of Indiana, from the Committee on the Judiciary, stated that the memorials presented contained nineteen specifications. The committee had been examining the case for some time, but now needed further authority, and he proposed this resolution, which was agreed to by the House without division:

Resolved, That the Committee on the Judiciary be, and is hereby, instructed to inquire whether Judge William F. Story, judge of the district court of the United States for the western district of Arkansas, shall be impeached for high crimes and misdemeanors, and that said committee have power to send for persons and papers.

On June 20, 1874,[142] Mr. John Cessna, of Pennsylvania, from the Committee on the Judiciary, presented a resolution providing that the

[138] Two other resolutions providing for carrying the impeachment to the Senate and for a committee to prepare articles accompanied this resolution. They were similar to the resolutions in the Durell case.
[139] Second session Forty-third Congress, Journal, pp. 140, 141; Record, pp. 324–326.
[140] First session Forty-third Congress, Journal, p. 511; Record, p. 1825.
[141] Journal, p. 869; Record, p. 3438.
[142] Journal, p. 1262; Record, p. 5316.

evidence taken in this matter by the Judiciary Committee be furnished by the Clerk of the House to the Attorney-General, Secretary of the Treasury, and Third Auditor and First Comptroller of the Treasury, "for their information and guidance, with the recommendation that such action be taken by the said Departments as will restore to the Treasury of the United States any moneys wrongfully paid to any of the officers of said court, and to prevent any such wrongful payments hereafter." This resolution was agreed to with an amendment including also a copy of testimony taken before the Committee on Expenditures in the Department of Justice.

2514. The investigation into the conduct of George F. Seward, late consul-general at Shanghai.

The Seward investigation was set in motion by a memorial.

In the Seward investigation the respondent was represented by counsel and in person before the committee.

An opinion of the Judiciary Committee that a person under investigation with a view to impeachment may not be compelled to testify.

An instance wherein a committee charged with the investigation reported articles with the resolution of impeachment.

On January 23, 1878,[143] the Speaker laid before the House a communication from John C. Myers, later consul-general at Shanghai, China, asking that an investigation might be had concerning the administration of the consulate-general at Shanghai, during the terms in office of Hon. George F. Seward, present minister to China; O. B. Bradford, vice-consul-general and consular clerk; and himself as consul-general.

The memorial was first referred to the Committee on Foreign Affairs, but later the reference was changed to the Committee on Expenditures in the State Department.

The Committee on Expenditures in the State Department, by a resolution of January 11, 1878,[144] had been empowered generally to investigate the affairs of the State Department, and under this authority they proceeded to take testimony on the subject of the memorial.

It appears[145] that counsel was permitted to represent Mr. Seward before the committee, and later the investigation was suspended in order that Mr. Seward might leave his post and appear before the committee to assist in cross-examination of witnesses. The committee, however, made the condition of this concession, that Mr. Seward should produce papers in his possession relating to the consul-generalship at Shanghai during his incumbency of the office. Mr. Seward did not produce the papers, did not obey a subpoena duces tecum, and declined the oath as a witness, urging that the fifth amendment to the Constitution provided that "no person shall be compelled, in any criminal case, to be a witness against himself."

The issue thus raised was referred to the Committee on the Judiciary, who reported on March 3, 1879,[146] Mr. Benjamin F. Butler, of

[143] Second session Forty-fifth Congress, Journal, pp. 268, 269, 273.
[144] Journal, pp. 158, 159.
[145] House Report No. 117, third session Forty-fifth Congress.
[146] Third session Forty-fifth Congress, Report No. 141.

Massachusetts, making the report. The general question of the production of papers was discussed,[147] and also the report said on the question of testimony:

> Investigations looking to the impeachment of public officers have always been finally examined before the Judiciary Committee of the House, so far as we are instructed; and it is believed that the case can not be found as a precedent where the party charged has ever been called upon and compelled to give evidence in such case. We distinguish this case from the case of an ordinary investigation for legislative purposes, where all parties are called upon to give such evidence (oral or written) as may tend to throw light upon the subject of investigation; but even in those cases it was early held that a person called as a witness, and not a party charged before the committee, was not bound to criminate himself; and a statute familiar to the House, for the protection of witnesses under such circumstances, from having the evidence given used against them, was passed.
>
> In making an investigation of the facts charged against an officer of the United States looking to impeachment, the House acts as the grand inquest of the nation to present that officer for trial before the highest court known to our Constitution—the Senate of the United States—for such punishment as may be constitutionally imposed upon him, which is very severe in its penalties, and even then does not exonerate the party from further prosecution before the proper courts for offenses against the laws.

On March 1, 1879,[148] before the report of the Judiciary Committee had been submitted to the House, Mr. Springer presented the report of the majority of the Committee on Expenditures in the State Department.[149] The report consisted of seventeen articles of impeachment, charging that as judge of the consular court, while consul-general, he had corruptly received money in the settlement of estates and in other judicial matters; that he had converted to his own use certain funds intrusted to him as consul-general; that he had used his official influence to promote the construction of a railway in violation of law and treaty; that he had converted to his own use fees belonging by law to the marshal of the consulate, by virtue of an unlawful agreement with the said marshal; that he had, by means of falsified accounts, converted to his own use certain premiums of exchange; that he unlawfully took the salary of his office as consul-general after he had become minister of the United States to China, and while receiving the salary of the latter office; that as minister to China he unlawfully suspended John C. Myers, then being consul-general at Shanghai, and procured the appointment of one Oliver B. Bradford to the place, for the purpose "to secrete and conceal the crimes committed as aforesaid;" and that he had neglected willfully to render true and just quarterly accounts of his office, and embezzled the public moneys of the United States; that as minister to China he unlawfully endeavored to procure and did procure the release of Oliver B. Bradford from the consular jail, whither he had been committed for embezzlement, and permitted him to go at liberty; and that he unlawfully took from the consulate-general at Shanghai certain account books, the property of the United States, and carried them away "with intent to conceal, destroy, or steal the same, and ever since has and still does conceal the same, and refuses to deliver the same up as required by law."

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[147] See sections 1699, 1700 of this volume for general aspects of the subject.
[148] Journal, pp. 621, 624, 625, 642, 649, 659, 664; Record, pp. 2874, 2878, 2884, 2778.
[149] For this report in full, see Journal, pp. 624–633.

The committee therefore recommended this resolution:

Resolved, That George F. Seward, late consul-general of the United States of America at Shanghai, China, and now envoy extraordinary and minister plenipotentiary of the United States of America to China, be impeached of high crimes and misdemeanors while in office.

Two other resolutions accompanied, providing for presentation of the impeachment in the Senate and for the appointment of a committee to frame articles of impeachment.

Mr. Solomon Bundy, of New York, presented views of the minority, with this resolution:

Whereas, in view of the great importance of the subject and matters embraced in the report of the majority of the committee in the matter of the proposed impeachment of George F. Seward for alleged high crimes and misdemeanors, and the complicated questions of law involved therein: Therefore

Resolved, That the matters embraced in such report, together with the evidence in the case, be referred to the Committee on the Judiciary.

On March 3,[150] the last day of the Congress, the House, by a vote of yeas 132, nays 109, voted to consider the report; but thereafter dilatory proceedings prevented action on it.

2515. The investigation into the conduct of Oliver B. Bradford, late vice-consul-general at Shanghai.

A question as to whether a vice-consul-general is such an officer as is liable to impeachment.

The Bradford investigation was set in motion by a memorial in which charges were preferred.

On March 22, 1878,[151] Mr. William M. Springer, of Illinois, from the Committee on Expenditures in the State Department, to whom had been referred a memorial of John C. Myers relating to the affairs of the consulate-general at Shanghai, China, reported a recommendation that Oliver B. Bradford, late vice-consul-general at Shanghai, China, and now holding the office of postal agent of the United States at Shanghai, and also the office of consular clerk of the United States assigned at Shanghai, be impeached at the bar of the Senate of high crimes and misdemeanors in office. The committee transmitted with their report the testimony taken, and also as part of their report, ten articles of impeachment, setting forth the charges against the said Bradford: (1) That in abuse of his official position he became interested in the construction of a railroad in China, violating treaties between the United States and China, and in violation of acts of Congress; (2) that in the construction of the said railroad he used his official position to further a fraudulent scheme; (3) that in five specified cases he has used his office to exercise oppressive, extortionate, and corrupt activity against American citizens; (4) that he embezzled a letter from the post-office at Shanghai; (5) that he unlawfully took from the post-office and opened another letter; (6) that he transmitted a false salary voucher to the United States Treasury to cover the withholding of a portion of the salary of an employee; (7) that as disbursing officer he defrauded the United States Government; (8) that he again was guilty of fraud as disbursing officer; (9) that he embezzled a sum of money belonging to the United States; (10) and that he unlawfully deposited to his own account a sum of money belonging to the United States.

[150] Journal, pp. 621, 622.
[151] Second session Forty-fifth Congress, Journal, p. 1127; Record, p. 3667; House Report No. 818.

In view of these specifications the committee recommended this resolution:

Resolved, That Oliver B. Bradford, now consular clerk of the United States, assigned to Shanghai, China, and postal agent of the United States at Shanghai, China, and late vice-consul-general of the United States at Shanghai, China, and late clerk of the consular court of the United States at Shanghai, China, be impeached by the House of Representatives at the bar of the Senate, for high crimes and misdemeanors while in office.

Mr. Springer announced in the report that two members of the committee, Messrs. Mark H. Dunnell, of Minnesota, and Solomon Bundy, of New York, entertained grave doubts whether Mr. Bradford was such an officer as was liable under the Constitution to impeachment. All of the committee agreed that the evidence sustained the charges. In view of the constitutional question involved, Mr. Springer moved that the whole subject be referred to the Judiciary Committee. This motion was agreed to without division.

2516. The investigation of the conduct of Henry W. Blodgett, United States judge for the northern district of Illinois.

In the case of Judge Blodgett the House ordered an investigation upon the presentation of a memorial specifying charges.

In the investigation of Judge Blodgett both the complainants and the respondent were represented by counsel and produced testimony before the committee.

The most liberal latitude was allowed in the examination of witnesses before the committee which investigated the conduct of Judge Blodgett.

The committee and the House acted adversely on a proposition to impeach Judge Blodgett for an act in excess of his jurisdiction, bad faith not being shown.

On January 7, 1879,[152] Mr. Carter H. Harrison, of Illinois, presented the memorials of certain citizens of Chicago asking for the appointment of a special committee to visit that city and investigate certain charges, therein set forth, against Henry W. Blodgett, district judge of the northern district of Illinois. Mr. Harrison also presented a preamble and resolution, which, after amendment, was agreed to by the House, giving the Judiciary Committee authority to investigate the charges.

On March 3,[153] Mr. J. Proctor Knott, of Kentucky, presented the report of the committee.

As to the method of investigation the report says:

That during the taking of the testimony herewith submitted, Judge Blodgett and Messrs. Cooper, Knickerbocker, and Sheldon, upon whose memorial the resolution recited above was introduced and adopted, were present in person and with consul. Both parties were permitted to introduce evidence, and the most liberal latitude was allowed to each in the examination of witnesses to the end that every fact bearing directly or remotely upon the subject under consideration might be clearly ascertained. In order to facilitate the investigation as much as possible, however, and to enable the committee to confine the testimony within reasonable limits, and present it to the House in something like a systematic form, the memorialists were requested to present their charges and specifications in writing, which was accordingly done, and copies thereof delivered to Judge Blodgett with the request that he would file written answers thereto, if such answers should be deemed by him necessary or desirable.

The report then discusses the charges, which were:

1. That Judge Blodgett had entered into a dishonest conspiracy to defraud, by aid of his acts as judge, the creditors of a certain corporation.

[152] Third session Forty-fifth Congress, Journal, p. 138.
[153] Journal, p. 671; Record, pp. 2388, 2390–2395; House Report No. 142.

2. That he had improperly attempted to prevent the grand jury from finding an indictment against one Homer N. Hibbard, for perjury.

3. That while holding the office of judge he had knowingly borrowed and converted to his own personal use money belonging to or deposited in the registry of his court.

4. That as judge he had willfully employed the power and authority of the court to perpetrate acts of gross judicial oppression upon the rights of a private citizen, and sanction and direct the commission of a flagrant trespass which constituted a criminal offense under the laws of the State of Illinois, punishable by fine and imprisonment.

5. That in administering the bankrupt law he had willfully violated the letter and spirit of the law by making an unlawful use of his power as judge to enrich his friends and favorites, to the reproach and scandal of the court.

6. That he had corruptly used his official position to aid a conspiracy to defraud the stockholders of a certain insurance company, by enabling certain persons to buy up the stock at a discount.

The committee found in general that the charges were not sustained by the evidence; but in discussing the fourth charge they say:

> It may be conceded that Judge Blodgett acted in this instance in excess of his jurisdiction. * * * However justly, therefore, Judge Blodgett may be amenable to criticism or censure on account of his action in this matter * * * it is impossible to see how he can be held liable to impeachment therefor, unless it can be shown that he did not act in good faith for the best interests of those concerned, as he understood them, but with such malice and corruption as to render his act in the premises an official misdemeanor.

In view of all the evidence the committee, without dissent, recommended this resolution:

> *Resolved*, That the charges against Henry W. Blodgett, United States district judge for the northern district of Illinois, be laid on the table, and the House take no further action thereon.

This resolution was agreed to by the House without division.

2517. The investigation into the conduct of Aleck Boarman, United States judge for the western district of Louisiana.

A Member of the House presented specific charges against Judge Boarman to the Judiciary Committee, which had been empowered to investigate the judiciary generally.

A subcommittee visited Louisiana and took testimony against and for Judge Boarman.

The Member who lodged charges against Judge Boarman conducted the case against him before the subcommittee.

Judge Boarman made a sworn statement or answer to the committee investigating his conduct in 1890, but did not testify.

The inquiry of 1890 into the conduct of Judge Boarman was conducted according to the established rules of evidence.

In 1890 the Judiciary Committee concluded that Judge Boarman should be impeached for an act in violation of the statute.

On March 1, 1890,[154] Mr. William C. Oates, of Alabama, from the Committee on the Judiciary, to whom had been referred, on February 18, 1890, a resolution providing for an investigation of "the practice of certain United States district courts and other officers in criminal cases," reported the resolution with an amendment in the nature of a substitute. To show the desirability of such investigation the report cites a letter from the Attorney-General to the chairman of the com-

[154] First session Fifty-first Congress, Journal, p. 296; House Report No. 566.

mittee and letters from the Commissioner of Internal Revenue and one of the Auditors of the Treasury. In addition to these letters numerous complaints had been made by persons seeming to be well informed and reputable; and also there had been complaints in the newspapers. Therefore an investigation seemed to the committee desirable, and they recommended a substitute amendment providing for a general investigation, including "maladministration or corrupt official conduct of any of the officers connected with the judicial department of the Government."

On April 1 [155] the House agreed to the resolution with the proposed amendment; and on September 16 [156] the committee was given authority to continue its investigation through the recess of Congress.

On February 17, 1891,[157] Mr. Albert C. Thompson, of Ohio, submitted the report of the committee. This report dealt generally with the subject referred to the committee, and also presented an ascertainment of fact in relation to Aleck Boarman, district judge for the western district of Louisiana. The report states that while the committee were investigating the general subject a letter was, in May, 1890, addressed to the chairman of the committee by Mr. C. J. Boatner, Member of the House from the Fifth District of Louisiana, preferring seven specific charges against Judge Boarman, and asking that a date be fixed when the charges might be substantiated by witnesses. Thereupon a subcommittee of the Committee on the Judiciary visited Shreveport and New Orleans and took testimony relating to the charges. Both Judge Boarman and Mr. Boatner were present at Shreveport, but neither attended at New Orleans. Mr. Boatner conducted the examination of witnesses called to sustain the charges, and Mr. Albert H. Leonard appeared as counsel for Judge Boarman. The report further says:

> The subcommittee before whom the testimony was taken aimed to admit nothing inadmissible under the well-established rules of evidence, but, notwithstanding the care exercised, much is found in the record that is not legal evidence. In reaching the conclusions, however, hereinafter stated, the committee endeavor to eliminate from their consideration those matters that are plainly hearsay and neighborhood gossip, and base their judgment, it is believed, upon substantial and trustworthy evidence.
>
> Judge Boarman did not testify before the subcommittee, nor did he introduce any oral testimony whatever, except that of Mr. Albert H. Leonard and a "statement" made by Mr. M. C. Elstner, the latter being entirely personal to Mr. Elstner himself and having no bearing upon any of the issues raised. The answer of Judge Boarman, hereinbefore referred to, is given its full legal effect, as an answer, and is taken to be true except in those particulars wherein its averments are overcome by countervailing legal testimony.

The answer of Judge Boarman, filed at the first meeting of the committee, is printed in the report, and begins as follows:

> In the matter of certain charges and complaints made by C. J. Boatner against Aleck Boarman, judge, western district of Louisiana, to the subjudiciary committee of the House of Representatives, sitting at Shreveport, La., the Hon. A. C. Thompson, chairman.
>
> Respondent, in answer to said charges, respectfully makes the following answer and statements under oath:
>
> He denies each and every allegation made against him, except what is hereinafter admitted.
>
> First charge. Respondent denies, etc.
>
> * * * * * * *

[155] Journal, p. 416; Record, p. 2877.
[156] Journal, p. 1046.
[157] Second session Fifty-first Congress, Journal, pp. 264, 270; Record, pp. 2797, 2937; House Report No. 3823.

Respondent submits this answer to said charges, and respectfully asks now, as he has, to the knowledge of the committee, heretofore done, that such a thorough investigation shall be made as will best subserve the public interest.

ALECK BOARMAN.

Sworn to and subscribed before me this November 17, 1890.

[SEAL] J. B. BEATTIE, *Clerk.*

Upon the filing of the answer Mr. Boatner asked and was granted leave to amend the charges against Judge Boarman by the addition of another specification.

The committee concluded as to all the charges except the fourth that while there was much in the testimony warranting severe criticism of his acts yet he should be acquitted; but on the fourth charge the committee were unanimous that he should be impeached. This charge was that he had "used for his own purposes the funds paid into the registry of his court, and has unlawfully and corruptly failed and refused to decide causes in which the funds in dispute were or should have been in the registry of his court, and also (additional charge) that the respondent repeatedly borrowed money from the marshal of this court, contrary to law." The report quotes sections 995, 996, and 5505 of the Revised Statutes, and rule 42 governing district courts in admiralty cases, and says:

The committee profoundly regret that from the evidence taken and fully appearing in the record there appears to have been no attempt on the part of Judge Boarman to comply with the statute and the rules of court as to moneys paid to the clerk. His practice in this regard, if not criminal, is reprehensible in the extreme.

Therefore the committee, without dissent, reported this resolution:

Resolved, That Aleck Boarman, judge of the United States district court for the western district of Louisiana, be impeached of high crimes and misdemeanors.

The House considered the resolution on February 28,[158] which was next to the last legislative day of the Congress, but the debate, which was entirely in favor of impeachment, was not concluded, and the resolution failed to be acted on.

2518. The Boarman investigation continued.

In 1892 the House referred to the Judiciary Committee the evidence taken in the Boarman investigation of 1890 as material in a new investigation.

At the investigation of 1892 Judge Boarman testified and was cross-examined before the committee.

The second investigation of Judge Boarman having revealed an absence of bad intent in his censurable acts, the committee and the House decided against impeachment.

A Member who had preferred charges against Judge Boarman declined, as a member of the Judiciary Committee, to vote on his case.

In the first session of the next Congress, on January 13, 1892,[159] Mr. Boatner submitted a resolution directing an investigation of the charges against Judge Boarman and it was referred to the Committee on the Judiciary.

On January 30[160] Mr. Oates reported from the committee, in lieu of that resolution, a preamble reciting the proceedings in the former Congress, especially citing the fact that the evidence taken was not ex parte, and that the respondent had been present in person or by coun-

[158] Journal, p. 330; Record, pp. 3595–3597.
[159] First session Fifty-second Congress, Journal, p. 26.
[160] Journal, p. 49; Record, p. 689.

sel when it was taken, and a resolution referring the report made in the last Congress, the charges and the evidence, to the Committee on the Judiciary, with instructions to investigate the same thoroughly, and further providing: "And for the purposes of making the investigation hereby ordered the said Committee on the Judiciary may adopt and use as legal evidence the testimony taken as aforesaid," and "may take and consider any additional and explanatory evidence of a legal character which may be offered either for or against said judge."

This resolution was agreed to, and the committee made the investigation.

On June 1,[161] Mr. Oates submitted the report of the committee.

As to the manner of investigation the report shows that it was conducted by a subcommittee, and says:

> Your committee found it unnecessary to take any additional testimony after having adopted that taken by its predecessor in the Fifty-first Congress. Upon due inquiry it was found that there were no other witnesses to be examined in behalf of the Government touching the said charges, and therefore the said judge was notified that if he had any exculpatory or explanatory evidence which he wished to offer that he should have the opportunity of doing so. He then came to Washington, appeared before said special subcommittee, and gave his testimony.

A reference to the printed testimony [162] shows that Judge Boarman testified at length and was then cross-examined by members of the committee. He explained his conduct as to the various charges.

The committee investigated the seven former charges and one new one. The committee found in favor of the judge as to the new charge; and also found in his favor as to the old charges, including that numbered four, on which the committee has found against him in the preceding Congress. As to the fourth charge the report says:

> It will be seen in this testimony that the judge claims to have been entirely ignorant of the existence of this statute. (Sec. 5505 relating to receiving from the clerk money belonging to the registry.) He says that it looks like a humiliating confession for a judge to make, and the committee agree with him in that statement. Ignorantia legis non excusat is a maxim of the law, applicable alike to the ignorant and the learned. It can not, therefore, be taken as any excuse whatever for his conduct in this case. He is, by his own confession technically guilty of embezzlement. There are, however, extenuating circumstances. Wheaton, the clerk, was upon his death bed when he gave the judge the orders * * * for this money. He told the judge that he was going to die, and that this money belonged in the registry of the court, and he did not wish it to go into his succession or estate. The judge swears that his motive in receiving the money was to preserve it unincumbered for the suitors who would be entitled to it when the distribution was decreed; and while he admits that he may have converted a part of it to his own use, if he did he replaced it with the new clerk, and thus those who were entitled to it received their money. While, therefore, the taking of the money by the judge was a statutory embezzlement, it can not be said from the evidence that he took it lucri causa, or with dishonest intent.

The committee find the second branch of the fourth charge—relating to corrupt failure to decide cases—not sustained.

The committee found that Judge Boarman's conduct had not been such as to absolve him from censure, but they failed to find that he "had been influenced by corrupt or dishonest motives." Therefore they asked to be discharged from further consideration of the case.

The report also says:

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[161] Journal, p. 207; Record, p. 4908; House Report No. 1536.
[162] See pp. 57–72 of Report No. 1536.

Hon. C. J. Boatner, now a member of this committee, having preferred the charges against Judge Boarman in the Fifty-first Congress, declined to vote on any of the propositions embraced in the foregoing report.

The report of the committee was concurred in by the House without division.

2519. The inquiry into the conduct of J. G. Jenkins, United States circuit judge for the seventh circuit.

The investigation of the conduct of Judge Jenkins was suggested by a resolution offered by a Member and referred to the Judiciary Committee.

Form of resolution authorizing the investigation into the conduct of Judge Jenkins.

Instance wherein a majority of the Judiciary Committee reported a resolution censuring a judge for acts not shown to be with corrupt intent.

On February 5, 1894,[163] Mr. Lawrence E. McGann, of Illinois, proposed a resolution to investigate and report whether or not the Hon. J. G. Jenkins, judge of the United States circuit court for the seventh circuit, has abused the powers and process of said court or oppressively exercised the same to oppress the employees of the Northern Pacific Railroad Company. This resolution was referred to the Committee on the Judiciary.

On March 6, 1894,[164] Mr. Charles J. Boatner, of Louisiana, from the Committee on the Judiciary, reported the following resolution, which was agreed to:

Resolved, That the Committee on the Judiciary of the House be, and is hereby, authorized to speedily investigate and inquire into all the circumstances connected with the issuance of writs of injunction in the case of the Farmers' Loan and Trust Company, complainant, against the Northern Pacific Railroad Company, defendant, in the United States circuit court for the eastern district of Wisconsin, and the several matters and things referred to in the resolution introduced on the 5th day of February, instant, charging illegalities and abuse of the process of said court therein and report to this House whether in any of said matters or things the Hon. J. G. Jenkins, judge of said court, has exceeded his jurisdiction in granting said writs, abused the powers or process of said court, or oppressively exercised the same, or has used his office as judge to intimidate or wrongfully restrain the employees of the Northern Pacific Railway Company, or the officers of the labor organizations with which said employees or any of them were affiliated, in the exercise of their rights and privileges under the laws of the United States; and if so, what action should be taken by this House or by Congress.

On June 8 [165] Mr. Boatner submitted the report of the committee. This report relates the history of the appointment of receivers for the Northern Pacific Railroad Company by Judge Jenkins, in conjunction with other judges in whose territory the property lay; of the successive reductions of the wages of employees made by the receivers; of great dissatisfaction which finally arose among te employees affected; and finally the issuance of a writ of injunction by Judge Jenkins, on application of the receivers, restraining the employees "from combining and conspiring to quit, with or without notice, the service of the said receivers, with the object and intent of crippling the property in their custody or embarrassing the operation of the said railroad, and from so quitting the service of the said receivers with or without notice as to cripple the property or prevent or hinder the operation of the said

[163] Second session Fifty-third Congress, Journal, p. 187.
[164] Journal, p. 229; Record, pp. 2629, 2661.
[165] House Report No. 1049.

railroad." his writ was followed by a second writ prohibiting the representatives of labor organizations from "ordering, recommending, approving, or advising others to quit the service of the receivers."

Although witnesses and the judge himself in an opinion denied that there was an intention to coerce the services of the employees, yet the majority of the committee find this explanation inconsistent with the words used, and hold that Judge Jenkins's writs were "not sustained either by reason or authority," were "in violation of a constitutional provision, an abuse of judicial power, and without authority of law." The report of the majority continues:

> The testimony adduced before us fails to show any corrupt intent on the part of the judge.

The majority, in conclusion, recommend the adoption of this resolution—

> *Resolved*, That the action of Judge James G. Jenkins in issuing said order of December 19, 1893, being an order and writ of injunction, at the instance of the receivers of the Northern Pacific Railroad Company, directed against the employees of said railroad company, and in effect forbidding the employees of said Northern Pacific Railroad Company from quitting its service under the limitations therein stated, and in issuing a similar order of December 22, 1893, in effect forbidding the officers of labor organizations with which said employees were affiliated from exercising the lawful functions of their office and position, was an oppressive exercise of the process of this court, an abuse of judicial power, and a wrongful restraint upon said employees and the officers of said labor organizations; and that said orders have no sanction in legal precedent, were an invasion of the rights of American citizens, and contrary to the genius and freedom of American institutions, and therefore deserving of the condemnation of the American people.

The minority views, signed by Messrs. William A. Stone, of Pennsylvania; George W. Ray, of New York; H. Henry Powers, of Vermont, and Thomas Updegraff, of Iowa, hold that if Judge Jenkins acted corruptly he should be impeached, while if he erred honestly the wrong would be righted by an appellate tribunal, and conclude:

> To propose that a judge, who, as the majority declare, had no "corrupt intent" and "who sincerely believes" in his conclusions, shall, without impreachment, be censured by the legislative branch of the Government, is to confound all distinctions between the legislative and judicial powers and create a side tribunal of appeal where justice would be for sale to the suitor who could poll the largest vote.

It does not appear that the resolution was acted on by the House.

2520. The investigation into the conduct of Augustus J. Ricks, United States judge for the northern district of Ohio.

The House ordered an investigation of the conduct of Judge Ricks on the strength of charges preferred in a memorial.

In the investigation of Judge Ricks the respondent made a statement before the committee and offered testimony in his behalf.

The majority of the Judiciary Committee reported a resolution censuring Judge Ricks.

On January 7, 1895,[166] Mr. Tom L. Johnson, of Ohio, presented the memorial of Samuel J. Ritchie, praying for the impeachment of Augustus J. Ricks, United States district judge for the northern district of Ohio. This memorial was referred under the rule.

[166] Third session Fifty-third Congress, Journal, pp. 50, 51; Record, p. 709.

On the same day Mr. Johnson, by unanimous consent, offered the following resolution, which was agreed to without debate and without the reading of the memorial or any statement of its contents beyond the mere announcement by Mr. Johnson that it was "the memorial of Samuel J. Ritchie, praying for the impeachment of Augustus J. Ricks," etc.:

Resolved, That the Committee on the Judiciary be, and they are hereby, instructed to investigate the charges against the Hon. Augustus J. Ricks, United States district judge for the northern distict of Ohio, contained in the memorial of Samuel J. Ritchie, presented to the House this day, and report what action in their judgment should be taken thereon.

On January 25 [167] Mr. George P. Harrison, of Alabama, from the majority of the Committee on the Judiciary, submitted a report, accompanied by this resolution:

Resolved, That while the committee is not satisfied that Judge Augustus J. Ricks has been guilty of any wrong committed while judge that will justify it in reporting a resolution of impeachment, yet the committee can not too strongly censure the practice under which Judge Ricks made up his accounts.

Minority views were presented by Mr. Joseph W. Bailey, of Texas, accompanied by these resolutions:

Resolved, That Augustus J. Ricks, judge of the United States court of the northern district of Ohio, be impeached for high crimes and misdemeanors.

Resolved, That the Committee on the Judiciary is hereby instructed to prepare without unnecessary delay and report to this House suitable articles of impeachment against the said Augustus J. Ricks, judge of the United States court for the northern district of Ohio.

It appeared from the report and the minority views that at first the committee, by a vote of seven to six, had agreed to recommend impeachment, one member being present and not voting and three being absent. But before a report was made in accordance with this vote an order was agreed to inviting Judge Ricks to appear before the committee, and also providing for the testimony of such other witnesses as might be called. It was "after hearing the statement of Judge Ricks on his own behalf, and the testimony of Martin W. Sanders," that the committee, by a vote of nine to seven, one member being absent, agreed to the resolution reported by the majority.

It appears further from the report that the committee took testimony at Cleveland, Ohio, through a subcommittee, and in Washington before the whole committee. This testimony was such as was offered both against and in behalf of Judge Ricks.

The minority views were concurred in by Messrs. Joseph W. Bailey, of Texas; Edward Lane, of Illinois; Thomas R. Stockdale, of Mississippi; David A. De Armond, of Missouri; D. B. Culberson, of Texas; Thomas Updegraff, of Iowa, and C. J. Boatner, of Louisiana. The charges which they discussed were:

First. That as judge the said Augustus J. Ricks had defrauded the United States out of certain moneys, which he appropriated to his own use.

Second. That he corruptly persuaded Martin W. Sanders, his successor in the clerk's office, to omit from his emolument report fees which ought to have been included in it.

Third. That he approved the emolument report of said Martin W. Sanders, knowing it to be incorrect.

[167] Journal, p. 84; Record, p. 1360; House Report No. 1670.

The minority found that the third charge was not reasonable, and that the second in the form made was not sustained by the evidence, although he had evidently taken fees to which he was not entitled. But on the first charge they concluded that the evidence sustained the guilt of the judge. The minority discuss at some length the evidence which led them to their conclusion.

The report was made near the close of the Congress, and it does not appear that any action was taken on it.

Nature of Impeachment [1]

1. As to what are impeachable offenses. Sections 454–465.
2. General considerations. Section 466.

454. Discussion by English and American authorities of the general nature of impeachment.

On January 3, 1913,[2] in the Senate sitting for the trial of the impeachment of Judge Robert W. Archbald, Mr. Manager Henry D. Clayton, of Alabama, submitted on behalf of the House of Representatives, a brief form which the following is an excerpt:

THE GENERAL NATURE OF IMPEACHMENTS.

The fundamental law of impeachment was stated by Richard Wooddeson, an eminent English authority, in his Law Lectures delivered at Oxford in 1777, as follows (pp. 499 and 501, 1842 ed.):

"It is certain that magistrates and officers intrusted with the administration of public affairs may abuse their delegated powers to the extensive detriment of the community and at the same time in a manner not properly cognizable before the ordinary tribunals. The influence of such delinquents and the nature of such offenses may not unsuitably engage the authority of the highest court and the wisdom of the sagest assembly. The Commons, therefore, as the grand inquest of the nation, became suitors for penal justice, and they can not consistently, either with their own dignity or with safety to the accused, sue elsewhere but to those who share with them in the legislature.

"On this policy is founded the origin of impeachments, which began soon after the constitution assumed its present form.

* * * * * * *

"Such kind of misdeeds, however, as peculiarly injure the commonwealth by the abuse of high offices of trust, are most proper—and have been the most usual—grounds for this kind of prosecution."

Referring to the function of impeachments, Rawls, in his work on the Constitution (p. 211), says:

"The delegation of important trusts affecting the higher interests of society is always from various causes liable to abuse. The fondness frequently felt for the inordinate extension of power, the influence of party and of prejudice, the seductions of foreign states, or the baser appetite for illegitimate emoluments are sometimes productions of what are not unaptly termed 'political offenses' (Federalist. No. 65), which it would be difficult to take cognizance of in the ordinary course of judicial proceeding.

"The involutions and varieties of vice are too many and too artful to be anticipated by positive law."

In Story on the Constitution (vol. 1, 5th ed., p. 584) the parliamentary history of impeachments is briefly stated as follows:

"800. In examining the parliamentary history of impeachments it will be found that many offenses not easily definable by law, and many of a purely political

[1] Cannon's Precedents, vol. 6, p. 632 (1936).
[2] Third session Sixty-second Congress, record of trial, p. 1051.

character, have been deemed high crimes and misdemeanors worthy of this extraordinary remedy. Thus, lord chancellors and judges and other magistrates have not only been impeached for bribery, and acting grossly contrary to the duties of their office, but for misleading their sovereign by unconstitutional opinions and for attempts to subvert the fundamental laws and introduce arbitrary power. So where a lord chancellor has been thought to have put the great seal to an ignominious treaty, a lord admiral to have neglected the safeguard of the sea, an ambassador to have betrayed his trust, a privy councilor to have propounded or supported pernicious and dishonorable measures, or a confidential adviser of his sovereign to have obtained exorbitant grants or incompatible employments—these have been all deemed impeachable offenses. Some of the offenses, indeed, for which persons were impeached in the early ages of British jurisprudence, would now seem harsh and severe; but perhaps they were rendered necessary by existing corruptions, and the importance of suppressing a spirit of favoritism and court intrigue. Thus persons have been impeached for giving bad counsel to the King, advising a prejudicial peace, enticing the King to act against the advice of Parliament, purchasing offices, giving medicine to the King without advice of physicians, preventing other persons from giving counsel to the King except in their presence, and procuring exorbitant personal grants from the King. But others, again, were founded in the most salutary public justice, such as impeachments for malversations and neglects in office, for encouraging pirates, for official oppression, extortions, and deceits, and especially for putting good magistrates out of office and advancing bad. One can not but be struck, in this slight enumeration, with the utter unfitness of the common tribunals of justice to take cognizance of such offenses, and with the entire propriety of confiding the jurisdiction over them to a tribunal capable of understanding and reforming and scrutinizing the polity of the State, and of sufficient dignity to maintain the independence and reputation of worthy public officers."

455. Discussion as to what are impeachable offenses.

Argument as to whether impeachment is restricted to offenses which are indictable, or at least of a criminal nature.

On January 8, 1913,[3] in the Senate sitting for the impeachment trial of Judge Robert W. Archbald, Mr. Manager John A. Sterling, of Illinois, said in final argument:

Mr. President, the record which has been made proves the charges set forth in the articles of impeachment constitute impeachable offenses. It is plain from the statement made by counsel for respondent, and from the brief which was filed that they rely for acquittal on the single proposition that these offenses do not constitute impeachable offenses for the reason that, as they claim, they do not constitute indictable offenses.

In their brief, counsel for the respondent lay down, as the first proposition, that no offense is impeachable unless it is indictable; and, as a second proposition, and the only other proposition that they submit, is that, if the offense in order to be impeachable need not be indictable, it must at least be of a criminal nature.

As to the first proposition, the contention of counsel for the respondent is not sustained either by the language of the Constitution, by the decisions of the Senate in former impeachment cases, by the decisions of other tribunals in this country which have tried impeachment cases, or by the decisions of the English Parliament; nor is that contention sustained, so far as I have been able to read the authorities and the law writers on constitutional law, by a single American writer. The language of the Constitution so far as it relates to the trial of this case is this:

"The Senate shall have the sole power to try all impeachments.

* * * * * * *

"Judgment in cases of impeachment shall not extend further than to removal from office and disqualification to hold and enjoy any office of honor, trust, or profit under the United States.

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[3] Third session Sixty-second Congress, Record, p. 1209.

"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.

* * * * * * *

"The judges * * * shall hold their offices during good behavior."

I have stated all the language of the Constitution with which the Senate has to deal in determining the case now before it. I ask the Senate to consider that nowhere in that language is there any limitation as to the nature or extent of the crimes, misdemeanors, and misbehaviors in office. The Constitution does not undertake to define those terms with reference to the jurisdiction of the Senate in removing public officers for the violation of those provisions of that instrument, nor does it limit the time as to the commission of these offenses. It does not provide that the offenses shall be committed during the service from which it is sought to remove him, nor does it limit Congress as to when it may proceed to impeach and try an offending servant. Under the plain language of the Constitution the House of Representatives has the power to impeach, and the Senate has the power to try and convict for offenses of the character described in the Constitution, let them have been committed at any time during the term of office from which the respondent is sought to be removed, during his service in some other office, or during some other term, or for offenses committed before he became an officer of the United States and while he was a private citizen.

If the Constitution puts no limitation on the House of Representatives or the Senate as to what constitutes these crimes, misdemeanors, and misbehaviors, where shall we go to find the limitations? There is no law, statutory nor common law, which puts limitations on or makes definitions for the crimes, misdemeanors, and misbehaviors which subject to impeachment and conviction.

It will not be maintained either by the managers or by the counsel for the respondent that precedents bind, and yet we may well consider them, because they are so uniform on the question as to what constitutes impeachable offenses. The decisions of the Senate of the United States, of the various State tribunals which have jurisdiction over impeachment cases, and of the Parliament of England all agree that an offense, in order to be impeachable, need not be indictable either at common law or under any statute.

I desire to read briefly from some of the law writers of this country, giving their conclusions as to what constitute impeachable offenses, after they had reviewed and considered cases that have been tried in the Senate and in other forums where impeachment cases have been tried.

After reading from Tucker on the Constitution, page 416, Cooley's Principles of Constitutional Law, page 178, and volume 15 of the American and English Encyclopedia of Law, paragraph 2, page 1066, Mr. Sterling concluded:

And so, Mr. President, I say, that outside of the language of the Constitution which I quoted there is no law which binds the Senate in this case to-day except that law which is prescribed by their own conscience, and on that, and on that alone, must depend the result of this trial. Each Senator must fix his own standard; and the result of this trial depends upon whether or not these offenses we have charged against Judge Archbald come within the law laid down by the conscience of each Senator for himself.

On January 9, 1913,[4] Mr. Alexander Simpson, of counsel for respondent, quoting the last statement in this address, said:

Sirs, if that be so, I want to know what has become of the Constitution in this case? Of what use was it to write into the Constitution that a man shall be impeached only for "treason, bribery, or other high crimes and misdemeanors" if there is no law to govern you, and if you may, out of your own consciences, evolve the thought that you will dismiss this respondent from the public service simply because you wish to get rid of him? You need no proof of "treason, bribery, or other high crimes and misdemeanors" to discharge him if that is the position you are to take in this case, for those words, under such circumstances, are unnecessary and meaningless.

[4] Record, p. 1269.

I submit that that is not and can not be the true legal position. It must be precisely the reverse of that. You must find somewhere, whether it is under the "good behavior" clause of the Constitution, or whether it is under the article relating to impeachments themselves, that upon which you can lay your finger and say that this respondent has violated that thing, or you must under your oaths of office say that he shall go free.

And that is the position which Mr. Manager Sterling, speaking for the managers, asks you to take here. He asks you not to look to the law of the land for that which shall govern the rights of the parties here; but he asks you, out of your own conscience, whether your conscience agrees with mine or his or anybody's to evolve a law which shall apply to this case and which when this case is over shall cease ever thereafter to be the law. In this, as in everything else, the Constitution is only a frame of government. It remains for the Congress to vivify many of its provisions. It remains for Congress to write on the statute books what shall constitute "high crimes and misdemeanors," and there are already in the Revised Statutes many provisions upon that point.

On January 9, 1913,[5] Mr. A. S. Worthington, of counsel on behalf of the respondent, also referred to the position taken by Mr. Sterling in this address and said:

It has been insisted here by the managers on the part of the House of Representatives that the question of Judge Archbald's guilt or innocence is to be determined by what you individually consider to be an offense which justifies his removal from office; not that he has been brought here charged with anything of that kind, but having brought him here charged with certain specific offenses for which he and his counsel have prepared themselves and have summoned their witnesses he is now to be disgraced and forever branded as a criminal because you may find that he is not fit to be a judge.

I might humby suggest that if there is ever to be presented to this great body the question whether or not you have the right to impeach an officer of the United States and remove him from his office because you think that on general principles he is not fit to hold his office, there might be presented an article of impeachment which would charge that that was the case and that he and his counsel might be prepared to meet it. But instead of that we have him charged with a certain number of specific acts, and when he comes here to meet those and the evidence is closed and the verdict is about to be reached, then we are told for the first time that you individually—each for himself—are to decide whether upon what you have heard here in evidence you think that on general principles he ought to be ejected from his office.

The Constitution of the United States says that civil officers of the United States may be impeached for treason, bribery, or other high crimes and misdemeanors.

If this were the first time that that sentence was heard by the Members of this body, I should like to know whether there is one of you to whose mind it would ever have occured for a moment that it meant anything except an offense punishable in a court of justice. I do not like the word "indictability," because a great many crimes are punished by information and not upon indictment. When I use that term I mean it in the sense of punishment in any way in a criminal court.

Now, my friend Mr. Manager Sterling when he read certain provisions of the Constitution at the outset of his argument said those were all that were necessary to be considered in this matter.

The sixth amendment says:

"In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

Where is the man in this United States of America who would suggest that Judge Archbald could be required to answer without being informed of what is the accusation against him? Where is the man who would suggest that it is not necessary to confront him with the witnesses against him? Where is the man who would say he is not entitled to have subpoenas issued to bring his witnesses here to testify for him? Where is the person who will say that you could turn his

[5] Record, page 1282.

counsel out of this Chamber and say he has to defend himself? Why? Because it is a criminal prosecution, and if it be not a criminal prosecution, then it is nothing known to the laws of this land.

On this subject Mr. Manager Edwin Yates Webb, of North Carolina, said by way of rebuttal:[6]

Mr. President, the respondent's counsel in his brief devotes 26 pages to a discussion of this proposition:

"Impeachment lies only for offenses which are properly the subject of a prosecution by indictment or information in a criminal court."

In those 26 pages of argument most of the quotations are from counsel who have appeared for respondents in various impeachment trials. I do not remember just at present a single noted constitutional authority that counsel quotes to maintain that proposition.

I wish to quote authority in opposition to this position.

Mr. Webb here quoted from Wooddeson (p. 355); Rawle, on the Constitution; Story, on the Constitution; Tucker, on the Constitution; Christian, Fourth Blackstone, footnote, p. 5, Lewis's ed.; Cooley's Principles of Constitutional Law, p. 178; Constitutional History of the United States, George Ticknor Curtis, vol. 1, pp. 481–482; Watson, on the Constitution, vol. 2, p. 1034; Wharton's State Trials, 263; Story, on the Constitution, page 583; and American and English Encyclopedia of Law, vol. 15, p. 1066.

One can not but be struck in this slight enumeration with the utter unfitness of the common tribunals of justice to take cognizance of such offenses and with the entire propriety of confiding jurisdiction over them to a tribunal capable of understanding and reforming and scrutinizing the policy of the State and of sufficient dignity to maintain the independence and reputation of worthy public officers.

The cases, then, seem to establish that impeachment is not a mere mode of procedure for the punishment of indictable crimes; that the phrase of "high crimes and misdemeanors" is to be taken not in its common-law but in its broader parliamentary sense, and is to be interpreted in the light of parliamentary usage: that in this sense it includes not only crimes for which an indictment may be brought, but grave political offenses, corruptions, maladministration, or neglect of duty involving moral turpitude, arbitrary and oppressive conduct, and even gross improprieties by the judges and high officers of State, although such offenses be not of a character to render the offender liable to an indictment either at common law or under any statute.

456. Argument that a civil officer of the United States may be impeached for an unindictable offense.

Discussion of the nature of impeachable offenses in minority views submitted in the Daugherty case.

On January 25, 1923,[7] Mr. R. Y. Thomas, jr., of Kentucky, from the Committee on the Judiciary, submitted the following minority views to accompany the report of that committee on the investigation into the conduct of Attorney General Harry M. Daugherty:

It was strongly intimated if not directly contended by several members of the committee that the Attorney General could not be impeached except for an indictable offense. I think this view is absolutely incorrect. Impeachment is an extraordinary remedy born in the parliamentary procedure of England, and the principles which govern it have long been enveloped in clouds of uncertainty. The practice of impeachment began in the reign of Edward the Third of England, and statutes for prosecutions for offenses of this character were first enacted in the reign of Henry the Fourth.

By usage of the English Parliament so far back that the memory of man runneth not to the contrary, offenses were impeachable which were not indictable or punishable as crimes at common law. Therefore, the phrase "high crimes and

[6] Record, p. 1215.
[7] Forth session Sixty-seventh Congress, House Report No. 1372.

misdemeanors" must be as broad and extended as the offense against which the process of impeachment affords protection. Every case of impeachment must stand alone, and while certain general principles control the judgment and conscience, the Senate alone must determine the issue.

In my opinion, the conclusion is irresistible that an impeachment proceeding by a committee of the House is only an inquiry into the charges like a grand jury investigation, and an official can be impeached for high crimes and misdeameanors which are not indictable offenses. If there ever was any doubt of this, that question has been entirely set at rest in the impeachment proceedings in 1912 against Robert W. Archbald, United States circuit judge. None of the articles exhibited against Judge Archbald, on which he was impeached, charged an indictable offense, or even a violation of positive law.

457. Summary of deductions drawn from judgments of the Senate in impeachment trials.

The Archbald case removed from the domain of controversy the proposition that judges are only impeachable for the commission of crimes or misdemeanors against the laws of general application.

On January 13, 1914,[8] on motinn of Mr. Elihu Root, of New York, a monograph by Wrisley Brown, of counsel on behalf of the managers in the impeachment trial of Judge Robert W. Archbald, was printed as a public document. The following is an excerpt:

The impeachments that have failed of conviction are of little value as precedents because of their close intermixture of fact and law, which makes it practically impossible to determine whether the evidence was considered insufficient to support the allegation of the articles, or whether the acts alleged were adjudged insufficient in law to constitute impeachable offenses. The action of the House of Representatives in adopting articles of impeachment in these cases has little legal significance, and the deductions which have been drawn from them are too conjectural to carry much persuasive force. Neither of the successful impeachments prior to the case of Judge Archbald was defended, and they are not entitled to great weight as authorities. In the case of Judge Pickering, the first three articles charged violations of statutory law, although such violations were not indictable. Article four charged open and notorious drunkeness and public blasphemy, which would probably have been punishable as misdemeanors at common law. In the case of Judge Humphreys, articles three and four charged treason against the United States. The offense charged in articles one and two probably amounted to treason, inasmuch as the ordinance of secession of South Carolina had been passed prior to the alleged secessionary speeches of the respondent, and the offenses charged in articles five to seven, inclusive, savored strongly of treason. But, it will be observed, none of the articles exhibited against Judge Archbald charged an indictable offense, or even a violation of positive law. Indeed, most of the specific acts proved in evidence were not intrinsically wrong, and would have been blameless if committed by a private citizen. The case rested on the alleged attempt of the respondent to commercialize his potentiality as a judge, but the facts would not have been sufficient to support a prosecution for bribery. Therefore, the judgment of the Senate in this case has forever removed from the domain of controversy the proposition that the judges are only impeachable for the commission of crimes or misdemeanors against the laws of general application. The case is constructive, and it will go down in the annals of the Congress as a great landmark of the law.

458. Argument as to whether a judge may be impeached for offenses committed in prior judicial capacity.

On January 8, 1913,[9] in the Senate sitting for the impeachment trial of Judge Robert W. Archbald, Mr. Manager Edwin Yates Webb, of North Carolina, said in final argument:

There is no merit in the argument that this respondent can not be impeached at present for acts committed by him while he was district judge. It is true that he is now a circuit judge, but it is also true that immediately before he became a circuit judge he was a district judge. He never ceased to be a judge or civil officer of the United States.

[8] Second session Sixty-third Congress, Senate Document No. 358, p. 16.
[9] Third session Sixty-second Congress, Record, p. 1218.

This question was raised in the impeachment trial of Judge D. M. Furches, in North Carolina, in 1901. There the respondent was impeached while he was chief justice of North Carolina for acts committed while he was an associate justice, two distinct and separate offices, but his defense did not avail. Both the authorities and reason compelled the repudiation of such a defense, and, to use the language of Judge William R. Allen, now of the supreme court of our State, then one of the managers in the Furches impeachment trial—

"The purpose of impeachment is to remove an officer whose conduct is a menace to the public interest, and it would be strange indeed if he could escape punishment by being elevated to a higher official position. If such a defense could be sustained one could by resignation avoid an investigation into his conduct by a court of impeachment, and if he was of the same political faith as the head of the executive department and in sympathy with it, he could be transferred from one office to another and thus avoid impeachment altogether. The effect of such defense would be to practically destroy the power of impeachment, and at any rate it would be greatly impaired. We believe that the authorities are practically unanimous in sustaining our contention that the change of office does not affect the power of impeachment. He is now exercising the same powers that he exercised when he was an associate justice. He is performing the same duties; he is practically filling the same office."

Mr. Foster, on this subject, says:

"The power of impeachment is granted for the public protection in order to not only remove but perpetually disqualify for office a person who has shown himself dangerous to the Commonwealth by his official acts. The object of this salutary constitutional provision would be defeated could a person by resignation from office obtain immunity from impeachment. State senates have sustained articles of impeachment for offenses committed at previous and immediately preceding terms of the same or a similar office."

Is it not true that Judge Archbald now holds a similar office to that which he held in 1908? He is now a circuit judge, and the powers and duties of district and circuit judges are almost identical. State *v.* Hill, Thirty-seventh Nebraska Reports.

We have, then, five precedents—one by the Senate of the United States, one by the senate of New York, one by the senate of North Carolina, one by the State of Wisconsin, and another by the court of impeachment of Nebraska, indorsed by the Supreme Court of Nebraska, and by Foster in his work on the Constitution.

We therefore confidently maintain that the respondent in this trial is now impeachable for acts which he committed while district judge of the middle district of Pennsylvania.

I shall not go into the discussion of the origin of impeachment trials, but will just quote this excerpt from one constitutional writer. Mr. Foster, in his splendid work on the Constitution, says:

"Impeachment trials are a survival of the earliest kinds of jurisprudence, when all cases were tried before an assembly of the citizens of the tribe or State. Later, ordinary cases, both civil and criminal, were assigned to courts created for that purpose, but matters of great public importance were still reserved for a decision of the whole body of citizens or subsequently of the council of elders, heads of families, or holders of fiefs."

This arrangement could be preserved in earlier times when population was sparse and business intercourse small and human affairs were not intricate; but as civilization became more complex, and the division of labor in administering judicial affairs became more urgent, the right to decide and pass upon various questions was allotted to different officers, and so to-day we have a judicial system in which all judicial power is lodged, but distributed to different courts, but in all this evolution and distribution of judicial power there is one great right which the people have always reserved unto themselves, and that is the right to supervise the conduct of public officials and, through their representatives, to remove such officials from office for misconduct or misbehavior, and so, Senators, you sit to-day, theoretically at least, as the court of 90,000,000 people who have commanded us through the popular branch of Congress to bring this respondent before you to inquire into his conduct, and ascertain if the condition on which he was appointed to the high office which he now holds has not been broken by him.

Quoting Foster again:

"What, it may be asked, is the true spirit of the institution itself? Is it not designed as a method of national inquest into the conduct of public men?'

This right to inquire into the conduct of public officials has been reserved to the people themselves, and this great Senate is the tribunal in which such questions must be tried, and necessarily and properly the powers of this court are "broad, strong, and elastic, so that all misconduct may be investigated and the public service purified." The fathers of the Constitution realized the importance of reserving unto the people the right to remove an unworthy or unsatisfactory official, and they were indeed wise in not attempting to define or limit the powers of the court of impeachment, but left that power so plenary that no misconduct on the part of a public official might escape its just punishment.

In reply, Mr. Alexander Simpson, jr., counsel for respondent, in his concluding argument on January 9 [10] said:

The first question which arises is whether or not the Senate can now consider an article of impreachment which relates to acts done while Judge Archbald was a district judge before his appointment to and confirmation as a judge of the Commerce Court. The managers in their brief say this in referring to this question:

"In this respect the case here presented seems to be unique in the annals of impeachment proceedings under our Constitution."

And they say further in that regard that they can justify the articles of impeachment, notwithstanding the change of office, because the two offices are substantially the same within the contemplation of the constitutional provisions relating to impeachments.

That argument necessarily concedes the points decided in the Blount case and considered and voted upon in the Belknap case, that he who is out of office can no longer be impeached. It necessarily also concedes that the constitutional provision has for its primary purpose the removal of the delinquent from the particular office in which he is said to have done a wrong. That is the necessary conclusion from the provision of Article I, section 3, of the Constitution, which provides what shall be the penalty in case of impeachment. It is considered also by Judge Story in his work on the Constitution, and if the argument which was presented by Judge Story is sound it must necessarily follow that the similarity of the two offices is not and can not be of any moment whatsoever. Can it be said that if a civil officer, say in the Cabinet of the President, is transferred from one portfolio to the other and continues steadily in office, that he may be impeached while holding the second office for that which was done in the first, and yet if he passes from the Cabinet to the Senate or into private life he can not be impeached at all? There is no logic or sound reasoning in any such proposition as that, nor is it in accord with any well-settled principles. In the provision which the managers quote in their brief from Mr. Foster he says this is regard to that:

"It includes such action by an officer when acting as a member ex officio of a board of commissioners; and such action in the same or a similar office at an immediately preceding term."

Now, I want to know why limit it to the immediately preceding term if the similarity of the office is the test in determining whether the impreachment will lie or not. Of course, that can not be sound; and the only reason why Foster wrote in his commentaries the "immediately preceding term" was because he felt that the line must be drawn somewhere. He knew that in certain of the State courts, under the language of their constitutions, it had been held that in a succeeding term of the same office there might be an impeachment for that which occurred in the immediately preceding term. But it remained for the managers to evolve the doctrine that it was to be a substantially similar office which was the test in determining the matter.

I submit that the proper test is the one to which I have already adverted. It is that the office, during the incumbency of which the acts were done of which complaint was made, shall be the determinative factor in deciding whether or not impeachment shall lie for the offense charged. If that is not so, there is no logical conclusion from the position which one of the managers assumed, that so long as the man is in public office whether the office is substantially similar or no, or whether there is a continuity of term or no—so long as he is in public office he may be impeached for anything which he has ever done in the past, because, as it was claimed, the purpose of the constitutional provision is to put out of office all those who by their past lives have shown that they are unfit to occupy it. That position would be a logical one; but there can not be a case found to sustain it; and all the authorities decide precisely the reverse.

[10] Record, p. 1278.

On January 3, 1913,[11] Messrs. R. W. Archbald, jr., M. J. Martin, Alexander Simpson, jr., and A. S. Worthington, of counsel for the respondent, offered a brief covering various phases of the case, from which the following extract relates to this question:

III.

The last six articles of impeachment in this case must fail, if for no other reason, because they relate to a time when the respondent held the office of district judge of the United States. He may not be impeached for alleged offenses committed prior to January 31, 1911, when he ceased to be district judge by appointment to a different office.

Articles VII, VIII, IX, X, XI, and XII, and Article XIII in part, charge offenses alleged to have been committed by the respondent before he was appointed to his present position as circuit judge and assigned to duty on the Commerce Court. He was a district judge of the United States from March, 1901, until the 31st day of January, 1911.

No useful information on this subject can be obtained from the English precedents, because in England a private citizen could be impeached as well as officers of the Government.

In this country there have been two attempts to impeach persons who had ceased to be officers for acts done by them while they were officers. One of these cases was that of William Blount in 1798; the other that of William W. Belknap in 1876.

In Blount's case when he was called upon to answer the articles he filed a plea which set up in substance these two defenses: (1) That a Senator is not impeachable, and (2) that he had ceased to be a Senator. (3 Hinds' Precedents, 663.)

This double plea was sustained by the Senate by a vote of 14 to 11. (3 Hinds' Precedents, 679.)

There is nothing in the record of the case to enable us to determine whether all the 14 Senators who voted to sustain the plea did so because they held that a Senator is not impeachable, or because Blount was out of office at the time. And, of course, it may be that some voted to sustain the plea on one of those grounds and some on the other.

It will be seen that the managers in that case actually contended that in the United States, as in England, private persons may be impeached as well as officers. It is not thought necessary to consider that question, because that contention has never been made since it was made by the managers in Blount's case. Mr. Ingersoll, of counsel for Blount, said in the course of the argument that he would not contend that an officer might escape an impending impeachment by resigning his office for that purpose.

This admission of Mr. Ingersoll's gave great comfort to the managers and some embarrassment to the counsel for the respondent in Belknap's case. In that case the respondent filed a plea in which he averred:

"That this honorable court ought not to have or take further cognizance of the said articles of impeachment * * * because he says that before and at the time when the said House of Representatives ordered and directed that he, the said Belknap, should be impeached at the bar of the Senate, and at the time when the said articles of impeachment were exhibited and presented against him * * * he, the said Belknap, was not, nor hath he since been, nor is he now, an officer of the United States; but at the said time was, ever since hath been, and now is, a private citizen of the United States and of the State of Iowa. (3 Hinds' Precedents, 919.)"

To this plea the managers for the House of Representatives filed a replication, in which they set up: (1) That at the time the acts charged in the articles of impeachment were committed, Belknap was Secretary of War; and (2) that Belknap had resigned to escape impeachment, after he had learned that the House of Representatives, by its proper committee, had completed its investigation into his official conduct, and was considering the report it should make to the House upon the same. There were further pleadings, but those above stated set forth sufficiently what the issues were. (3 Hinds' Precedents, 921.)

After much discussion the Senate determined to hear first the question of the sufficiency of the replication. After a long debate, it was decided, by a vote of 37 to 29, that Belknap was amenable to trial by impeachment for acts done as Sec-

[11] Record of trial, p. 1067.

retary of War, notwithstanding his resignation before he was impeached. (3 Hinds' Precedents, 964.)

Belknap was called upon to plead to the merits, but declined to do so on the ground, as set forth on the record by his counsel, that, as less than two-thirds of the Senate had sustained the jurisdiction, the respondent was entitled to be discharged, without further proceedings. (3 Hinds' Precedents, 936–937.)

The Senate, however, went on and took evidence in the case, with the result that Belknap was acquitted. The vote on the several articles ranged from 35 to 37 for conviction. On each article 25 voted not guilty. Most of those who voted not guilty stated that they did so because they believed the court was without jurisdiction, for the reason that the respondent had ceased to be a civil officer of the United States at the time he was impeached by the House of Representatives.

Hence, in Belknap's case, as in Blount's case, it will be seen that the final vote does not indicate that any of the Senators who voted "guilty" did so on the ground that one who has been a civil officer remains liable to impeachment as long as he lives, for acts done during the time he held the office. The evidence in the case showed that Belknap was advised at 10 o'clock of the morning of the day that he resigned, that the Judiciary Committee of the House was about to report a resolution recommending his impeachment. He hurried to the President, tendered his resignation, and had it accepted, a few hours only before the Judiciary Committee did present to the House the resolution recommending his impeachment. There was much controversy in the discussion of the case before the Senate by the managers and counsel, respectively, as to whether Belknap was an officer when the resolution of impeachment was presented to the House, on the theory that the law takes no notice of fractions of a day. But, aside from this, it was strenuously contended by the managers that even if the general rule be that an officer ceases to be subject to impeachment when he leaves the office, there should be an exception to that rule when the officer resigns for the very purpose of escaping impeachment.

It is impossible to determine what proportion of the Senators who voted against Belknap at the conclusion of the trial did so on the ground that he could not escape impeachment by resigning for that purpose, even if he would not be subject to impeachment had he not vacated the office in that way and for that purpose. In other words, the case is not a precedent for the proposition that one whose term of office has expired remains subject to impeachment during the whole of his life for acts done while he held the office.

When Manager Hoar was making his argument a Member of the Senate interrupted him and propounded the following question:

"There are no doubt several Members of the Senate who have been in past years civil officers of the United States. Are they liable to impeachment for an alleged act of guilt done in office?"

The manager did not flinch at this question, but said, as he was evidently required to say or abandon his contention: "The logic of my argument brings us to that result."

It will be seen that the contention which was made on behalf of the House in Belknap's case, and which we understand is maintained by the managers in the case at bar, is far-reaching. The present President of the United States at one time held the office of Solicitor General; at another time he was circuit judge of the United States; at another time he was governor of the Philippine Islands; at another time he was Secretary of War. Is it possible that he can now be the subject of impeachment for any act committed by him at the time he held either one of those offices? If so, he may be removed from his present office as President of the United States by a majority of the House and two-thirds of the Senate for alleged offenses charged to have been committed while he held any one of the other positions above mentioned.

And so of any other public man who has never held office under the United States.

It would seem that a contention which leads to such absurd results cannot be sustained.

459. On January 9, 1913,[12] in the Senate sitting for the Archbald impeachment trial, Mr. Manager George W. Norris, of Nebraska, said in concluding argument:

The authorities are practically unanimous that a public official can be impeached for official misconduct occurring while he held a prior office if the duties

[12] Third session Sixty-second Congress, Record, p. 1265.

of that office and the one he holds at the time of the impeachment are practically the same, or are of the same nature. The Senate must bear in mind, as stated by all of the authorities, that the principal object of impeachment proceedings is to get rid of an unworthy public official. In the State of New York it was held in the Barnard case that the respondent could be impeached and removed from office during his second term for acts committed during his first term. And in the State of Wisconsin the court held the same way in the impeachment of Judge Hubbell. To the same effect was the decision in Nebraska upon the impeachment trial of Governor Butler. On this point the respondent relies upon the case of the State *v.* Hill (37 Nebr., p. 80).

In that case the State treasurer of Nebraska was impeached after he had completed his term and retired to private life. The articles of impeachment were not passed on by the legislature—in fact, were not even introduced in the legislature— until after the respondent had served his full term, and the court there held that impeachment did not lie, but it expressly approved the judgment of the New York court in the Judge Barnard case, the judgment of the Wisconsin court in the Judge Hubbell case, and the prior judgment of the Nebraska court in the Butler case.

460. Argument that an impeachable offense is any misbehavior or maladministration which has demonstrated unfitness to continue in office.

On January 9, 1913,[13] in the Senate, sitting for the impeachment trial of Judge Robert W. Archbald, Mr. Manager Paul Howland of Ohio, in final argument said:

The managers contend that the power to impeach is properly invoked to remove a Federal judge whenever, by reason of misbehavior, misconduct, malconduct or maladministration, the judge has demonstrated his unfitness to continue in office: that misbehavior on the part of a Federal judge is a violation of the Constitution, which is the supreme law of the land, and a violation also of his oath of office taken in compliance with the requirements of the statute law. If the Senate should adopt this view of the law, then the only question to be passed on by the Senate would be whether the acts alleged and proven constitute such misbehavior as to render the respondent unfit to continue in office.

The learned counsel for the respondent, by insisting that only indictable offenses are impeachable, would seem to be placing himself in the position of holding that the object of impeachment was punishment to the individual. This conception of the object of impeachment is entirely erroneous, and whatever injury may result to the individual is purely incidental and not one of the objects of impeachment in any sense. An impeachment proceeding is the exercise of a power which the people delegated to their representatives to protect them from injury at the hands of their own servants and to purify the public service. The sole object of impeachment is to relieve the people in the future, either from the improper discharge of official functions or from the discharge of official functions by an improper person. This view of impeachment is clearly demonstrated by the judgment which the Constitution authorizes in case of conviction and which shall extend no further than removal from office and disqualification to hold or enjoy any office of honor, trust, or profit under the Government of the United States, leaving the punishment of the individual for any crime he may have committed to the criminal court. (See Art. I, sec. 3, par. 7, Constitution of the United States.)

As bearing upon the question of law raised by the demurrer of the respondent I wish to call attention to two provisions of the Federal Constitution. Section 4, Article II, provides:

"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"—

To which I shall hereafter refer as the removal section, and section 1, Article III, the second sentence thereof, which provides that—

"The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior"—

To which I shall hereafter refer as the judicial-tenure section.

[13] Third session Sixty-second Congress, Record, p. 1259.

It will be noted that the removal section immediately precedes the judicial-tenure section. The limitation of the judicial tenure to good behavior is the only limitation of that character to be found in the Federal Constitution upon the tenure of any of the civil officers of the Government. I therefore contend that it was the plain intention of the framers of the Constitution that, in so far as the Federal judges were concerned, the removal section was not intended to be antagonistic in its terms to the judicial-tenure section, immediately following it, and that the judicial-tenure section, which provides that the judicial term shall be during good behavior, was not intended to be antagonistic to the removal section, which immediately precedes it. These two sections must be construed together, and when so construed the judicial-tenure section is of necessity either an addition to the enumerated offenses in the removal section or a definition of the term "high crimes and misdemeanors," when applied to the judiciary, as including misbehavior. To say that the judicial tenure shall be limited to good behavior in one section of the Federal Constitution and then contend that the section of the Constitution immediately preceding that has destroyed its force and effect and has left the Federal Government without any machinery to pass upon the question of the forfeiture of the judicial tenure, or to take jurisdiction of acts which constitute misbehavior but are not criminal, is to treat the words "during good behavior" as surplusage. Such an interpretation violates all rules of construction.

What is the legal status of the judicial tenure and what determines that status? There are some considerations on which to base the claim that the legal status of the judicial tenure should be determined by the same principles that are applicable to a contract of hiring. The parties to the contract are the people of the United States and the candidate for a Federal judgeship. When he has been nominated by the President and confirmed by the Senate the commission tendered or delivered to him is an offer on the part of the people of the United States to the candidate whereby they agree to enter into a contract on certain terms and conditions with the candidate and offer to pay him a fixed sum of money for the performance of certain services for them in accordance with the terms of the offer. No obligation on the part of the Government has yet attached; the candidate need not accept the offer; he is not compelled to qualify; that is a voluntary act on his part. (See Marberry *v.* Madison, 1 Cranch, 137.)

Section 257 of the judicial code provides that the Federal judges shall take a certain prescribed oath before they proceed to perform the duties of their respective offices.

The acceptance of the offer on the part of the candidate is evidenced by his oath, and when the oath is taken the contract of hiring becomes valid and binding on the parties to the same in accordance with the terms and conditions of the contract.

In this case the contracts between the United States and the respondent are evidenced by the various commissions and the various oaths accepting the same.

Under this state of facts, if we were not dealing with the Government as one of the parties to the contract, under constitutional limitations, the contract could be abrogated for breach of condition if necessary and the rights of the parties determined in the courts of law.

If it should be objected that the legal status of the judicial tenure must be placed on a higher ground than an ordinary contract right by reason of the solemnities necessary to create the status and by reason of the important and sacred functions of government with which the judge is charged, we perhaps would be justified in saying that a fiduciary relation of the highest and most sacred character known to the law is created by the commission of appointment and the oath of acceptance of a Federal judge. Under this conception of the status of the judicial tenure the judge is acting as a trustee. The subject matter of the trust is the judicial power of the United States, and the beneficiaries of the trust are the people thereof. Given this status in a court of equity, the trustee, under well-known and well-recognized principles of equitable jurisprudence, can always be removed on application of the beneficiary and a showing that the trustee is not performing his duties as such trustee in such a manner as to satisfy the conscience of the chancellor that he is acting for the best interest of the beneficiary. Realizing, however, the manifest impropriety of leaving the question of forfeiting the judicial tenure to the judges, the framers of the Constitution wisely provided a different forum, viz, the Congress, to raise and try the question of the forfeiture. We have now seen that whether we apply principles of law or equity to the status created by the appointment of the Federal judge there would be a forum to adjudicate the rights of the parties, and reasoning by analogy we are driven to the conclusion that the framers of the Constitution

were not unmindful of the importance of the subject with which they were dealing, and intended to and did provide a forum before which the people of the United States could bring their judges and on proper showing of misbehavior, which demonstrates the unfitness of the judge to continue in office, work a forfeiture of the judicial tenure.

461. Summary of State trials of impeachments with reference to their holdings on the question of whether acts of a judge must be indictable to be impeachable.

On January 9, 1913,[14] in the Senate, sitting for the Archbald impeachment trial, Mr. Manager Paul Howland, of Ohio, filed as part of his final argument a record of impeachment trials in various States, with particular reference to their holdings on the question as to whether an offense in order to be impeachable must be indictable. The summary appears in full in the Congressional Record of that date.

462. Discussion of the meaning in English parliamentary law and in the constitution, of the phrase "high crimes and misdemeanors" as applied to judicial conduct.

Arguments as to whether acts of maladministration which are not indictable are subject to impeachment.

On January 9, 1913,[15] in the Senate, sitting for the trial of the impeachment of Judge Robert W. Archbald, Mr. Manager Paul Howland, of Ohio, in final argument said:

In the removal section of the Constitution we find the words "high crimes and misdemeanors." These words are used in the same sense that had attached to them for centuries in the impeachment trials of England. They were used as part of the well-recognized terminology of the law of Parliament as distinguished from the common law. We must bear in mind that these terms are used in a section of the Constitution which is plainly intended to protect the State against its own servants.

The two enumerated offenses of treason and bribery are offenses peculiarly against the state as distinguished from offenses against the individual. In construing a clause of this character in the Constitution, where the whole object is to protect and preserve the Government, such a construction should be placed upon the language used as will best accomplish the results desired. To insist that the technical definition of the criminal law should be applied in construing the meaning of the term "high crimes and misdemeanors" is to insist on the narrowest possible construction, and loses sight of the object and purpose of this clause in the Constitution. To insist that it is impossible to impeach a judge unless he has committed some indictable offense is to say that the people of this country are powerless to remove a Federal judge so long as he is able to keep out of jail. Whhile no criminal is fit to exercise the judicial function, it does not follow that all other persons are fit to be judges. Such a construction is absolutely repulsive to reason and ought not to be and is not a correct interpretation of the term "high crimes and misdemeanors."

Attention is often called to the discussion that took place in the Constitutional Convention between Colonel Mason and Mr. Madison in which Mr. Madison suggested that the term "maladministration" was too vague and the phrase "high crimes and misdemeanors" was adopted. Attention was called to that by the distinguished counsel for the respondent in his opening statement.

On the strength of this passage in Madison's papers it is contended that Mr. Madison did not construe the phrase "high crimes and misdemeanors" as including maladministration. (3 Madison's Papers, 1528.)

We find, however, that Mr. Madison in a speech in Congress on the 16th day of June, 1789, on the bill to establish a department of foreign affairs, in discussing the possibility of abuse of power by the Executive, said:

"Perhaps the great danger of abuse in the Executive's power lies in the improper continuance of bad men in office. But the power we contend for will not enable him to do this, for if an unworthy man be continued in office by an unworthy President the House of Representatives can at any time impeach him and the Senate can remove him, whether the President chooses or not." (4 Elliot's Debates, 375.)

[14] Third session Sixty-second Congress, Record, p. 1261.
[15] Third session Sixty-second Congress, Record, p. 1260.

This language clearly demonstrates that Mr. Madison believed that acts of maladministration which were not indictable were impeachable.

Nowhere in the English law of impeachment or in the Constitution of the United States or any of the States do we find any definition of impeachable offenses. The language of the Federal Constitution attempts no definition of impeachable offenses, and the general term "high crimes and misdemeanors" is not and was not intended to be a definition.

Under the State constitutions we sometimes find the added terms "mal and corrupt conduct," "corruption in office," and "maladministration"—all general terms without attempting any technical definition. The reason for this is perfectly obvious, and is that the subject matter is not capable of technical definition. Who is wise enough to anticipate every manifestation of fraud that would give a chancellor jurisdiction and write it into a statute? It is the effect of acts under the circumstances of each particular case that confers jurisdiction. So it is with impeachment. No one can tell in advance in what way or from what source the danger may arise which demands the exercise of this power. The power of impeachment is recognized and authorized in every one of our constitutions, Federal and State, but the circumstances which warrant the exercise of that power are not defined and the necessity for its exercise is in the first instance left to the discretion of the House of Representatives. It is an indefinite and broadpower incident to sovereignty, and its exercise in this country is demanded whenever the agents of sovereignty have acted in such a manner as to destroy their efficiency in the discharge of their duties to the sovereign. The existence of this power is necessary to the permanence of the State, and the exercise of the power is necessary whenever and however the welfare of the State may be threatened by its civil officers.

Mr. Alexander Simpson, counsel for respondent, took issue with this argument, saying: [16]

It was claimed by Mr. Manager Howland to-day, that the words "high crimes and misdemeanors" as used in this provision of the Constitution were taken bodily out of the English practice, the English parliamentary law, as they said. That is unquestionably true. It is not true that in all the impeachments in England they used the words "high crimes and misdemeanors," but those words are used in a number of their impeachments. This being so, you must either accept the constructions placed upon those words in the lex parliamentii, or you must decline to accept that construction. If you decline to accept it, of course that branch of the argument falls by the wayside at once. But if you accept it, then the question arises which of the English precedents are you going to accept, in view of the fact that some hold that an impeachable offense need not be an indictable one, and others hold a precisely antagonistic view. Are you going back to the days when a man was impeached simply because he happened to have been put in office by those who have themselves just been turned out? If that is the view you are going to accept then perhaps every four years in this country there will be a wholesale slaughter. But if you are going to accept the best precedents which appear upon the English reports, and especially those down near to the time when the Constitution of the United States was adopted, then those best precedents show that, except for an indictable offense, no impeachment would lie under the laws of England.

But what are you going to do if the matter is to be considered solely under the language of the Constitution itself? The word "misdemeanors" 'in that clause must be taken either in the technical sense or in the proper sense. If that word is taken in the technical sense everybody knows that a misdemeanor taken technically is a crime pure and simple. If it is taken in the popular sense, then, notwithstanding what some text writers have said, I venture the assertion that if you go out into the cars or on the streets or in your homes and ask the people you meet what is meant by the words "treason, bribery, or other high crimes and misdemeanors," you will not find one in a thousand but will say that every one of those words imports a crime. If that is so, then necessarily, when you come to construe those words after this trial is over, you will necessarily have to reach the conclusion that these charges must be indictable or they can not be impeachable.

463. On January 9, 1914,[17] in the Senate, sitting for the Archbald impeachment trial, Mr. Manager John W. Davis, of West Virginia, said in final argument:

[16] Record, p. 1270.
[17] Third session Sixty-second Congress, Record, p. 1266.

The issue narrows itself down to the meaning of the phrase "high crimes and misdemeanors" occurring in Article II, section 4, of the Constitution; and the respondent now renews the oftrepeated contention that this language can be used only with reference to offenses which, either by common law or by some express statute, are indictable as crimes. Every canon of construction which can be applied to this clause of the Constitution negatives the position which counsel for the respondent assume. Test it by the context, by contemporary interpretation, by precedent, by the weight of authority, and by that reason which is the life of every law, and the answer is always the same.

In the first place, when we read this clause of the Constitution, as we are required to do in the light of the context of the instrument, we are confronted at once by the clause fixing the tenure of judges of the Federal courts during good behavior; and if it be difficult, as counsel for respondent assert, to enlarge the phrase "high crimes and misdemeanors" so as to embrace acts not indictable as crimes, it is certainly far more difficult to restrict "good behavior" to the narrow limits fixed by the criminal law. To say that a judge need take as the guide of his conduct only the statutes and the common law with reference to crimes, and that so long as he remains within their narrow confines he is safe in his position, is to overlook the larger part of the duties of his office and of the restraints and obligations which it imposes upon him. We insist that the prohibitions contained in the criminal law by no means exhaust the judicial decalogue. Usurpation of power, the entering and enforcement of orders beyond his jurisdiction, disregard or disobedience of the rulings of superior tribunals, unblushing and notorious partiality and favoritism, indolence and neglect, all are violations of his official oath, yet none may be indictable. Personal vices, such as intemperance may incapacitate him without exposing him to criminal punishment. And it is easily possible to go further and imagine such indecencies in dress, in personal habits, in manner and bearing on the bench; such incivility, rudeness, and insolence toward counsel, litigants, or witnesses; such willingness to use his office to serve his personal ends as to be within reach of no branch of the criminal law, yet calculated with absolute certainty to bring the court into public obloquy and contempt and to seriously affect the administration of justice. Can it be possible that one who has so demonstrated his utter unfitness has not also furnished ample warrant for his impeachment and removal in the public interest?

Stated in its simplest terms, the proposition of counsel is to change the language of the Constitution so that instead of reading that—

"the judges both of the Supreme and inferior courts shall hold their offices during good behavior"—

it will read that—

"the judges both of the Supreme and inferior courts shall hold their offices so long as they are guilty of no indictable crime."

If the latter were the true meaning, is it conceivable that the careful and exact stylists by whom the Constitution was composed would have used an ambiguous term to express it?

But counsel ask: What shall be done with that clause which provides that in case of impeachment—

the party convicted shall nevertheless be liable and subject to indictment, trial, judgment, and punishment according to law.

This, they insist, is a definition by implication, and signifies that the scope of impeachment and indictment is one and the same, although the mode of trial and the penalty to be inflicted may differ. We submit, on the contrary, that this clause, instead of being a declaration that impeachment and indictment occupy the same field, is a recognition of the fact that the field which they occupy may or may not be identical; and, recognizing this fact, it declares merely that when the field of impeachment and the field of indictment overlap there shall be no conflict between them, but that the same offense may be proceeded against in either forum or in both.

The light drawn from contemporary speeches and writings confirms the position for which we contend. It is true, as counsel will point out, that in the Constitution Convention when the word "maladministration" was proposed it was objected to by Mr. Madison as too vague, and the words "high crimes and misdemeanors" were inserted instead; but it is also true that on the 16th day of June, 1789, when debating in the House of Representatives the propriety of giving to the President the right to remove an officer, he said:

"The danger, then, consists merely in this: The President can displace from office a man whose merits require that he should be continued in it. What will

be the motives which the President can feel for such abuse of his power and the restraints that operate to prevent it? In the first place he will be impeachable by this House before the Senate for such an act of maladministration; for I contend that the wanton removal of meritorious officers would subject him to impeachment and removal from his own high trust."

Mr. Davis then cited numerous authorities and said:

It can be safely said that nothing was further from the minds of the men who framed the Constitution than the construction here contended for by respondent's counsel.

Again we may look to the precedents only to find that the word "misdemeanor" has always been treated as having a meaning of its own in parliamentary law, and that one impeachment proceeding after another has been based upon offenses not within the law of crimes. I do not repeat the many authorities for this statement which my colleagues have cited. This body, of course, being a law unto itself, is bound by no precedents save those of its own making, and even as to them no doubt has the power which any other court enjoys to overrule a previous decision if convinced of its error.

After citing authorities, Mr. Davis continued:

But, without stopping to multiply precedents further, we next call attention to the long list of eminent authorities and commentators on the Constitution who uphold the construction for which we contend—Story, Curtis, Cooley, Tucker, Watson, Foster—all these and many more have been cited in the course of this discussion. Speaking as a lawyer, it must be said that the weight of authority in our favor is overwhelming.

Last of all we resort to the highest of all canons for the construction of constitutions and statutes alike, viz, "The reason of the thing." It is true that the framers of the Constitution intended to create an independent judiciary, but they never contemplated a judiciary which should be totally irresponsible. Regarding public office as a public trust, they found it necesssary to lodge somewhere the power to determine whether that trust had or had not been abused. In the appointment of judges they required that the judgment of the President with reference to individual fitness should be concurred in by the Senate, and quite naturally they gave to the body which had approved the appointment the power to withdraw that approval and dismiss the officer when he had shown himself faithless to his trust. In requiring first of all a majority of the House of Representatives in order to prefer articles of impeachment and then two-thirds of the Members of the Senate present to convict they hedged the power about with all the safeguards necessary to protect the upright official and yet leave it sufficient play to preserve the public welfare. Experience has shown how more than adequate the machinery so provided has been to prevent hasty or intemperate action. Indeed, it would seem that if the fathers erred it was in making too slow and difficult the process of removing the unfaithful and unfit. I hope—indeed, I believe—that this high court will never sanction any construction of the Constitution which will render it practically impotent for the purposes of its creation.

But in the brief filed by counsel for the respondent it is suggested that if an impeachable offense need not be criminal in fact it must still be criminal in its nature. It will at once be clear that it is a definition which does not define, and that the phrase "criminal in its nature" has no more certainty to commend it than has "good behavior." Recognizing this to be true, counsel go on to say, in the attempt to define their own language, that—

"For the same reason, even if the misdemeanors for which impeachment will lie are not necessarily indictable offenses, yet they must be of such a character as might properly be made criminal."

We are not called on to agree with their position as so stated, but have no great cause to fear it.

We understand a crime or misdemeanor to be, in the language of Blackstone:

"An act committed or omitted in violation of a public law either forbidding or commanding it."

If the phrase "criminal in nature" means those things which might be made crimes by legislative prohibition, every act here charged against this respondent comes within the description. Certainly Congress could by express criminal statute forbid a Federal judge to accept gifts of money from members of his bar, to communicate in private either orally or by letter with counsel in reference

to cases pending for decision, to request financial favors from parties litigant before him, and as to the Commerce Court might well forbid the members of that court to engage in the business of hunting bargains from railroad companies engaged in interstate commerce. And certainly if such things are not already misdemeanors or misconduct or misbehavior, a statute to forbid them can not come too soon.

464. Discussion of the question of impeachability of a judge for offenses not subject to prosecution by indictment or information in a criminal court.

Argument that impeachment is not restricted to offenses indictable under Federal law, and that judges may be impeached for breaches of "good behavior."

On January 9, 1913,[18] in the Senate, sitting for the impeachment trial of Judge Robert W. Archbald, Mr. Manager George W. Norris, of Nebraska, in the final argument said:

It is strenuously argued by attorneys for respondent that an impeachment lies only for offenses which are criminal in their nature, and which could legally be the subject of prosecution by indictment.

The Constitution provides (Art. I, sec. 2) that the House of Representatives shall have the sole power of impeachment, and in section 3 of the same article it is provided that the Senate shall have the sole power to try all impeachments. It is undisputed, and, indeed, has never been questioned, that to remove a United States judge from office two things are essential: First, he must be impeached by the House of Representatives, and, second, he must be tried and convicted by the Senate upon the articles of impeachment presented by the House. There is no other way provided by the Constitution of the United States for the removal from office of a judge. In the consideration of this subject, I shall draw a distinction between a judge of the United States court and all other civil officers of the United States. I shall demonstrate from the Constitution itself that a judge of the United States court can properly be impeached, convicted, and removed from office for any act from treason down to conduct that tends to bring the judiciary into disgrace, disrespect, or disrepute. Section 4 of Article II of the Constitution reads as follows:

"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."

It will be noted that this provision of the Constitution applies to all civil officers of the United States alike. It is undisputed that it includes judges, and were there no other provision of the Constitution applying particularly to the conduct or the tenure of office of judges, then there would be no distinction between the impeachment and trial of judges and any other civil officer, including the President and Vice President. But section 1, Article III, so far as the same is applicable to this case, provides: "The judges, both of the Supreme Court and inferior courts, shall hold their offices during good behavior." This provision of the Constitution, it will be observed, applied only and exclusively to judges. It has no relation to any other civil officer of the Government, and if we are not to nullify it entirely, we will find that it bears a very important part in the consideration of the particular branch of the case under discussion. I desire the Senate to continually bear in mind and to faithfully observe at all times during the consideration of this subject that in the construction of any legal document or instrument the court will so construe it as to give life and vitality to every part of the instrument, if it can reasonably and logically do so. It is our duty to construe these two provisions of the Constitution together and, if possible, to give equal vitality and life to them both.

Most of the civil officers provided for by the Constitution have a definite fixed term, but the judges hold office during good behavior. Much of the contention arises over what is meant in section 4, Article II, by the word "misdemeanor." It is contended by the respondent that this word is intended only to apply to such offenses as are indictable and punishable under the criminal law, and that a judge can not be impeached and removed from office unless his offense, whatever it may be called, is at least of so high a degree as to make it criminal and indictable. This construction, if adhered to, absolutely nullifies that provision

[18] Third session Sixty-second Congress, Record, p. 1264.

of section 1, Article III, above quoted which provides that judges shall hold their offices during good behavior. If judges can hold their offices only during good behavior, then it necessarily and logically follows that they can not hold their offices when they have been convicted of any behavior that is not good. If good behavior is an essential to holding the office, then misbehavior is a sufficient reason for removal from office. And if, therefore, we give full life and vitality to both of these provisions of the Constitution, we must hold that the lack of good behavior, or misbehavior, mentioned in section 1, Article III, is synonymous with the word "misdemeanor" in section 4, Article II, in all cases where the offense is less in magnitude than in indictable one.

This view of these provisions of the Constitution has been sustained by practically all of the leading law writers upon the subject. It has also been sustained by the Senate in the trial of prior impeachment cases that have taken place. (John Randolph Tucker, Commentaries on the Constitution, vol. 1, sec. 200; George Ticknor Curtis, Constitutional History of the United States, p. 481; Watson, on the Constitution, vol. 2, p. 1034.) These citations showed that the Senate has in the past found officials guilty where the crime charged was not an indictable offense.

But suppose, for the sake of argument, it be admitted that "misdemeanors" as used in section 4, Article II, was intended by the framers of the Constitution to exclude all offenses that were not indictable under the law, it would still not necessarily follow that judges could not be impeached and removed from office for misdemeanors of so low a grade that they were not indictable. The section simply provides that all the civil officers of the United States shall be removed from office on impeachment for and conviction of treason, bribery, and other high crimes and misdemeanors. If in any other provision of the Constitution additional reasons for impeachment are given of some of these specified officers, or additional reasons are given why some of them should cease to hold office, then under such provision such specified officers could be tried, impeached, and removed, even though the offense of which they might be guilty was not included in any of these enumerated in section 4, Article II.

While I believe the construction placed on "misdemeanors" by the respondent is wrong, yet they have not made a defense to the various charges of misbehavior in office, even if we accept their construction of the law that misdemeanors in this section means only indictable offenses. If, for instance, the President was expressly excluded from the officers named in this section, then I concede there would be no way under the Constitution for him to be impeached, tried, and removed from office, because there is no other provision of the Constitution that provides for any offense on the part of the President or limits his tenure of office, excepting the expiration of his regular term. But if judges were expressly eliminated from this section, and it read, "all civil officers of the United States except judges, etc.," it would not follow that they could not be impeached, convicted of misbehavior, and removed from office, because section 1, Article III, expressly provides that they shall only hold their offices during good behavior. In other words, our forefathers in framing the Constitution have wisely seen fit to provide for a requisite of holding office on the part of a judge that does not apply to other civil officers. The reason for this is apparent. The President, Vice President, and other civil officers, except judges, hold their positions for a definite, fixed term, and any misbehavior in office on the part of any of them can be rectified by the people or the appointing power when the term of office expires. But the judge has no such tenure of office. He is placed beyond the power of the people or the appointing power and is, therefore, subject only to removal for misbehavior. Since he can not be removed unless he be impeached by the House of Representatives, tried and convicted by the Senate, it must necessarily follow that misbehavior in office is an impeachable offense.

Any authority that has been cited by the respondent which shows or tends to show that a President, Vice President, or other civil officer other than a judge can not be impeached except the offense is at least of the grade of a misdemeanor that is indictable, does not apply to the impeachment or trial of a United States judge. To hold that an officer whose tenure of office is definite and fixed and who will necessarily go out of office within the course of a year or two, should not be impeached and removed from office for a misbehavior that does not reach in magnitude an indictable offense, is entirely different from holding that an officer whose term of office ordinarily lasts for life should not be so impeached and removed. And our forefathers evidently had this distinction in mind when they applied exclusively to judges that provision of the Constitution which provides that judges shall hold their offices during good behavior.

If I am not right in my construction of the Constitution, then the Congress and the country are absolutely helpless in any attempt to get relief from a judge who drags the judicial ermine down into disgrace, but is careful in doing so not to commit any criminal offense. If I am not right in my construction, then that provision of the Constitution which says that judges shall hold office during good behavior is absolutely nullified, and as far as the good behavior part of it is concerned it has no vitality, no life, no effect. The judge who secretly arranges with attorneys on one side of a case to make a private argument—who not only makes such arrangement, but who initiates it—is guilty of a misbehavior. Every lawyer knows this; every Senator will admit it. Are we helpless in the premises simply because such an act is not indictable under the law? The judge who is continually asking favors of litigants in his court, if he is careful, can not be convicted of any crime, but he is guilty of a misbehavior. No one will dispute. He is perverting the ends of justice. He is bringing the judiciary into disgrace and into disrepute. Carried to its logical conclusion, such conduct would soon mean that our judicial system would fail. It could not survive. Are we helpless? Must we say that, although the Constitution says the judge shall only hold his office during good behavior, the House of Representatives and the Senate are unable to apply those provisions of the Constitution which provide for impeachment, trial, and removal? If our forefathers meant anything when they provided in the Constitution that the judges should hold their offices during good behavior, they certainly intended that when the judge misbehaved he should be removed from office. Such a construction of the Constitution will not violate any principle of law, but, on the other hand, it will give full effect to a constitutional provision that would otherwise be meaningless and a dead letter. Our forefathers wisely, I think, refrained in the Constitution from giving any definition to "crimes and misdemeanors," and likewise refrained from defining what would be an abuse or a violation of "good behavior." Misbehavior, the opposite of good behavior, and I think the proper appellation of any conduct that is not good behavior, implies innumerable offenses of greater or less magnitude.

As to what is misbehavior in office must be determined in the first place by the House of Representatives when they adopt the articles of impeachment. It must be redetermined by the Senate when, after listening to the evidence, they pass judgment upon the case. I think all will agree that any conduct on the part of a judge which brings the office he holds into disgrace or disrepute, or which results or has a tendency to result in the denial of absolute justice to all persons engaged in litigation in his court, is a misbehavior. Certainly such conduct is not good behavior, and the Constitution provides that he shall only hold office during good behavior. Therefore it follows that in the absence of good behavior on the part of the judge he should be removed from office. It is undoubtedly true that the House of Representatives, in passing upon articles of impeachment, and the Senate upon the trial of the offense charged in such articles, where only misbehaving in office was shown, would take into consideration in reaching their conclusions not only the magnitude of such misbehaviors but the frequency of their occurrence. Where the evidence shows that a judge is continually misbehaving by engaging in conduct and practices that bring his office into disrespect and disrepute, the House and the Senate can not avoid their duty or their responsibilty by saying that each distinct offense is in itself of small magnitude and not indictable.

465. Discussion of the clause "during good behavior" in relation to tenure of judicial offices, and effect by implication of misbehavior upon such tenure.

On January 8, 1913,[19] in the Senate, sitting for the impeachment trial of Judge Robert W. Archbald, Mr. Manager Edwin Yates Webb, of North Carolina, in final argument said:

If the Constitution, Article III, section 1, means anything, then we want to bring it before the Senate to-day and ask Senators to say what it does mean when it provides that judges of the Supreme Court and inferior courts shall hold their offices "during good behavior."

The provision in Article II of the Constitution, section 4, Mr. President, refers to impeachment of the President, Vice President, and other civil officers for treason, bribery, or other high crimes and misdemeanors; but later on in that

[19] Third session Sixty-second Congress, Record, p. 1217.

same great instrument, after Article II had been adopted, the constitutional fathers say the judges of the United States shall hold their offices "during good behavior."

It has been pointed out by many constitutional writers, and you yourselves see, that the people have no way of getting rid of a judge who has violated this provision by misbehavior except it is done by this great body. What does "during good behavior" mean?

The Century Dictionary says:

"During good behavior: As long as one remains blameless in the discharge of one's duties or the conduct of one's life; as, an office held during good behavior."

Mr. Foster in his work on the Constitution (p. 586) makes this statement:

"The Constitution provides that 'the judges, both of the Supreme and inferior courts, shall hold offices during good behavior.'"

This necessarily implies that they can be removed in case of bad behavior; but no means except impeachment is provided for their removal, and judicial misconduct is not indictable by either a statute of the United States or the common law.

Says Elliott in his Debates on the Constitution:

"Mr. Dickinson moved as an amendment to Article XI, section 2, after the words 'good behavior,' the words: '*Provided*, That they may be removed by the Executive on the application of the Senate and the House of Representatives.'"

This was in respect of the judges. Mr. Gerry seconded the motion. Mr. Gouverneur Morris thought it a contradiction in terms to say that the judges should hold their offices during good behavior and yet be removable without a trial. Besides, it was fundamentally wrong to subject judges to so arbitrary an authority.

But, mark you, the object then was to remove for bad behavior, but to give them a trial, as the Senate is doing in this particular case.

Judge Lawrence, in the Johnson impeachment case (p. 643), says:

"Impeachment was deemed sufficiently comprehensive to cover every proper case for removal."

In Watson on the Constitution the proposition is stated as follows (vol. 2, pp. 1036–1037):

"What will those who advocate the doctrine that impeachment will not lie except for an offense punishable by statute do with the constitutional provision relative to judges, which says: 'Judges, both of the Supreme and inferior courts, shall hold their offices during good behavior'? This means that as long as they behave themselves their tenure of office is fixed and they can not be disturbed. But suppose they cease to behave themselves? When the Constitution says 'a judge shall hold his office during good behavior' it means that he shall not hold it when it ceases to be good."

I suppose the argument in the Federalist, Mr. President, had as much to do with the adoption of the Constitution of the United States as any other authority. I quote:

"The principle of this objection would condemn a practice, which is to be seen in all the State governments—if not in all the governments with which we are acquainted—I mean that of rendering those who hold offices during pleasure dependent on the pleasure of those who appoint them." (Federalist, p. 306.)

And that is yourselves, Senators, for the President nominates judges and you appoint them.

"According to the plan of the convention, all the judges who may be appointed by the United States are to hold their offices during good behavior; which is conformable to the most approved State constitutions." (Federalist, p. 355.)

"Upon the whole, there can be no room to doubt that the convention acted wisely in copying from the models of those constitutions which have established good behavior as the tenure of judicial offices in point of duration, and that so far from being blamable on this account their plan would have been inexcusably defective if it had wanted this most important feature of good government." (Federalist, p. 361; Publius.)

Mr. President, after counsel for the respondent has discussed in 26 pages of his brief the proposition that the respondent is not impeachable unless he is indictable, he then makes this concession: That if it is not necessary to prove indictable offenses against the judge it is necessary, at least, to prove some offense of a criminal nature.

Mr. President, after all crime is nothing but misconduct. The only thing that is made criminal in this country is some form of misconduct.

Before proceeding to argue the facts in the case, I maintain that any judge of a high court who will dicker and traffic with litigants in his court while their cases are pending ought to be indictable, because such conduct is criminal in its nature, and the reason it has not been made indictable long ago is because the people of the United States have never thought it necessary to surround the judiciary with such a statute.

In reply to this argument, Mr. Alexander Simpson, counsel for respondent, said:[20]

Now, I want to know what good behavior means. This is the provision:

"The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation which shall not be diminished during their continuance in office."

If you take that whole clause and consider it, either historically or grammatically, you will find that the words "good behavior" relate to good behavior in office. The compensation which is to be paid is for service in the office. The good behavior which is the tenure is to be good behavior in the office. But, say the managers, it is not good behavior in office which is the test at all, and you may impeach and remove a man even though he has behaved perfectly well in his office. Personally I agree with that; I am not challenging that position, but it answers their proposition now being considered that good behavior in office is the tenure by which the respondent holds, and for a breach of that he may be removed from office without considering the impeachment clause of the Constitution.

I do not think that the good-behavior clause has anything whatever to do with the impeachment. Everybody knows how the good-behavior clause came into being. In the ancient days the judges, like all other civil officers, held their positions at the pleasure of the King. Then the barons wrested from the King his power of dismissal and required that there should be a good-behavior tenure rather than a tenure at the pleasure of the King, subject at that time only to the power of impeachment. And then, a little later—I think it was in 1701, after the Revolution—there was added the removal power; so that, upon address, judges might be removed the same as upon impeachment without a trial. Those are the circumstances under which the good-behavior tenure came into existence.

But what does "good behavior" mean if you are going to take that alone into consideration? A man ill behaves if he speaks unduly cross to his wife and children. May he be removed from office because of that? If he is the happy owner of an automobile he may violate the speed laws and be hailed before some magistrate and fined. Is he to be removed from office because of that? No one would answer "yes" to either of those questions, and hence you must get down to something definite, something upon which you can lay your finger and say, "There is the definite thing which this man should have known, and as he should have known it and has chosen to violate it he must pay the penalty of his violation." That definite thing can be ascertained only by reference to the clause which says that he may be impeached for "treason, bribery, or other high crimes and misdemeanors." In the ordinary sense of the term one can understand how a man can be of perfectly good behavior in everything else and still be guilty of treason, but does anybody doubt but that he could be removed from office if he was guilty of treason? In truth, you have to go back from the good-behavior clause to the impeachment clause to find out what are the causes for an impeachment. It is the impeachment clause which is the controlling clause and not the good-behavior clause at all.

The argument that grows out of a claim that a violation of the good-behavior clause is sufficient justification for an impeachment is as clearly reasoning in a circle as anybody can well imagine. Concede that good behavior is the tenure, still you can not remove a man from office, under the Constitution, unless he is guilty of "treason, bribery, or other high crimes and misdemeanors," and hence the determinative factor as to whether or not a judge was of good behavior is whether or not he was guilty of "treason, bribery, or other high crimes and misdemeanors."

On January 3, 1913,[21] Mr. Manager Henry D. Clayton, of Alabama, presented a brief on behalf of the House of Representatives, covering this question, among others, as follows:

[20] Record, p. 1270.
[21] Record, of trial, p. 1051.

THE TENURE OF FEDERAL LIMITED TO "DURING GOOD BEHAVIOR"

The provision in Article III, section 1, of our Constitution that "the judges, both of the Supreme and inferior courts, shall hold their offices during good behavior," which was also borrowed from the English laws, must be considered in paramateria with Article IV, section 2, providing that all civil officers of the United States shall be removed from office upon "impeachment for and conviction of treason, bribery, or other high crimes and misdemeanors."

Good behavior is thus made the essential condition on which the tenture to the judicial office rests, and any act committed or omitted by the incumbent in violation of this condition necessarily works a forfeiture of the office. The Constitution provides no method whereby a civil officer of the United States can be removed from office save by impeachment. It follows, therefore, that the framers of our Constitution must have intended that Federal judges, who are civil officers, should be removable from office by impeachment for misbehavior, which is the antithesis of good behavior. Otherwise the constitutional provision limiting the tenure of the judicial office to "during good behavior" would be entirely without force and effect.

466. Review of impeachments in Congress showing the nature of charges upon which impeachments have been brought and judgments of the Senate thereon.

On January 3, 1913,[22] in the Senate, sitting for the impeachment trial of Judge Robert W. Archbald, Mr. Manager Henry D. Clayton, of Alabama, filed, on behalf of the House of Representatives, a brief, in which the following appears:

IMPEACHMENT TRIALS IN THE UNITED STATES SENATE

A concise statement of the general character of the several impeachment trials which have been heretofore conducted by the Senate of the United States:

IMPEACHMENT OF WILLIAM BLOUNT

William Blount, a Senator from Tennessee, was impeached in 1797, on a charge of conspiracy to create, promote, and set on foot within the jurisdiction of the United States, and to conduct and carry on from thence, a hostile military expedition against the territories and dominions of Spain in Florida and Louisiana for the purpose of wresting such territories from Spain and conquering the same for Great Britain, with which Spain was at war; conspiring to incite the Creek and Cherokee Nations of Indians to commence hostilities against the subjects of Spain in violation of the then existing treaty between the United States and Spain, and conspiring to alienate the confidence of these Indian tribes from the principal agent of the United States appointed by the President, in accordance with law, to reside among the tribes; conspiring to seduce the official interpreter appointed by the United States to reside among the said Indian tribes from the duty and trust of his appointment, and conspiring to impair the confidence of the Cherokee Nation in the United States and create discontent among the Indians relative to the ascertainment of the boundary line of the United States and the Cherokee Nation under treaty provisions.

Shortly after Blount had been impeached by the House he was expelled by the Senate, and he was thereafter acquitted of the impeachment on the grounds that he was not a civil officer of the United States.

IMPEACHMENT OF JOHN PICKERING

John Pickering, judge of the United States District Court for the District of New Hampshire, was impeached in 1803, on the ground that he had disobeyed the law in the course of proceedings brought by the United States to condemn a ship with its cargo for a violation of the customs laws, in that the judge delivered the ship to the claimant after its attachment by the marshall without requiring a bond, in accordance with the requirements of law; that in such proceedings he had refused to hear the testimony offered in behalf of the United States; that he had refused to grant an appeal by the Government from his arbi-

[22] Third session Sixty-second Congress, Record of trial, p. 1061.

trary decree to the circuit court; and that he had attempted to perform his official functions while in a state of intoxication. The respondent did not appear to answer the articles exhibited against him, but his son presented a petition, alleging the insanity of his father and praying an opportunity to adduce evidence in that behalf. Evidence was admitted and considered by the Senate in support of this petition. The facts alleged in the articles of impeachment were proved to the satisfaction of the Senate, and the respondent was convicted on each of the articles against him and removed from office.

IMPEACHMENT OF SAMUEL CHASE

In 1804 the House impeached Samuel Chase, a justice of the United States Supreme Court, on the ground that he had been guilty of certain misconduct to the prejudice of the defendants in the trials of John Fries for treason and James Thompson Callender for breach of the sedition laws; that he had improperly attempted to induce a grand jury in Delaware to find an indictment against the editor of a newspaper for breach of the sedition laws; and for addressing an intemperate and inflammatory harangue to a jury in the State of Maryland.

On a party vote, the respondent was acquitted as to all of the articles exhibited against him.

IMPEACHMENT OF JAMES H. PECK

In 1830 James H. Peck, judge of the United States District Court for the District of Missouri, was impeached on the ground that he had grossly abused his power as a judge in sentencing an attorney to 24 hours imprisonment and suspension from the bar of his court for 18 calendar months for writing and publishing a moderate criticism of one of Judge Peck's decisions in a case in which this attorney had appeared in behalf of the plaintiff, with the result that the attorney was practically prevented from further participation in the case. The respondent was acquitted by the Senate on all of the articles presented against him on the ground that he was justified in assuming that he was legally clothed with the power that he had exercised, and that the element of malice had not been established.

IMPEACHMENT OF WEST H. HUMPHREYS.

In 1862 West H. Humphreys, judge of the United States District Court for the District of Tennessee, was impeached for making a public speech declaring the right of secession and inciting revolt and rebellion against the Government of the United States; with the support and advocacy of the ordinance of secession; with aiding in the organization of an armed rebellion against the United States; with conspiring to oppose the authority of the Government of the United States by force; with refusing to hold his court or perform its functions; and with unlawfully acting as judge of the Confederate district court in causing arrests, imprisonments, and confiscations. The respondent made no appearance, and the trial proceeded in his absence. The respondent was convicted on all the charges, with the exception of the unlawful arrests and confiscations, and was removed and disqualified from holding office.

IMPEACHMENT OF ANDREW JOHNSON.

Andrew Johnson, President of the United States, was impeached in 1868 on 11 articles charging the attempted removal of E. M. Stanton, the Secretary of War, in violation of the so-called tenure-of-office act; in attempting to induce a general of the Army to violate the provisions of an act of Congress; and of attempting to bring into contempt and reproach the Congress of the United States by intemperate and inflammatory speeches. The respondent was acquitted on each of the charges by a margin of one vote.

IMPEACHMENT OF WILLIAM W. BELKNAP.

In 1876 William W. Belknap, Secretary of War, was impeached on five articles, charging that he had accepted a portion of the profits of an Army post tradership from a post trader whom he had appointed while he held the War portfolio. A few hours before the House formally adopted the articles of impeachment against him, Belknap resigned as Secretary of War and the President accepted

his resignation. His counsel interposed a plea to the jurisdiction in the Senate on the ground that the respondent was not a civil officer of the United States at the time of his impeachment. This plea was overruled by a majority of less than two-thirds and the trial proceeded. The respondent was ultimately acquitted by the votes of the Senators who had originally voted in favor of the plea to the jurisdiction.

IMPEACHMENT OF CHARLES SWAYNE.

In 1904 Charles Swayne, judge of the United States District Court for the Northern District of Florida, was impeached on 12 articles, charging that he had rendered false claims against the Government in his expense accounts; that he had appropriated to his own use, without making compensation to the owner, a certain railroad car belonging to a railroad company then in the possession of a receiver appointed by the respondent, and that he had allowed the credit claimed by the receiver for and on account of the expenditure incident to the improper use of this car as a part of the necessary expenses of operating the road; that he had resided outside of his district in violation of a statute of the United States; and that he had maliciously adjudged certain parties to be in contempt of court and imposed excessive fines and prison sentences therefor without just cause or warrant of law.

A trial was had and the respondent was ultimately acquitted.

Function of the House in Impeachment [1]

1. The managers. Section 467.
2. High privilege of questions relating to impeachment. Sections 468–470.

467. A summary of impeachment proceedings resulting in trial, with reference to methods of their institution, and the number and manner of appointment of managers on the part of the House.

An examination of the comparatively few impeachment cases which have resulted in trial shows a wide variance in the manner in which preliminary investigations in the House have originated and in the method of selecting managers on the part of the House to conduct impeachment in the Senate.

The case of Senator William Blount, of Tennessee [2] the first in the history of the Congress to reach trial, had its inception in a confidential letter from the President to the House.

The eleven managers selected by the House were elected by ballot. All were, of course, members of the Federalist Party.

In this, and in the two cases following, procedure was through special committees, as the Judiciary Committee did not come into existence as a standing committee until 1813.

The case of Judge Pickering [3] originated in response to a special message from the President, to which were affixed certain ex parte affidavits.

The special committee to which the message was referred having reported in favor of impeachment, and the report being agreed to by the House, eleven managers were elected by ballot, all of whom were from those voting for impeachment, seven being members of the majority party of the House and one of the minority party. The party affiliations of the remaining three are not of record.

Action against Judge Chase [4] was begun as the result of a formal statement in the House by Mr. John Smilie, of Pennsylvania, who incorporated in his remarks a statement made by Mr. John Randolph, of Virginia, criticizing the official conduct of Judge Chase.

Two members of the select committee chosen to inquire into the charges were chosen from those opposing the investigation, but all of the seven managers, elected by the House by ballot had voted both for the investigation and in favor of impeachment. Four of them were members of the majority party.

[1] Cannon's Precedents, vol. 6, p. 657 (1936).
[2] Hinds' Precedents, sections 2294–2318.
[3] Hinds' Precedents, sections 2319–2341.
[4] Hinds' Precedents, sections 2342–2363.

The case of Judge Peck [5] originated as the result of a memorial by an individual, which was referred to the Committee on the Judiciary and was by that committee reported to the House with a recommendation in favor of impeachment.

Five managers were selected by ballot, three of whom served on the Judiciary Committee, three belonging to the majority party of the House and two to the minority.

In the case of Judge Humphreys [6] the Committee on the Judiciary, as the result of an investigation authorized by resolution, reported recommending impeachment.

Five managers were appointed by the Speaker, three from the Judiciary Committee and four representing the majority party of the House.

The first attempt to impeach President Andrew Johnson [7] was initiated by Mr. James Ashley, of Ohio, who rose in the House and impeached the President, submitting specific charges, which were by resolution referred to the Committee on the Judiciary for investigation.

Congress having adjourned without action on the subject, a second proceeding looking to impeachment was begun in the succeeding Congress and referred to what was known as the Committee on Reconstruction, which recommended impeachment.

Under authority conferred by resolution, the Speaker appointed seven managers, two of whom were members of the Committee on the Judiciary and six of whom were members of the majority party of the House.

The impeachment of Secretary of War William W. Belknap [8] resulted from an investigation by a select committee appointed to look into the affairs of the Government in general. On report of this committee, the Committee on the Judiciary was instructed to draw up articles of impeachment.

Seven managers were appointed by the Speaker, three of whom were from the Committee on the Judiciary and five of whom belonged to the majority party in the House.

Mr. William Lamar, of Florida,[9] rising in his place, impeached Judge Swayne, making specific charges, which were referred to the Committee on the Judiciary. The Judiciary Committee reported in favor of impeachment and, by resolution, a select committee was appointed to draw up articles of impeachment. This was in keeping with the procedure in each previous impeachment case, with the exception of that of Secretary Belknap, where, as in the case of Judge Archbald, following, the investigating committee reported the articles of impeachment.

Seven managers to conduct the impeachment of Judge Swayne were appointed by the Speaker, five of whom were members of the Committee on the Judiciary and four of whom were from the majority party of the House.

The original charges against Judge Archbald [10] were filed by a commissioner of the Interstate Commerce Commission in a letter to the

[5] Hinds' Precedents, sections 2364–2384.
[6] Hinds' Precedents, sections 2385–2397.
[7] Hinds' Precedents, sections 2408–2443.
[8] Hinds' Precedents, sections 2444–2468.
[9] Hinds' Precedents, sections 2469–2485.
[10] Hinds' Precedents, sections 7727–7741.

President. Later, in the House, Mr. George W. Norris, of Nebraska, introduced a resolution asking that the President transmit this letter to the House. The letter having been messaged to the House by the President, was referred to the Committee on the Judiciary, which, after investigation, recommended impeachment.

Seven Members were named by resolution to act as managers, all of them members of the Committee on the Judiciary, the only instance in the history of impeachment proceedings in which all managers were selected from one committee. Four of the managers belonged to the majority party of the House.

In most of the cases cited a select committee was appointed by the Speaker to take the case of impeachment to the bar of the Senate. The function of this committee was simply to report to the Senate the fact that an impeachment had been voted in the House and to report back to the House that they had so reported to the Senate.

In some cases the Speaker appointed a select committee to draw up the articles of impeachment, the work of the committee being completed when the articles so draw had been adopted by the House.

It is to be noted that managers have been selected in three ways:

(*a*) By resolution authorizing the Speaker to appoint managers and naming the number thereof;

(*b*) By resolution naming both the number and the personnel of the committee;

(*c*) By election by ballot.

In case of election by ballot a majority vote has been necessary to the selection of each of the seven managers.

Where six received a majority vote and the seventh (although the next highest) failed to receive a majority vote another ballot on the seventh manager was taken.

468. A proposition to impeach a civil officer of the United States is presented as a question of constitutional privilege.

The inquiry into the conduct of H. Snowden Marshall, United States district attorney for the southern district of New York.

An instance in which a Member after submitting articles of impeachment which were referred to a committee of the House, later submitted amended articles of impeachment which were referred to the same committee.

The incorporation of unprivileged matter in a resolution proposing impeachment destroys its privilege.

A resolution directly proposing impeachment is privileged but the same is not true of one proposing investigation with a view to impeachment.

A Member submitting a privileged resolution proposing impeachment is entitled to recognition for one hour in which to debate it.

A Member recognized to present a privileged resolution may not be taken from the floor by a motion to refer.

On December 14, 1915,[11] Mr. Frank Buchanan, of Illinois, submitted as a privileged subject the following:

Mr. Speaker, by virtue of the power conferred on me by the Constitution of the United States as a Member of this House, and to the end that justice may be restored in the administration of the office of United States district attorney for the southern district of New York, I impeach H. Snowden Marshall, United States

[11] First session Sixty-fourth Congress, Record, p. 240.

district attorney for the southern district of New York, for the following specific offenses:

1. He has corruptly neglected and refused to prosecute gross and notorious violations of law by the most powerful and dangerous criminal trusts and monopolies in the United States within his said judicial district.

2. He has prostituted the great office intrusted to him by the people to the service of the great criminal trusts.

3. He has used the powers of his said office for the purpose of publicly defaming, slandering, and libeling the good name of peaceful and law-abiding citizens of the United States, to their great injury.

4. He has violated persistently the eight-hour laws of the United States and of the State of New York.

5. He has corruptly neglected and refused to prosecute men who have made the port of New York within his said district a naval base for foreign belligerent powers.

6. He has corruptly neglected and refused to prosecute violators of the Federal statutes prohibiting the loading and shipment of explosives on ships carrying passengers.

And for other high crimes and misdemeanors.

On motion of Mr. Buchanan, of Illinois, the charges were referred to the Committee on the Judiciary.

On January 11, 1916,[12] Mr. Buchanan again asked recognition for a question of privilege and said:

I rise to offer a resolution amending my impeachment charges against H. Snowden Marshall, and I desire to send the following resolution to the Clerk's desk, to be read.

The Clerk read as follows:

Whereas on the 14th day of December, 1915, certain charges of impeachment were presented in this House by me against the United States district attorney for the southern district of New York, H. Snowden Marshall; and

Whereas said charges were not accompanied by a resolution empowering the Judiciary Committee sufficiently:

Therefore I present the following amended impeachment charges contained in the resolution which I am now offering:

Resolved, That the Committee on the Judiciary be directed to inquire and report whether the action of this House is requisite concerning the alleged official misconduct of H. Snowden Marshall, United States attorney for the southern district of New York.

The resolution here details at length specific items, and concludes:

And in making this investigation, the said committee is hereby authorized to send for persons and papers, administer oaths, take testimony, employ a clerk and stenographer, and is also authorized to appoint a subcommittee to act for and on behalf of the whole committee whenever and wherever it may be deemed advisable to take testimony for the use of said committee. The said subcommittee, while so employed, shall have the same powers in respect to obtaining testimony as are herein given to said Committee on the Judiciary, with a sergeant at arms, by himself or deputy, who shall serve the process of said committee or subcommittee and shall attend the sitting of the same as ordered and directed thereby. The Speaker shall have authority to sign, and the Clerk to attest, subpœnas for any witness or witnesses.

The expense of such investigation shall be paid out of the contingent fund of the House.

Mr. James R. Mann, of Illinois, made the point of order that the resolution was not privileged, in that it included a provision for the payment of expenses from the contingent fund of the House, and said:

To begin with, it provides for the payment of the expenses out of the contingent fund of the House, and under the rules no resolution providing for that is privileged unless it is reported from the Committee on Accounts.

[12] Record, p. 918.

That is far enough; but my colleague from Illinois has impeached this official and the House had referred that matter to the Committee on the Judiciary. Now he presents a resolution, not of impeachment, but a resolution authorizing a committee to make an investigation, which of itself is not a privileged matter.

The privileged matter is the impeachment. That is not concerned in this case. The Speaker could very readily see that if to-day I can impeach a judge or other official of the United States and have it referred to the Committee on the Judiciary and immediately thereafter present a resolution providing for an investigation, and that is privileged, then I am entitled to have an hour in the House in the discussion of that, and if that be voted down I can present another resolution, if it be privileged, in a little different form, and take another hour in the House, and if that be laid upon the table or something else be done with it, then I present another resolution along the same lines, and so on ad infinitum.

Now, the privilege is the presenting of the impeachment. A Member on his responsibility in the House impeaches an official of the Federal Government. That is a matter of high privilege. But when the House has disposed of that it is not a privileged matter to present another resolution referring to an investigation of that subject.

The Speaker sustained the point of order, and Mr. Buchanan withdrew the resolution and immediately reoffered it with the provision for expenses omitted.

Mr. Mann made the point of order that the resolution proposed an investigation with view to impeachment rather than impeachment as such, and was therefore without privilege. The Speaker sustained the point of order, and Mr. Buchanan withdrew the resolution.

Finally, on January 12 [13] Mr. Buchanan again presented a resolution similar in form to that last offered omitting the preamble, and moved its adoption.

Mr. John J. Fitzgerald, of New York, interrupting at the conclusion of the reading of the resolution, moved that it be referred to the Committee on the Judiciary. Mr. Buchanan made the point of order that he had not yielded the floor.

The Speaker held that Mr. Buchanan was entitled to the floor for one hour to debate the resolution, at the conclusion of which Mr. Fitzgerald might move to commit, and recognized Mr. Buchanan.

After debate, on motion of Mr. Fitzgerald, the resolution was referred to the Committee on the Judiciary, yeas 133, noes 712.[14]

469. A proposition to impeach civil officers of the United States presents a question of high constitutional privilege.

The investigation of the Federal Reserve Board in 1917.

An arraignment of impeachment may interrupt the reading of the Journal or business proceeding under a unanimous consent agreement.

An instance in which a Member proposed impeachment individually and collectively against members of an official board.

Articles of impeachment were referred by the House to the Committee on the Judiciary.

In the absence of evidence to support charges the House declined to institute impeachment proceedings.

A member having submitted articles of impeachment, it was held that his privilege had expired.

On February 12, 1917,[15] Mr. Charles A. Lindbergh, of Minnesota, rising to a matter of privilege, said:

[13] Record, p. 962.
[14] For further proceedings in this case see sections 7747–7751.
[15] Second session Sixty-fourth Congress, Record, p. 3117.

Mr. Speaker, I rise to a point of the highest privilege to prefer impeachment proceedings.

Mr. James R. Mann, of Illinois, inquired if pending business under a unanimous consent agreement could be interrupted by the proposed matter of privilege.

The Speaker [16] said:

The gentleman can interrupt the reading of the Journal with a question of that kind. A question of the highest privilege takes precedence over everything.

Subsequently [17] Mr. Lindbergh, as a privileged subject, submitted the following:

Mr. Speaker and the House of Representatives, I, Charles A. Lindbergh, the undersigned, upon my responsibility as a Member of the House of Representatives, do hereby impeach W. P. G. Harding, governor; Paul M. Warburg, vice governor; and Frederick A. Delno, Adolph C. Miller, and Charles S. Hamlin, members, each individually as a member of the Federal Reserve Board, and also all of them collectively as the five active working members of said board, of high crimes and misdemeanors.

I, upon my responsibility as a Member of the House of Representatives, do hereby impeach the said W. P. G. Harding, governor; Paul M. Warburg, vice governor; and Frederick A. Delano, Adoph C. Miller, and Charles S. Hamlin, members, and each of them as members of the Federal Reserve Board, and also impeach all of them collectively as the five active working members of the Federal Reserve Board, of high crimes and misdemeanors in aiding, abetting, and conspiring with certain persons and firms hereinafter named, and with other persons and firms, known and unknown, in a conspiracy to violate the Constitution and the laws of the United States and the just and equitable policies of the Government, which said conspiracy developed and grew out of and was consummated from the following facts and acts, to wit:

Mr. Lindbergh then presented in detail fourteen charges upon which the arraignment was based. At the conclusion of the arraignment Mr. Lindbergh inquired if his privilege ceased with the presentation of charges. The Speaker replied that it did. Thereupon, on motion of Mr. Claude Kitchin, of North Carolina, the articles of impeachment were referred to the Committee on the Judiciary.

On March 3,[18] Mr. Edwin Yates Webb, of North Carolina, from the committee, submitted a report recommending that no further proceedings be had in the matter. The report was adopted by the House without debate.

470. Questions relating to impeachment while of high privilege must be submitted in the form of a resolution to entitle the proponent to recognition for debate.—On January 18, 1933,[19] Mr. Louis T. McFadden, of Pennsylvania, announced that he rose to a question of constitutional privilege relating to impeachment proceedings, and asked recognition for one hour.

Mr. Robert Luce, of Massachusetts, made the point of order that recognition to raise a question of constitutional privilege could not be granted unless preceded by a resolution or motion in writing.

The Speaker [20] sustained the point of order and said:

The rules of the House provide that the gentleman must send a resolution to the Clerk's desk in raising a question of constitutional privilege.

In order for the gentleman to have the right to make such a statement to the House, he must send a resolution to the Clerk's desk and have it read, on which the House may then act. The gentleman would then have one hour in which to address the House, if he presented a question of constitutional privilege.

[16] Champ Clark, of Missouri, Speaker.
[17] Record, p. 3126.
[18] House Report No. 1628.
[19] Second session Seventy-second Congress, Record, p. 2042.
[20] John N. Garner of Texas, Speaker.

Mr. McFadden submitted that he was entitled under the rules governing the presentation of questions of privilege to make a statement of his proposition.

The Speaker dissented and said:

Not prior to the submission of a resolution. That is true of a question of personal privilege, but the gentleman rises to a question of constitutional privilege. This can only be done by the presentation of a resolution upon which the constitutional question is based. A mere statement by the gentleman does not comply with the rules of the House. If the gentleman has no resolution involving a constitutional question, the Chair thinks he is not entitled to recognition. The gentleman must present a resolution in the first instance on which to base his statement to the House, and then would be entitled to one hour.

Mr. McFadden called attention to occasions on which impeachment proceedings had been set in motion through memorials and other methods than those referred to by the Speaker:

The Speaker rejoined:

When such memorials and petitions are presented to the House, they are referred to the committee having jurisdiction of the particular subject. If a Member of the House bases his question of privilege on a memorial or petition, the memorial or petition must first be reported by the Clerk, and then the House may take such action as it sees fit. If the gentleman has a communication of that character, let him send it to the Clerk's desk and the Clerk will report it. Then the House can take such action as it deems proper. The gentleman can not get the floor under the proposition he has presented at the present time unless he sends up a resolution or motion.

Function of the Senate in Impeachment [1]

1. Does the Senate sit as a court? Section 471.

471. During the Archbald trial the functions of the Senate sitting for an impeachment trial were discussed by managers and counsel for respondent.

On January 9, 1913,[2] in the Senate, sitting for the impeachment trial of Judge Robert W. Archbald, Mr. Alexander Simpson, of counsel for respondent, in final argument said:

The question is whether or not the duty which you have to perform is in point of fact a judicial duty. It must be conceded that it is not a legislative duty. That is perfectly clear. It is certainly equally clear that it is not an executive duty. I can not see what else remains unless it is a judicial duty.

But the Constitution in its various articles has made that exceedingly clear. In Article I, section 3, it says "the Senate shall have the sole power to try all impeachments." It says, "when the President of the United States is tried the Chief Justice shall preside; and no person shall be convicted without the concurrence of two-thirds of the Members present." It says, "judgment in cases of impeachment shall not extend further than to removal from office," and so on, "but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment, and punishment, according to the law." It says in Article II, section 2, "the President * * * shall have power to grant reprieves and pardons for offenses against the United States except in cases of impeachment," and Article III, section 2, lastly says, "the trial of all crimes except in cases of impeachment shall be by jury, and such trial shall be held in the State where the said crime shall have been committed."

Now, I want to ask if it is possible to use words more clearly demonstrative that that which you as Senators are doing, you are doing in a judicial capacity? That is what I am claiming at this stage. It will reach up itself to its proper conclusion after a little while. The point is, you are in fact sitting as judges. I read, for it expresses briefly the thought, the language of Professor Dwight in 6 American Law Register (n. s.), 258–259:

"When a criminal act has been committed, it may evidently be regarded in three aspects: first, the injury to the individual or his family may be considered; second, the wrong to the executive officer charged with the administration of the laws may be looked at; and, third, the mind may dwell upon the general wrong done to the State, or 'the people,' as we say in modern times. This view was early taken in the common law; the injury to the individual was redressed by a proceeding called an appeal; the injury to the King by a process called an indictment; the wrong to the entire nation by a proceeding called an impeachment. In process of time the injury to the individual came to be regarded as a private and not as a public wrong, so that in the progress of the law there remained two great criminal proceedings—indictment and impeachment."

If the position I have taken on this point be accurate, we ought to be able to take the next step, and a long one, in regard to this matter. If this is a court then it is perfectly evident that the rules which experience has demonstrated to be wise and applicable in trials in other courts ought to be applied here; and among those rules, which are down at the very foundation of Anglo-Saxon jurisprudence, are those which relate to the effect of character evidence, to the effect of the reasonable doubt doctrine, to the effect of the presumption of innocence, and to the effect to be given to admissions made during the trial.

Replying to this argument on the following day,[3] Mr. Manager Henry D. Clayton, of Alabama, said:

[1] Cannon's Precedents, vol. 6, p. 664 (1936).
[2] Third session Sixty-second Congress, Record, p. 1271.
[3] Record, p. 1345.

Mr. President, much has been attempted by counsel for the respondent in their effort to show that this is a court in the ordinary acceptance of that term. Whatever name you may call this body sitting here now, whatever functions they may discharge, it can not be said to be a court as that word is employed in the Constitution or understood by the ordinary man. It is more than a court. Under our Government it is clothed with the highest and most extraordinary powers of any body or any functionary or any agency of our Federal Government. Your powers here invoked are political in their nature. Mr. Bayard announced that doctrine in the first impeachment case, that of Blount. Every commentator, including Story and all the rest, has quoted it with approval, and should any man deny it he would at ounce confess himself ignorant of the history and the law of impeachments.

Mr. Manager Clayton quoted from Article III of the Constitution and continued:

So we form a correct conception of what this tribunal is, its purposes and its powers. Again, if it be necessary, let me ask from what power did this judge derive that trust which he has violated? Did he derive it from the judicial power? No. It was derived from the exercise of a political power. The President, exercising political power, nominated him for this office, and the Senate of the United States, with its power of disapproval, with its vitalizing power of confirmation, before he could become a public officer exercised not a legislative function, not a judicial function, but brought into operation a power which in its very nature and in any just conception you can take of it was a political power.

Now, Mr. President, I say this because I want to get away from the murky and unhealthful atmosphere of a police court, and I want to try on a higher plane this great cause, involving the rights—the civil rights—the power, and the majesty of the American people on the one side and on the other the puny privilege of an unfaithful judge, to desecrate his official position. It is political. Why? Because under representative institutions that is the only way under our Constitution that the political power exercised in the creation of a Federal judge can be performed. Under the State constitutions, or most of them, that political power is exercised by the people in their primary capacity when they select by ballot their judges to preside over them and administer public justice.

Mr. Manager Clayton then read citations from the following authorities: The Works of Charles Summer, Vol. XII, E. 415, 6th S., 93, p. 321; Samuel J. Tilden, Public Writings and Speeches, vol. 1, p. 474; Rawle, on the Constitution, p. 211.

Procedure of the Senate in Impeachment [1]

1. Sittings and adjournments. Section 472.
2. Functions and powers of Presiding Officer. Section 473.
3. Arguments on preliminary or interlocutory questions. Section 474.
4. Voting and debate. Section 475.
5. Rules, practice, etc. Sections 476–478.

472. The hour of adjournment of the Senate, sitting for an impeachment trial, being fixed, a motion to adjourn at another time is not in order.

On December 5, 1912,[2] the Senate, sitting for the impeachment trial of Judge Robert W. Archbald, agreed to this order.

Ordered, That the daily sessions of the Senate, sitting in the trial of impeachment of Robert W. Archbald, shall, until otherwise ordered, commence at 1 o'clock and 30 minutes in the afternoon and continue until 6 o'clock in the afternoon of each day.

On the following day [3] Mr. Jacob H. Gallinger, of New Hampshire, moved that the Senate, sitting in the trial of articles of impeachment, adjourn at another hour than that previously ordered.

The President pro tempore held that the hour for ending the daily session, having been fixed by order of the Senate, could be altered only by unanimous consent or by order formally passed by a majority of the Senate, and the motion of the Senator from New Hampshire was not in order.

473. The Senate elected a presiding officer for the Archbald trial, who thereupon exercised the powers of the President of the Senate in signing orders, writs, etc.

On December 16,[4] the term for which Mr. Augustus O. Bacon, of Georgia, was chosen President pro tempore of the Senate, having expired, Mr. Jacob H. Gallinger, of New Hampshire, was elected President pro tempore of the Senate, and thereupon requested that he be relieved from the duty of presiding over the Senate sitting as a court in the impeachment of Robert W. Archbald.

Whereupon Mr. Lodge submitted the following resolution, which was unanimously agreed to:

Resolved, That the Hon. Augustus O. Bacon, a Senator from the State of Georgia, be, and he is hereby, appointed to preside during the trial of the impeachment of Robert W. Archbald, circuit judge of the United States.

[1] Cannon's Precedents, vol. 6, p. 666 (1936).
[2] Third session Sixty-second Congress, Record, p. 170.
[3] Record, p. 230.
[4] Third session Sixty-second Congress, Record, p. 696.

474. Argument on incidental questions arising during the trial of an impeachment is properly confined to an opening, a reply, and a conclusion.

On December 4, 1912,[5] in the Senate, sitting for the impeachment trial of Judge Robert W. Archbald, at the conclusion of a colloquy between managers and counsel for the respondent, the President pro tempore said:

The Chair desires, in the interest of expedition and orderly procedure, to suggest to both the managers on the part of the House and counsel for the respondent that hereafter when incidental questions are to be discussed they be confined to an opening and a reply and a conclusion. The Chair will not rule that arbitrarily or positively, but trusts that counsel will act upon its suggestion.

475. In impeachment trials all orders and decisions of the Senate, with specified exceptions, are by the yeas and nays, but the yeas and nays may be waived by unanimous consent.

On December 4, 1912,[5] in the Senate, sitting for the trial of the impeachment of Judge Robert W. Archbald, the question of the admission of a certain exhibit offered by the managers being submitted to the Senate, Mr. Moses E. Clapp, of Minnesota, asked if the requirement under the rule for a yea-and-nay vote could be waived.

The President pro tempore replied:

If it is unanimous, the Chair is of the opinion that a yea-and-nay vote is not required, because it is the same as if every Senator voted.

Upon the suggestion of Mr. Clapp, the President pro tempore put the question:

Is there objection by any Senator to the admissibility of the paper in evidence?

Whereupon Mr. Clarence D. Clark, of Wyoming, objected, and the roll was called.

476. Managers on the part of the House having verbally notified the Senate of the impeachment of Judge Archbald, formal reading of articles of impeachment was delayed for proclamation by the Sergeant at Arms.

On July 13, 1912,[6] (legislative day of July 6), in the Senate, sitting for the impeachment trial of Judge Robert W. Archbald, after Mr. Manager Clayton had read the resolution adopted by the House, informing the Senate that the House had impeached Judge Archbald, he proposed to read the articles of impeachment, when Mr. Henry Cabot Lodge, of Massachusetts, interposed and said:

Mr. President, before the presentation by the managers on the part of the House of the articles of impeachment, section 2 of the Rules of Procedure and Practice in the Senate when sitting on impeachment trials requires that the Sergeant at Arms shall make proclamation as therein prescribed.

Thereupon, by direction of the President pro tempore, the Sergeant at Arms made proclamation, at the conclusion of which Mr. Manager Clayton read the articles of impeachment drawn by the House.

477. After trial of impeachment had proceeded for several days, the formality of announcement by the Doorkeeper of appearance in the Chamber of the managers and the respondent was by consent dispensed with.

[5] Third session Sixty-second Congress, Record, p. 107.
[6] Second session, Sixty-second Congress, Senate Journal, p. 625; Record, p. 8989.

On July 29, 1912,[7] in the Senate, at the opening of the trial of the impeachment of Robert W. Archbald, the Doorkeeper of the Senate announced formally the appearance of the respondent and the managers on the part of the House of Representatives.

This ceremony continued to be observed each day until December 3, 1912,[8] when Mr. Henry D. Clayton, of the managers on the part of the House of Representatives, suggested:

Mr. President, if it is agreeable to the Senate sitting as a Court of Impeachment, hereafter the managers on the part of the House of Representatives will appear without the formality of an announcement.

To which Mr. Worthington, of counsel, on behalf of the respondent, added:

I presume that might apply, Mr. President, to the counsel for the respondent and to the respondent himself.

The President pro tempore said:

The Chair will give proper direction in that regard.
Proper order will be given in the premises.

The appearance of the managers and the respondent was not thereafter announced.

478. The expenses of the Archbald trial were defrayed from the Treasury.

On July 16, 1912,[9] the Senate, in legislative session, agreed to the following resolution:

Resolved, etc., That there be appropriated from any money in the Treasury not otherwise appropriated the sum of $10,000, or so much thereof as may be necessary, to defray the expenses of the Senate in the impeachment trial of Robert W. Archbald.

This resolution was agreed to by the House on July 27, without amendment and was approved by the President on July 31.

[7] Second session Sixty-second Congress, Record, p. 9795.
[8] Third session Sixty-second Congress, Record, p. 20.
[9] Second session Sixty-second Congress, Senate Journal, p. 460; Record, p. 9118.

Conduct of Impeachment Trials [1]

1. Form of summons. Section 479.
2. Answer of respondent, replication, etc. Sections 480, 481.
3. Counsel and motions. Sections 482, 483.

479. The writ of summons issued for the appearance of Judge Archbald to answer articles of impeachment does not appear in the Journal.

Form of return appended to the writ of summons served by the Sergeant at Arms on the respondent.

On July 16, 1912,[2] the Senate, sitting for the trial of the impeachment of Robert W. Archbald, agreed to an order directing that a summons be issued as required by the rules of procedure and practice, returnable on Friday, the 19th.

The text of this writ does not appear either in the Record or in the Journal.

On July 19,[3] however, immediately after the approval of the Journal, the Secretary, by direction of the President pro tempore, read the return appended to the writ of summons as follows:

SENATE OF THE UNITED STATES,
OFFICE OF THE SERGEANT AT ARMS.

The foregoing writ of summons, addressed to Robert W. Archbald, and the foregoing precept, addressed to me, were duly served upon the said Robert W. Archbald, by delivery to and leaving with him true and attested copies of the same as 236 Monroe Avenue, Scranton, Pa., the residence of Robert W. Archbald, on Wednesday, the 17th day of July, 1912 at 11 o'clock and 30 minutes in the afternoon of that day.

DANIEL M. RANSDELL,
Sergeant at Arms United States Senate.

480. In the trial of the impeachment of Judge Robert W. Archbald the procedure of former trials of impeachment was observed, in that briefs were not submitted until after managers and counsel for respondent had made opening statements and introduced witnesses.

Form of order providing for filing and printing of briefs by managers and respondent in trial of impeachment.

On December 4, 1912,[4] in the Senate, sitting for the trial of Robert W. Archbald, Mr. William E. Borah, of Idaho, sent to the deck a question, in writing, addressed to the managers on the part of the House of Representatives.

The President pro tempore said:

The Senator, from Idaho propounds, in writing, the following inquiry for the consideration of the managers, and the Secretary will read it.

[1] Cannon's Precedents, vol. 6, p. 669 (1936).
[2] Second session Sixty-second Congress, Senate Journal, p. 629; Record, p. 9124.
[3] Record, p. 9275; Senate Journal, p. 629.
[4] Third session Sixty-second Congress, Record, p. 97.

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The Secretary read as follows:

Are the managers prepared at this time to present their brief as to our power to impeach for offenses or acts which were not committed or done during the term of the office which the party charged now holds?

In reply to this inquiry Mr. Henry D. Clayton, of Alabama, for the managers, submitted:

Mr. President, on behalf of the managers, in reply to the suggestion, I beg to say that that question has been thoroughly considered by the managers, and they have no doubt that this judge can be impeached for a misbehavior of a grave character that he may have committed while he held the office of district judge, his tenure of the one having dovetailed into the tenure of the present office.

We have gathered as best we could the authorities to sustain that position. We have made a brief, and we are prepared to make the argument on that proposition.

But, Mr. President, the managers have not up to this time deemed it proper or, I might say, advisable to bring that question to the attention of the court, for the reason that we are pursuing in this case the practice which was pursued in other cases, notably the practice in the Swayne case. After the statement of facts in that case, as the present occupant of the chair knows, immediately the managers began the introduction of their witnesses, and neither the law nor the facts bearing upon any phase of the different controversies involved in that case were argued until the respondent had also made his opening statement and introduced his witnesses; and after all the witnesses had been examined, then the case was opened for discussion both upon the law and the facts.

So, Mr. President, the managers have followed what they deemed the practice to be in like cases.

On the following day,[5] on motion of Mr. John D. Works, of California, it was

Ordered, That such briefs and citations of authorities as have already been prepared by the managers on the part of the House and counsel for the respondent be filed with the Secretary and printed in the Record for the immediate use of Senators.

Mr. Worthington, of counsel for the respondent, then said:

I can say, Mr. President, we can certainly have that done this week.

481. Correction of errors in the report of the proceedings of the Senate, sitting in trial of impeachment as reported in the Record, is properly made after the reading and approval of the Journal.

On December 4, 1912,[6] in the Senate, sitting for the impeachment trial of Judge Robert W. Archbald, after the reading and approval of the Journal, Mr. Henry D. Clayton, of Alabama, of the managers on the part of the House of Representatives, called attention to inaccuracies in the report of the proceedings of the previous day as printed in the Record, and said:

Mr. President, the managers desire to call the attention of the court to a verbal inaccuracy in the proceedings of yesterday. It, perhaps, is immaterial to the statement as made on yesterday, but for the sake of better English I desire to have a correction made in the Record.

Mr. Manager Clayton then referred to particular pages of the record and indicated a number of corrections desired.

The President pro tempore said:

The correction will be made as desired by the manager.

482. Instance in which on motion of counsel for respondent, and over protest of managers for the House, the Senate granted the respondent 10 days in which to answer articles of impeachment.

On July 19, 1912,[7] in the Senate, sitting for the impeachment trial

[5] Senate Journal, p. 318.
[6] Third session Sixty-second Congress, Record, p. 96.
[7] Second session Sixty-second Congress, Senate Journal, p. 630; Record, p. 9277.

of Robert W. Archbald, counsel for the respondent submitted the following motion:

IN THE SENATE OF THE UNITED STATES,
SITTING AS A COURT OF IMPEACHMENT.

UNITED STATES *v.* ROBERT W. ARCHBALD.

The respondent, by his counsel, now comes and moves the court to grant him the period of—days in which to prepare and present his answer to the articles of impeachment presented against him herein.

R. W. ARCHBALD, Jr.
A. S. WORTHINGTON.

JULY 19, 1912.

Thereupon Mr. Clark, of Wyoming, asked for the adoption of the following order:

Ordered, That the respondent present his answer to the articles of impeachment at 12 o'clock and 30 minutes postmeridian on the 24th day of July, 1912.

Whereupon Mr. Worthington, of counsel for the respondent, submitted:

Mr. President, I should like to state that that time seems very short to the counsel for the respondent, in view of the number of articles of impeachment which are here and the customs which have been followed heretofore in cases of this kind, and also because of certain circumstances which exist in this case, which I wish to bring to the attention of the court.

It was for that reason that in the motion which we made we left blank the number of days which we were to have, to be filled at the pleasure of the court.

I had hoped we might get 20 days for that purpose. As I calculate the time proposed to be given by the order which has just been presented by a member of the court, it would give us but 5 days, which, I think, would be entirely insufficient, in view of the fact that one of those days is dies non.

On behalf of the respondent and his counsel, I therefore respectfully ask that we be given at least 20 days for the purpose indicated.

To which Mr. Manager Clayton responded:

After a conference had this morning the managers reached the conclusion that perhaps four or five days would be ample time to afford the accused the opportunity of fully answering all the articles of impeachment in this case.

The managers think there is nothing by way of surprise contained in the articles of impeachment. We believe Judge Archbald and his counsel are well informed as to every charge set forth in the articles of impeachment. We think five days—or four days, if one day be excluded on account of its being dies non juridicus—are quite sufficient for Judge Archbald to answer these articles of impeachment. Their nature is fully understood. The testimony which induced the House to adopt these articles is perfectly familiar to the counsel and perfectly familiar to the accused.

Mr. Porter J. McCumber, of North Dakota, moved to amend the order to read:

Ordered, That the respondent present his answer to the articles of impeachment at 12 o'clock and 30 minutes postmeridian on the 31st day of July, 1912.

A suggestion by Mr. Henry Cabot Lodge, of Massachusetts, that the date proposed be amended to read "Monday, the 19th day of July," was accepted and the order with this amendment was agreed to.

483. In the Archbald trial new rules of procedure and practice of the Senate, when sitting in impeachment trials, were not adopted, the rules framed in former trials being considered as operative.

On July 15, 1912,[8] on motion of Mr. Clarence D. Clark, of Wyoming, extracts from the Journals of the Senate containing the record of

[8] Second session, Sixty-second Congress, Senate Journal, p. 454.

former impeachment trials were ordered printed. No further preliminary action with reference to procedure in the pending trial of the impeachment of Judge Archbald appears, and the "Rules of procedure and practice of the Senate when sitting in impeachment trials" observed in former trials, and to all intents identical with those revised and adopted in 1868[9] for the Johnson trial, and followed in the Belknap and Swayne trials, were treated as existing rules.

[9] Second session Fortieth Congress, Senate Journal, pp. 794, 870, 878, 937; Senate Report No. 59.

Presentation of Testimony in an Impeachment Trial [1]

1. Attendance of witnesses. Sections 484–486.
2. Examination of witnesses. Sections 487–489.
3. Rulings of presiding officer as to evidence. Sections 490, 491.
4. Cross-examination, rebuttal evidence, etc. Section 492.

484. Lists of witnesses to be subpoenaed in a trial of impeachment are supplied by the managers and respondent respectively to the Sergeant at Arms of the Senate.

After the filing of lists of witnesses to be subpoenaed in a trial of impeachment, further witnesses may be subpoenaed on application of the managers or the respondent made to the Presiding Officer.

On August 6, 1912,[2] in the Senate, sitting for the impeachment trial of Robert W. Archbald, Mr. Henry D. Clayton, of Alabama, chairman of the managers for the House of Representatives, said:

On behalf of the managers of the House, I desire to say that the managers will furnish—I presume that it ought to be furnished to the Secretary of the Senate—a list of the witnesses whom the managers desire to have subpoenaed on behalf of the prosecution, if I may so term the side which is occupied by the managers on the part of the House. Am I correct in the view that we shall furnish this list to the Secretary of the Senate?

The President pro tempore replied:

The Presiding Officer is not advised as to what are the precedents, but as the Sergeant at Arms is to execute the order, the Chair will suggest that the Sergeant at Arms is the proper person to whom the list should be supplied.

Mr. Manager Clayton inquired:

Then Mr. President, under the intimation of the Chair, the managers beg to say at this time that they will in due time furnish the Sergeant at Arms a list of the witnesses they desire subpoenaed, and they expect to be ready, by having the witnesses here and ready otherwise to proceed with the cause, if it meets the pleasure of the Senate, on the 3d day of December next.

Mr. Manager Clayton further inquired:

Mr. President there is one other thing that the managers desire to know. There is no settled practice, it appears from my rather imperfect examination of the precedents in the case, but I have reached the conclusion from such examination as I have been able to make that after this list is furnished by the managers and the list furnished on behalf of the respondent by the respondent that then it is the practice or the usage of the Senate, under, I suppose, certain discretion vested in the Presiding Officer, to entertain and to direct the issuance of subpœnas for other witnesses whose names may not appear on the list which

[1] Cannon's Precedents, vol. 6, p. 673 (1936).
[2] Second session Sixty-second Congress, Record, p. 10139.

is furnished in the first instance; and believing that to be the practice and believing that the managers should have that right, I shall not insist upon the proposition which I offered in the beginning of the case today; that is, to provide that these additional witnesses might be subpoenaed on application made by the managers or the respondent, as the case might be, but that the application should be made to the Presiding Officer; the Presiding Officer having the discretion and presumably the authority to grant a request for additional witnesses.

Putting that interpretation upon the matter, Mr. President, we shall not ask any amendment of the order at this time, for it is presumed that this court like any court that wants to do justice in the premises, would, notwithstanding any rule to the contrary, or because of the absence of any positive rule making provision for such an emergency, direct the subpoena of witnesses if, in the judgment of the court, it ought to be done to meet the manifest ends of justice.

The President pro tempore said:

The Chair will state that the manager has stated the practice as it is understood and contemplated by the Senate in that regard.

485. Under a rule of the Senate subpoenas or other writs are signed by the Presiding Officer, whether the Vice President or President pro tempore, during session of the Senate sitting in trial of impeachment or in vacation.

On August 3, 1912,[3] in the Senate, sitting for trial of the impeachment of Robert W. Archbald, Mr. William J. Stone, of Missouri, propounded the following inquiry:

Mr. President, I should like to propound an inquiry. The Presiding Officer, in other words, the Senator who shall preside, I presume is to attach his signature to the subpœnas for witnesses Is that correct?

On response, the President pro tempore directed the Secretary to read the following rule of the Senate:

V. The Presiding Officer shall have power to make and issue, by himself or by the Secretary of the Senate, all orders, mandates, writs, and precepts authorized by these rules, or by the Senate and to make and enforce such other regulations and orders in the premises as the Senate may authorize or provide.

Mr. Stone then inquired:

Then under the rule the Vice President will be the Presiding Officer who would sign all writs.

Would the present occupant of the chair be clothed with that power during the vacation? Application for the issue of subpœnas for witnesses will be made during the vacation of the Senate, in all probability; probably in November. It puzzles me a little bit to know who would sign those writs.

The President pro tempore said:

The Chair does not think there is any trouble at all about it. Whoever is the presiding officer at the time the writ is required would, in the opinion of the present occupant of the chair, be clothed with that power. The Vice Preisdent, of course, will be during the vacation the presiding officer of the Senate, and if the Senate should indicate anyone else to be President pro tempore during that time, the power would be exercised in the first instance by the Vice President, or, if he should be under disability, by the President pro tempore, whoever he might be.

486. The Senate, sitting for the Archbald trial, ordered process to compel the attendance of a witness who had disregarded a subpoena duly served by the Sergeant at Arms.

Form of order for attachment of delinquent witness.

A dilatory witness who failed to appear until after attachment had been ordered was admonished by the President pro tempore.

[3] Second session Sixty-sixth Congress, Record, p. 10140.

On December 5, 1912,[4] in the Senate, sitting for trial of the impeachment of Judge Robert W. Archbald, Mr. Henry D. Clayton, of Alabama, of the managers on the part of the House of Representatives, said:

Mr. President, at the session held by the managers this morning, it was called to our attention that a certain witness who has been subpœnaed announced that he did not intend to come here unless brought on process issued by the Senate. It appeared yesterday, Mr. President, from reading the returns of the Sergeant at Arms, that Mr. J. H. Rittenhouse, an important witness in this case, had been regularly subpœnaed to attend and was required to be here yesterday. He was not here yesterday. He is not here to-day. He is the witness, who we are informed, said he would not come unless brought here by process of the Senate.

Therefore, Mr. President, I ask to have called the officer who served the subpœna upon the witness and prove the service. Then I shall ask for an attachment to bring him here.

Mr. James K. Julian, being called and sworn, testified, that as an employee in the office of the Sergeant at Arms, he had served J. H. Rittenhouse personally with a subpœna. The Sergeant at Arms was then directed to call the said James H. Rittenhouse, and on his failure to respond, Mr. Manager Clayton moved for an attachment, which was unanimously ordered, as follows:

Ordered, That an attachment do issue in accordance with the rules of the Senate of the United States for one J. H. Rittenhouse, a witness heretofore duly subpœnaed in this proceeding on behalf of the managers of the House of Representatives.

Later on the same day Mr. Manager Clayton stated that the witness, James H. Rittenhouse, had appeared and was now in the corridor and asked that he be admonished to be present until discharged.

The PRESIDENT PRO TEMPORE. The witness will be brought into the presence of the Senate.

James H. Rittenhouse appeared in the Chamber.

The PRESIDENT PRO TEMPORE. Mr. Witness, you are brought before the Senate to be admonished that you must scrupulously obey the orders you have received in the summons to appear here and not to absent yourself without leave of the Senate. You may now retire.

Thereupon Mr. Rittenhouse retired from the Chamber.

The PRESIDENT PRO TEMPORE. Does the manager on the part of the House desire that the order for attachment be vacated?

Mr. Manager CLAYTON. I ask that that be the course pursued.

The order for the attachment was then vacated.

487. The posture and position of managers and counsel in trials of impeachment has been left to their own judgment and preference.

On December 4, 1912,[4a] in the Senate, sitting for the trial of the impeachment of Robert W. Archbald, Mr. Worthington, of counsel for the respondent, inquired:

Mr. President, may I ask a question? The practice differs. In some courts it is required that counsel examining a witness shall stand; but it is not customary where I have been; and I presume it is a matter about which the examining counsel or manager may use his judgment.

The PRESIDENT PRO TEMPORE. Absolutely, on both sides. The managers and counsel may assume such posture as they prefer.

On the following day,[5] in concluding the examination of a witness, Mr. Edwin Yates Webb, of North Carolina, of the managers on the part of the House of Representatives, said:

[4] Third session Sixty-second Congress, Senate Journal, p. 318; Record, p. 152.
[4a] Third session Sixty-second Congress, Record, p. 98.
[5] Record, p. 152.

It has been suggested that the few remaining questions which I am to ask this witness may be heard more distinctly by standing at this point in the Chamber.

Mr. Webb then concluded the examination standing in the central aisle.

488. Witnesses in an impeachment trial were required to stand when necessary in order to be better heard.

Witnesses whose testimony was audible when seated were permitted to testify from a seat at the Secretary's desk.

On December 4, 1912,[6] in the Senate during the examination of a witness, in the impeachment trial of Judge Robert W. Archbald, Mr. Edwin Yates Webb, of North Carolina, of the managers on the part of the House of Representatives, inquired:

Mr. President is it desired that the witness shall sit or stand?

The President pro tempore said:

The present position of the witness is probably the one from which he can be best heard by the Senate.

Mr. Miles Poindexter, of Washington, also inquired:

Mr. President, is it required that the witness should remain standing while he is giving his testimony?

The President pro tempore said:

The Chair directed that he should, because he did not think that if the witness took his seat he could be heard on the other side of the Chamber.

It is for that purpose that it was directed that the witness should stand; otherwise, of course, he would be permitted to sit.

As the trial progressed, however, it appears that witnesses whose testimony was audible were provided with a seat at the desk of the Secretary.[7]

489. Discussion of the order in which witnesses should be sworn in trial of impeachment.

Procedure to be followed in the swearing of witnesses having been left to managers and counsel, witnesses were sworn as produced.

On December 4, 1912,[8] in the Senate, preliminary to the presentation of evidence in the impeachment trial of Judge Robert W. Archbald, Mr. Henry D. Clayton, of Alabama, of the managers on the part of the House of Representatives, said:

We ask at this time that the Secretary read the whole list of witnesses on behalf of the managers on the part of the House of Representatives, and then after that list is read I will do as the Chair may suggest, either have all the witnesses sworn en bloc or have each one sworn separately as we produce him to testify. If the Chair would prefer that each witness be sworn separately as he is produced, that course will be followed.

The PRESIDENT PRO TEMPORE. The presumption is that the Senate will allow the managers to pursue their own course in that matter.

Mr. Manager CLAYTON. I would therefore ask that the witnesses be called and all of them required to enter the Chamber who are present to-day and that the oath be administered to them.

The PRESIDENT PRO TEMPORE. The Secretary will call the names of those who are here.

The Secretary read the list of witnesses for the managers on whom service had been made.

Mr. Manager CLAYTON. I suppose, Mr. President, that it would be a difficult matter for the Secretary to call the names of witnesses.

[6] Third session Sixty-second Congress, Record, p. 98.
[7] Record, p. 152.
[8] Third session Sixty-second Congress, Record, p. 97.

The PRESIDENT PRO TEMPORE. Are the managers prepared to furnish the names of those whom they now wish to be sworn? If so, they will be called into the Chamber.

Mr. Manager CLAYTON. We will proceed to swear each witness as we produce him.

The PRESIDENT PRO TEMPORE. Very well; that course is preferred.

490. In the Archbald trial the Senate declined to admit and reserve decision on the admissibility of evidence to the admission of which an objection was pending.

Questions as to admissibility of evidence in impeachment trials are not debatable.

On December 4, 1912,[9] in the Senate sitting for the impeachment trial of Judge Robert W. Archbald, a question as to the admissibility of certain evidence having arisen, Mr. Miles Poindexter, of Washington, inquired:

Mr. President, I should like to inquire if it be within the rules of the Senate sitting as a court of impeachment to receive this evidence and to reserve a decision as to its admissibility? That practice is common in the courts. If we undertake to vote upon each objection to the testimony, or at least each important objection to the testimony of witnesses——

The President pro tempore answered:

The Senator has no right under the rule to discuss the question. The Senator has the right, if he so desires, to submit an order to the Senate, which would cover the point that he wishes to make.

Thereupon Mr. Poindexter submitted the following order:

Ordered, That the evidence be received and the decision as to its admissibility be reserved.

Mr. Poindexter proposed to debate the question, when the President pro tempore ruled:

The Senator has not the right to discuss it.

Mr. POINDEXTER. Have I no right to make an explanation?

The PRESIDENT PRO TEMPORE. No.

The question being submitted to the Senate, it was decided in the negative, yeas 3, nays 57, so the order was not adopted.

491. Questions as to admissibility of evidence in a trial of impeachment are by long-established custom, submitted by the Presiding Officer to the Senate for decision.

On December 4, 1912,[10] in the Senate, sitting for the impeachment trial of Judge Robert W. Archbald, Mr. Edwin Yates Webb, of North Carolina, of the managers on the part of the House of Representatives, offered in evidence a copy of an assignment of two options covering a culm bank, executed on September 5, 1911, to which Mr. A. S. Worthington, of counsel for the respondent, interposed an objection. After argument on the admissibility of the exhibit, the President pro tempore said:

Before taking action in regard to this question the Chair desires to make a statement to the Senate. Anticipating that questions of the admissibility of evidence would arise, the present occupant of the chair has examined former impeachment cases in order to ascertain what was the practice of Presiding Officers themselves in regard to deciding questions of this character or of submitting them to the Senate. Upon examination it is found in former impeachment

[9] Third session Sixty-second Congress, Record, p. 106.
[10] Third session Sixty-second Congress, Record, p. 106.

cases that very liberally, to say the least, the Presiding Officer had availed himself of the privilege of submitting the matter to the Senate. In the Andrew Johnson impeachment case in particular, which was presided over by the highest judicial officer in the land, Chief Justice Chase, almost invariably every question as to the admissibility of evidence was submitted by him to the Senate for its determination. While the present occupant of the chair is not averse to taking responsibility in a matter that is alleged by the counsel to be peculiarly vital to the case, he feels that the matter should be submitted to the Senate. He is more inclined to that course by the fact that if one single Senator differed from the conclusion of the Chair he would have the right to have the vote taken by the Senate. Therefore, in this case the present occupant of the chair will submit to the Senate the question as to the admissibility of the evidence.

492. The President pro tempore ruled, in the Archbald trial, that counsel in examination might confine a witness within the limits of his interrogation, but witness should have opportunity either in direct examination or under cross-examination, to explain fully any answer made.

On December 6, 1912,[11] in the Senate sitting for trial of the Archbald impeachment, during the examination of a witness on behalf of the managers, Mr. Alexander Simpson, of counsel for the respondent, submitted an objection, saying:

I submit, Mr. President, when a witness is answering a question he has a right to complete his answer so as to make it clear to the Senate what his answer is, and the manager has no right to interrupt him in making a clear statement as to what his answer is. If the witness gets beyond that point, of course the manager has the right to interrupt him.

The President pro tempore ruled:

The Chair will rule that the manager has the right to conduct his examination in his own way and confine it within the limits of his questions, if he desires to do so, and that then the witness shall, before he leaves the stand, have full opportunity to explain any answer he has made. The manager in examining a witness has the right to confine him within the limits of the interrogation which he desires to submit, but the witness certainly must have the opportunity, either before the direct examination concludes or under cross-examination, to explain fully any answer which he may make.

[11] Third session Sixty-second Congress, Record, p. 224.

Rules of Evidence in an Impeachment Trial [1]

1. Strict rules of the courts followed. Sections 493, 494.
2. As to opinions of witnesses. Section 495.
3. General decisions as to evidence. Sections 496, 497.

493. Under recognized rules of evidence, leading questions were ruled out in a trial of impeachment and witnesses were admonished to observe established procedure.

On December 4, 1912,[2] in the Senate, sitting for the trial of the impeachment of Judge Robert W. Archbald, during the direct examination of a witness on behalf of the House of Representatives, Mr. Worthington, of counsel for the respondent, objected to a question propounded by Mr. Manager Edwin Yates Webb, of North Carolina, and said:

One moment, please. I submit, Mr. President, we had as well try this case with some appearance of conformity to the rules of a court. That was a leading question, which ought never to have been asked and should not be allowed to be answered.

The President pro tempore ruled:

Counsel, as far as possible, will avoid leading questions.

During the examination of the same witness by Mr. Manager Webb, Mr. Worthington objected to a question asked the witness by Mr. Manager Webb as a leading question. The witness, however, answered the question and Mr. Worthington said:

As the witness has already answered the question, for the present purposes it is futile to proceed. I think the witness should be cautioned, when objection is made, not to answer a question until the Presiding Officer or the Senate has ruled upon it.

The PRESIDENT PRO TEMPORE. That is a very proper suggestion. The witness will be governed by that. Hereafter when there is an objection to testimony the witness will not reply until after the matter has been passed upon.

494. Evidence may be introduced by counsel to contradict testimony in chief given by their own witness only upon statement that such testimony is at variance with that expected and that relying on evidence previously given by the witness, they have been surprised and entrapped.

Instance wherein the President pro tempore ruled on the admission of evidence in the trial of an impeachment.

On December 6, 1912,[3] in the Senate, sitting for the impeachment trial of Judge Robert W. Archbald, Mr. John A. Sterling, of Illinois, of the managers on the part of the House of Representatives, offered testimony in the following words:

[1] Cannon's Precedents, vol. 6, p. 679 (1936).
[2] Third session Sixty-second Congress, Record, p. 98.
[3] Third session Sixty-second Congress, Record, p. 222.

Mr. President, we offer Exhibit 7, the examination of Edward J. Williams at Scranton, Pa., March 16 and March 17 of this year, made by Mr. Wrisley Brown, representing the Department of Justice, who was sent there by the Attorney General to investigate this case.

Objection to admission of the deposition was made by Mr. A. S. Worthington, of counsel for the respondent.

After extended argument by managers and counsel, the President pro tempore ruled:

If the proposition be simply to disprove the statement of the witness as to the number of questions which had been asked by Mr. Boland, the Chair would undoubtedly rule that only the questions themselves could be put in evidence for the purpose of contradicting him to that extent. But the Chair thinks it is a well-recognized rule, which is found in every jurisdiction, that where a witness is put up by a party and where the party who offers him as a witness has had previous information from him as to what his testimony would be, and upon his examination he gives testimony contrary to that former testimony, the party offering that witness can prove the former statements of the witness if he will state in his place that he has been entrapped by him; that relying upon the evidence that he had given and that he would again testify as he had previously done, they have put him up and they have been entrapped and surprised by the fact that he then testified to matters in conflict to what he had previously testified.

The Chair thinks that is a well-recognized rule of law. It is not for the purpose of impeaching the witness, though it might be called one class of impeachment. It is for the purpose of negativing testimony which he had given and which the counsel otherwise would be bound by, they themselves having put him up.

The Chair will add, so far as the bulk of this testimony is concerned, unless it is in the main, generally as well as specifically upon the particular points in which the counsel have been entrapped, that only such parts of it as do relate to than contradiction in his testimony would be admissible, but on the statement of the counsel that they have been thus entrapped the Chair is of the opinion that to that extent it is admissible.

The President pro tempore further held:

Counsel for the respondent will, of course, have the right to recall the witness and require him to make such explanation of the apparent conflict as is proper and consistent with his information; he is not debarred from that privilege, but the purpose of that rule is not to impeach a witness and establish the fact that he is not to be believed on oath, because if that were the case a party could never put up an adverse witness. He is entitled to the testimony of this witness, and he is entitled to have the truth ascertained from the testimony of the witness and from his conflicting statements. The Chair thinks that is a correct rule of law, and that is the principle upon which it is based.

495. In the Archbald trial it was held that while witnesses might testify as to the general reputation of the respondent, and as to his reputation for judicial integrity in particular, it was not competent to introduce evidence as to his reputation for ability and industry; and in no event was the personal opinion of a witness on questions of character or reputation admissible.

On December 17, 1912,[4] in the Senate, sitting for the impeachment trial of Judge Robert W. Archbald, this question was asked by Mr. A. S. Worthington, of counsel for respondent, on the direct examination of Everett Warren, a witness subpoenaed on behalf of the respondent.

Now, Major Warren, I want to ask you to tell us from your long acquaintance with Judge Archbald and your observation of him as a judge what were his principal characteristics as a judge, as to integrity, ability, and industry.

Mr. Manager Norris objected, saying:

[4] Third session Sixty-second Congress, Record, p. 772.

Mr. President, I object to the question as immaterial and irrelevant. The counsel has a right to ask the witness as to reputation, but I do not believe he can go beyond that.

Mr. Worthington argued:

I ask you to remember, Mr. President, that we are not trying this case before a jury. We are trying this case before a tribunal which is the judge of the law and the judge of the facts, and the tribunal which is to inflict the sentence as well.

The question which the Senate is to determine at the end of this case is not the mere question whether this or that thing is proved, but whether upon the whole, taking into consideration the character of the man, the good that he has done, the kind of judge that he is, what the people in and about Scranton think of him and know of him, he shall be deprived of office, and be held forever incapable of showing his head as a reputable man, because of the contention that has been made here that he is not fit to hold any office of any kind under the Government of the United States.

Now, one thing more, it seems to me, takes this entirely out of the considerations which are invoked in ordinary courts of justice when a similar question arises. When our forefathers framed this Constitution of ours, they put into it the provision that the trial of persons accused of crime shall take place in the districts where the crime was committed.

Now, Mr. President, in this case the trial has to be here in the Senate Chamber. This defendant can not have the benefit of being tried by his neighbors, the people who know him and know the witnesses against him.

We can not take the Senate to Scranton, but we do want to bring to this trial the atmosphere of Scranton so far as relates to Judge Archbald's reputation, and, as far as we can, give him the benefit of that which the meanest criminal throughout the Union has—to be tried in the place where the crime was committed and among people who know him and who know those who testify against him. W can not go there, where the witnesses generally know the man. We want Senators to know what the men who have spent their lives in and around Scranton practicing before Judge Archbald—his neighbors and friends—think of him and what his reputation is throughout the whole State of Pennsylvania.

Mr. Manager Clayton argued:

Mr. President, it is perhaps unnecessary for me to state the general rules governing the admission of character testimony, and perhaps it is also unnecessary for me to state the questions which have generally been propounded in such matters of inquiry and recognized as proper in places where character is put in issue.

I may say, Mr. President, in the beginning that we have not controverted the good character of Judge Archbald. Perhaps if we had controverted that a larger range would be permissible for the respondent in reply to that controversy raised by the managers. But the managers have not raised that question.

So, Mr. President, I take it that the rules of evidence are to be applied by the Senate in this case, first, for the purpose of doing justice both to the managers who represent the accusation, the House of Representatives, and of also doing justice to this respondent. Secondarly, and perhaps just as important, these rules are for the expeditious disposition of the cause. It is not to militate against the doing of justice in this case that we raise this question. We say that justice can be done within the rules which permit ordinary questions which are asked in ordinary cases about character, and the answers thereto. There is enough latitude in that to do justice to both sides in this controversy, especially to the respondent, where the managers have not assailed his character by introducing evidence for that specific purpose.

Mr. President, the next reason, to which I have adverted, is for the dispatch of his case. Any rule looking to the speedy termination of this case ought to be enforced unless its relaxation would favor the doing of more ample justice to all parties concerned. In this case I take it that the Senate will consider the respondent as having gotten all he is entitled to when he proves by those who know him the fact that they know him; the fact that they know his general reputation, and that his general reputation and his character, predicated upon that general reputation, is good. We have not controverted that, and therefore it does not seem to me that there is any necessity here for the enlargement of the rule.

The Presiding Officer said:

The Chair thinks there is, of course, basis for the contention that rules should be liberal in practice in certain circumstances. Nevertheless, generally, the rules of law must be applied. The Chair thinks that the rule, generally, as to proof of character is, first, that anyone who is accused of misconduct may put in issue his general character, irrespective of what the charge is, because general character always is involved in any question of violation of law or misbehavior. Further, he may put in evidence his character as to the particular quality or characteristic which will elucidate the particular charge. With that view, the Chair thinks it is perfectly competent for the counsel to prove the general reputation of the respondent, as to whether or not he bears a good character, in the broadest sense of that term, and also that he may prove his general reputation as to the particular matter involved in issue.

Now, as the Chair understands, the particular matter involved here is a question of judicial integrity. So the Chair would not, if the Senate approves the opinion of the Chair, limit the counsel to proof of reputation for general good character, but would recognize the right of the respondent also to prove his general reputation for judicial integrity. But the Chair knows of no rule of law which permits a witness to give his individual opinion of the character of an accused. If there is any such case, the Chair has failed to learn of it in such experience as he has been fortunate enough to have.

This particular question is as to the opinion of the witness himself. If the counsel would limit his question to the witness's knowledge of the general character of the respondent for judicial integrity, the Chair would think that was competent; but this question not only asks the individual opinion of the witness, leaving aside the question of general reputation, but it goes further and asks for the opinion of the witness, not only as to integrity, but as to ability and industry, none of which characteristics or features are involved, as the Chair understands, in any issue before the Senate at this time. The Chair is therefore obliged to sustain the objection to this particular question, but will recognize the right of the respondent to proceed along the lines indicated, with every disposition to be as liberal as the rule will possibly permit.

496. Decision by the President pro tempore in the impeachment trial of Judge Archbald, on the latitude of counsel in cross-examination of witness relative to testimony previously given by the witness before a committee of the House.

On December 6, 1912,[5] in the Senate sitting for the impeachment trial of Judge Robert W. Archbald, during the cross-examination of W. A. May, a witness on behalf of the managers, by Mr. A. S. Worthington, of counsel for the respondent, Mr. Manager George W. Norris, of Nebraska, objected, saying:

Mr. President, before the witness answers the question, I desire to object to this form of interrogation of the witness. As I understand, we would not be allowed to call his attention to the testimony unless we had first asked him about the same matter and he had testified differently. Counsel has been asking questions of this witness, reading evidence that was taken before the Judiciary Committee, without any intimation that there is anything different in his testimony now. He reads a lot of testimony and asks the witness if that was true. It seems to me that that is not a proper examination of the witness.

The President pro tempore said:

The previous testimony of this witness can be read to him for two purposes. As the Chair recollects the rule, it can be read for the purpose of contradicting him or for the purpose of refreshing his memory. If counsel examine the witness as to a matter and his testimony is not clear on the subject, the Chair would hold that then, after having attempted to elicit testimony in the usual way without success, he could go further and call attention to the witness to what he had previously testified to by way of refreshing his memory. The Chair thinks that is the correct rule of law.

The Chair would suggest to counsel for the respondent that it is perfectly competent for him to put questions as to the particular matters that he desires to

[5] Third session, Sixty-second Congress, Record, p. 217.

have testimony upon without reading from the questions and answers; but in either case the Chair would rule that counsel has the right to bring out the testimony if it is either for the purpose of calling attention to the fact that the witness had previously made conflicting statements, or for the purpose of refreshing his memory upon some things in regard to which he is not now clear.

497. A contract having been admitted as evidence in an impeachment trial, it was held competent to show the intention of the parties thereto.

Instance of a ruling by the President pro tempore on a question of evidence in an impeachment trial.

On December 6, 1912,[6] in the Senate, sitting in trial of the impeachment of Judge Robert W. Archbald, one of the managers called William L. Pryor, a witness to prove the charge that the respondent had been a silent party to a written contract previously admitted in evidence by vote of the Senate.

Mr. A. S. Worthington, counsel for the respondent, objected to questions propounded and submitted:

Mr. President, it was held by the Senate, by the vote on the first day of our taking testimony here, that this silent-party paper was admissible in evidence, or at least should be introduced here, although no evidence was offered tending to show Judge Archbald knew of it or authorized it. But I do not understand that that ruling went so far as to hold that the parties who may have made statements about Judge Archbald would be competent witnesses against him, or that any statement made against Judge Archbald by Pryor, or perhaps other persons who were in Boland's office, would be competent and proper evidence in this matter.

The President pro tempore ruled:

The paper has been admitted as a legitimate piece of evidence. The Chair is of the opinion that everything that is necessary for a proper explanation of the meaning of that paper is competent. What effect it would have upon the respondent is a question of law that would afterwards be determined. But as to the question of the admissibility of the evidence, the Chair is of opinion that whenever there is ambiguity in an instrument which itself is admitted in evidence it is competent to show what those who made the paper intended. How far that would be binding upon the respondent is an altogether different question, and the Chair does not mean in the ruling to rule on that point. That would be a question for the Senate to determine when it comes to consider the weight of the evidence. As to whether or not a partnership has been proven and whether the respondent should be bound by statements made by one who is alleged to be his partner, is a question to be determined by the Senate sitting as a court.

Upon the naked question as to whether or not the paper which is proven to have been executed, and which the Senate has decided to be proper evidence, shall have any ambiguous term explained by showing what the parties to it said it meant, the Chair is not in any doubt whatever.

[6] Third session Sixty-second Congress, Record, p. 226.

The Impeachment and Trial of Robert W. Archbald [1]

498. The impeachment and trial of Robert W. Archbald, United States circuit judge, designated as a member of the Commerce Court.

In response to a resolution of the House, the President transmitted to the Judiciary Committee of the House charges filed against Judge Archbald and all papers relating thereto with a message suggesting that they be not laid before the House until examined by the committee.

Form of resolution instructing the Judiciary Committee to examine the charges against Judge Archbald.

In investigating the conduct of Judge Archbald, the Judiciary Committee by resolution, extended to the accused permission to be present with counsel and cross-examine witness.

On April 23, 1912,[1a] Mr. George W. Norris, of Nebraska, introduced, by delivery to the Clerk, the following resolution:

"*Resolved*, That the President of the United States be, and he is hereby, requested, if not incompatible with the public interest, to transmit to the House of Representatives a copy of any charges filed against Robert W. Archbald, associate judge of the United States Commerce Court, together with the report of any special attorney or agent appointed by the Department of Justice to investigate such charges, and a copy of any and all affidavits, photographs, and evidence filed in the Department of Justice in relation to said charges, together with a statement of the action of the Department of Justice, if any, taken upon said charges and report."

The resolution was referred, under the rule, to the Committee on the Judiciary. On April 25,[2] Mr. Henry D. Clayton, of Alabama,

[1] Cannon's Precedents, vol. 6, p. 684 (1936).
[1a] Second session Sixty-second Congress, Record, p. 5242.
[2] Record, p. 5346.

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from that committee, submitted the report of the committee, with favorable recommendation, and the resolution was unanimously agreed to.

A message from the President in response to this request was laid before the House by the Speaker on May 4,[3] in part as follows:

In reply, I have to state that, in February last, certain charges of improper conduct by the Hon. Robert W. Archbald, formerly district judge of the United States Court for the Middle District of Pennsylvania, and now judge of the Commerce Court, were brought to my attention by Commissioner Meyer of the Interstate Commerce Commission. I transmitted these charges to the Attorney General, by letter dated February 13, instructing him to investigate the matter, confer fully with Commissioner Meyer, and have his agents make as full report upon the subject as might be necessary, and, should the charges be established sufficiently to justify proceeding on them, bring the matter before the Judiciary Committee of the House of Representatives.

The Attorney General has made a careful investigation of the charges, and as a result of that investigation has advised me that, in his opinion, the papers should be transmitted to the Committee on the Judiciary of the House to be used by them as a basis for an investigation into the facts involved in the charges. I have, therefore, directed him to transmit all of the papers to the Committee on the Judiciary; but in my opinion—and I think it will prove in the opinion of the committee—it is not compatible with the public interests to lay all these papers before the House of Representatives until the Committee on the Judiciary shall have sifted them out and determined the extent to which they deem it essential to the thoroughness of their investigation not to make the same public at the present time. But all of the papers are in the hands of the committee and, therefore, within the control of the House.

The message was read and, with the accompanying papers, was referred to the Committee on the Judiciary. On the same day Mr. Clayton, from that committee, reported the following resolution, which was agreed to by the House.

Resolved, That the Committee on the Judiciary be, and is hereby, authorized to inquire into and concerning the official conduct of Honorable Robert W. Archbald, formerly district judge of the United States Court for the Middle District of Pennsylvania, and now a judge of the Commerce Court, touching his conduct in regard to the matters and things mentioned in House Resolution numbered five hundred and eleven, and especially whether said judge has been guilty of an impeachable offense, and to report to the House the conclusions of the committee in respect thereto, with appropriate recommendation:

And resolved further, That the Committee on the Judiciary shall have power to send for persons and papers, and to subpœna witnesses and to administer oaths to such witnesses; and for the purpose of making this investigation said committee is authorized to sit during the sessions of this House; and the Speaker shall have authority to sign and the Clerk to attest subpœnas for any witness or witnesses.

Preliminary to the investigation thus authorized the committee agreed upon the following program of procedure:[4]

That for the present the committee will hold public hearings, under the authority given by House resolution 524, for the purpose of examining the witnesses in regard to the matters and things mentioned in House resolution 511, which involve the conduct of Hon. Robert W. Archbald, and that in these public hearings where witnesses are examined Judge Archbald may be represented by counsel, if he desires, and that after the chairman of the committee shall have conducted the principal examination of witnesses and asked the members of the committee to ask such questions as their judgment may dictate to be proper, then, with the permission of the committee, counsel for Judge Archbald, if Judge Archbald is desirous to have counsel present, may ask such questions of the witnesses as the committee may deem proper to be asked of the witnesses in such investigation.

[3] Record, p. 5896.
[4] Record, p. 8907.

Pursuant to this determination, Judge Archbald attended and was represented by counsel, who cross-examined witnesses and submitted briefs, which were considered by the committee.

499. The Archbald impeachment continued.

The committee, empowered to investigate, reported simultaneously resolutions impeaching Judge Archbald and articles of impeachment.

On July 8, 1912, Mr. Clayton, from the Committee on the Judiciary, presented as privileged a unanimous report, which was referred to the House Calendar.[5]

The report, which incorporates findings of fact and conclusions reached by the committee as well as a discussion of the law, nature, and function of impeachment, with citations of authorities relating thereto, concludes:

Your committee reports herewith the accompanying resolution and articles of impeachment against Judge Robert W. Archbald, and recommends that they be adopted by the House and that they be presented to the Senate with a demand for the conviction and removal from office of said Robert W. Archbald, United States circuit judge designated as a member of the Commerce Court:

"*Resolved*, That Robert W. Archbald, additional circuit judge of the United States from the third judicial circuit, appointed pursuant to the act of June 18, 1910 (U. S. Stat. L., vol. 36, 540), and having duly qualified and having been duly commissioned and designated on the 31st day of January, 1911, to serve for four years in the Commerce Court, be impeached for misbehavior and for high crimes and misdemeanors; and that the evidence heretofore taken by the Committee on the Judiciary under House resolution 524 sustains 13 articles of impeachment which are hereinafter set out; and that said articles be, and they are hereby, adopted by the House of Representatives, and that the same shall be exhibited to the Senate in the following words and figures, to wit:

(Then follow 13 articles of impeachment setting forth the charges in detail.)

500. The Archbald impeachment, continued.

Form of resolution designating managers on the part of the House to conduct the impeachment trial and instructing them to carry the impeachment to the Senate.

The managers elected to conduct the Archbald trial on behalf of the House of Representatives consisted of seven members of the Judiciary Committee and represented both the majority and minority parties in the House.

Form of resolution authorizing the managers to incure necessary expenses in the conduct of the Archbald case.

The report[6] was debated in the House on July 11.[7] At the conclusion of the reading of the report by the Clerk, Mr. James R. Mann, of Illinois, said:

Mr. Speaker, when the report was made by the gentleman from Alabama [Mr. Clayton] it was stated by him, and properly so, that the resolution would be printed separately as any other resolution. The Clerk has read the resolution from the report. The resolution was not printed separately, through some misunderstanding, probably, on the part of the clerk in charge, and I ask unanimous consent that the resolution may be numbered and printed and reported from the committee as of July 8, 1912, in the ordinary form. It seems to me that that is due to the proper procedure in the House.

[5] Record, p. 8705.
[6] Second session Sixty-second Congress, House Report No. 946.
[7] Record, p. 8904.

There was no objection, and the resolution was ordered printed separately, as of July 8, and numbered H. Res. 622.

After extended debate, the resolution, with the accompanying articles of impeachment, was agreed to, yeas 223, nays 1.

Thereupon, it was:

Resolved, That Henry D. Clayton, of Alabama; Edwin Y. Webb, of North Carolina; John C. Floyd, of Arkansas; John W. Davis, of West Virginia; John A. Sterling, of Illinois; Paul Howland, of Ohio; and George W. Norris, of Nebraska, Members of this House, be, and they are hereby, appointed managers to conduct the impeachment against Robert W. Archbald, circuit judge of the United States and designated as a judge of the United States Commerce Court; that said managers are hereby instructed to appear before the Senate of the United States and at the bar thereof in the name of the House of Representatives and of all the people of the United States to impeach the said Robert W. Archbald of high crimes and misdemeanors in office and to exhibit to the Senate of the United States the articles of impeachment against said judge which have been agreed upon by this House; and that the said managers do demand that the Senate take order for the appearance of said Robert W. Archbald to answer said impeachment, and demand his impeachment, conviction, and removal from office.

It was also:

Resolved, That the managers on the part of the House in the matter of the impeachment of Robert W. Archbald, circuit judge of the United States and designated as a judge of the United States Commerce Court, be, and they are hereby, authorized to employ legal, clerical, and other necessary assistants and to incur such expenses as may be necessary in the preparation and conduct of the case, to be paid out of the contingent fund of the House on vouchers approved by the managers, and the managers have power to send for persons and papers.

It was further:

Resolved, That a message be sent to the Senate to inform them that this House has impeached for high crimes and misdemeanors Robert W. Archbald, circuit judge of the United States and designated as a judge of the United States Commerce Court, and that the House adopted articles of impeachment against said Robert W. Archbald, judge as aforesaid, which the managers on the part of the House have been directed to carry to the Senate, and that Henry D. Clayton, of Alabama; Edwin Y. Webb, of North Carolina; John C. Floyd, of Arkansas; John W. Davis, of West Virginia; John A. Sterling, of Illinois; Paul Howland, of Ohio; and George W. Norris, of Nebraska, Members of this House, have been appointed such managers.

The Members so elected were members of the Committee on the Judiciary and represented both the majority and minority parties in the House.

501. The Archbald impeachment, continued.

A message was sent to inform the Senate that the managers on the part of the House of Representatives would present the impeachment of Judge Archbald, and the Senate transmitted a message in reply informing the House that the Senate was ready to receive them.

Forms and ceremonies of presenting the Archbald impeachment at the bar of the Senate.

The articles of impeachment, signed by the Speaker and attested by the Clerk, after being read by the chairman of the managers, were handed to the Secretary of the Senate.

Having carried to the Senate the articles impeaching Judge Archbald, the managers returned and reported verbally in the House.

On July 13 [8] (legislative day of July 6), in the Senate, a message

[8] Second session Sixty-second Congress, Record, p. 8989.

was received from the House of Representatives, delivered by its Chief Clerk, announcing that the House had passed the following resolution:

Resolved, That a message be sent to the Senate to inform them that this House has impeached for high crimes and misdemeanors, Robert W. Archbald, circuit judge of the United States and designated as a judge of the United States Commerce Court, and that the House adopted articles of impeachment against said Robert W. Archbald, judge as aforesaid, which the managers on the part of the House have been directed to carry to the Senate; and that Henry D. Clayton, of Alabama; Edwin Y. Webb, of North Carolina; John C. Floyd, of Arkansas; John W. Davis, of West Virginia; John A. Sterling, of Illinois; Paul Howland, of Ohio; and George W. Norris, of Nebraska, Members of this House, have been appointed such managers.

On motion of Mr. Augustus O. Bacon, of Georgia, it was:

Ordered, That the Secretary inform the House of Representatives that the Senate is ready to receive the managers appointed by the House for the purpose of exhibiting articles of impeachment against Robert W. Archbald, circuit judge of the United States and designated as a judge of the United States Commerce Court, agreeably to the notice communicated to the Senate.

On July 15,[9] at 12 o'clock and 15 minutes p.m., the Assistant Doorkeeper of the Senate announced:

I have the honor to announce the managers on the part of the House of Representatives to conduct the proceedings in the impeachment of Robert W. Archbald, judge of the circuit court and designated a judge of the Commerce Court of the United States.

The President pro tempore said:

The managers on the part of the House will be received, and the Sergeant at Arms will assign them their seats.

The committee from the House of Representatives were escorted by the Sergeant at Arms to seats assigned them in the area in front of the Chair, and Mr. Manager Clayton, its chairman, said:

Mr. President, the managers on the part of the House of Representatives are here present and ready to present the articles of impeachment which have been preferred by the House of Representatives against Robert W. Archbald, a circuit judge of the United States and designated a judge of the Commerce Court of the United States. The House adopted the following resolution, which I will read to the Senate:

By direction of the President pro tempore, the Sergeant at Arms made proclamation as follows:

Hear ye! Hear ye! Hear ye! All persons are commanded to keep silence, on pain of imprisonment, while the House of Representatives is exhibiting to the Senate of the United States articles of impeachment against Robert W. Archbald, circuit judge of the United States and designated a judge of the United States Commerce Court.

Mr. Manager Clayton then read the articles of impeachment, and continued:

And, Mr. President, the House of Representatives by protestation, saving to themselves the liberty of exhibiting at any time hereafter any further articles of accusation or impeachment against the said Robert W. Archbald, a circuit judge of the United States and designated as a judge of the United States Commerce Court, and also of replying to his answers which he shall make unto the articles preferred against him, and of offering proof to the same and every part thereof, and to all and every other article of accusation or impeachment which shall be exhibited by them as the case shall require, do demand that the said Robert W. Archbald may be put to answer the high crimes and misdemeanors in office which have been charged against him in the articles which have been exhibited to the Senate, and that such proceedings, examinations, trials, and judgments may be thereupon had and given as may be agreeable to law and justice.

[9] Record, p. 9051.

Mr. President, the managers on the part of the House of Representatives, in pursuance of the action of the House of Representatives by the adoption of the resolutions and articles of impeachment which have just been read to the Senate, do now demand that the Senate take order for the appearance of said Robert W. Archbald to answer said impeachment, and do now demand his impeachment, conviction, and removal from office.

The articles of impeachment signed by the Speaker and attested by the Clerk, were handed to the Secretary of the Senate,[10] and the President pro tempore said:

Mr. Chairman and gentlemen of the committee of the House of Representatives, the Chair begs to assure you that the Senate will take order in the matter of the impeachment of Judge Archbald and communicate its action to the House of Representatives.

Mr. Manager Clayton replied:

Mr. President, in behalf of the House of Representatives the managers of the House beg to thank the Presiding Officer and the Senate for the courtesy extended to the managers upon the part of the House of Representatives.

The committee of the House of Representatives then retired from the Chamber.

The committee of the House of Representatives having returned to the Hall of the House, Mr. Clayton submitted as privileged:

Mr. Speaker, as one of the managers, and in behalf of all the managers on the part of the House of the impeachment proceedings, I beg to report to the House that the articles of impeachment prepared by the House of Representatives and preferred against Robert W. Archbald, a United States circuit judge and designated as a judge of the Commerce Court of the United States, have been exhibited and read to the Senate; that the Presiding Officer of that body stated to the managers that the Senate would take order in the premises, and that due notice of the same would be given to the House of Representatives.

502. The Archbald impeachment continued.

The articles of impeachment in the Archbald trial were ordered printed by the Senate and referred to a special committee appointed by the President pro tempore.

In the organization of the Senate for the Archbald trial the oath was administered to the President pro tempore by a Senator designated by order of the Senate for that purpose.

The President pro tempore, after being sworn, administered the oath to the Senators sitting for the trial of Judge Archbald.

The Senate notified the House by message that it was organized for the trial of Archbald impeachment.

The hour prescribed by the rule having arrived, the President pro tempore declared legislative business suspended and the Senate in order to proceed for the impeachment trial.

Whereupon [11] Mr. George Sutherland, of Utah, offered the following order, which was agreed to:

Ordered, That the articles of impeachment presented against Robert W. Archbald be printed for use of the Senate.

The following resolution offered by Mr. Clarence D. Clark, of Wyoming, was also agreed to:

Resolved, That the message of the House of Representatives relating to the impeachment of Robert W. Archbald be referred to a select committee to consist of five Senators to be appointed by the President pro tempore.

[10] These articles of impeachment appear in full in the Journals of both the House and Senate, in the House Journal on July 11, (p. 854), the day of their adoption, and in the Senate Journal on July 15, (454), the day they were presented and read.
[11] Second session Sixty-second Congress, Senate Journal, p. 628.

The President pro tempore appointed Messrs. Clarence D. Clark, of Wyoming; Knute Nelson, of Minnesota; William P. Dillingham, of Vermont; Augustus O. Bacon, of Georgia; and Charles A. Culbertson, of Texas, as members of this select committee.

On July 16,[12] at 1 o'clock p. m., the President pro tempore of the Senate announced:

The hour of 1 o'clock has arrived, and in accordance with the rule the legislative business will be suspended, and the Senate will proceed upon the impeachment of Robert W. Archbald.

On motion of Mr. Reed Smoot, of Utah, by unanimous consent, Mr. Shelby M. Cullom, of Illinois, was designated to administer the constitutional oath.

Mr. Cullom administered the oath to the President pro tempore:

You do solemnly swear that in all things appertaining to the trial of the impeachment of Robert W. Archbald, additional circuit judge of the United States for the third judicial district, designated a judge of the Commerce Court, now pending, you will do impartial justice according to the Constitution and laws. So help you God.

The President pro tempore said:

Without objection, the Chair will suggest that the Secretary will call the roll, calling 10 Senators at a time, and that as their names are called the Senators advance to the desk to have the oath of office administered to them.

Accordingly the roll was called and those Senators present advanced to the desk in groups of 10 and the oath was administered by the President pro tempore to the several groups as called.

The oath having been administered to those present, the names of the absentees were again called, and Senators who had entered the Chamber since the first call advanced to the desk and were sworn.

The President pro tempore announced:

Senators, the Senate is now sitting for the trial of the impeachment of Robert W. Archbald additional circuit judge of the United States for the third judicial district, designated a judge of the United States Commerce Court.

On motion of Mr. Clark, the following resolution was agreed to:

Ordered, That the Secretary notify the House of Representatives that the Senate is now organized for the trial of articles of impeachment against Robert W. Archibald, United States circuit judge, and is ready to receive the managers on the part of the House at its bar.

A message announcing the passage of this order was delivered in the House by Mr. Crockett, one of the clerks of the Senate.

Mr. Lodge then submitted:

I am about to make a motion that the Senate, sitting as a court of impeachment, take a recess until 3 o'clock in order to give the managers on the part of the House time to assemble and appear here. Before making the motion, however, I call attention to the fact that the Senate, sitting as a court, when it takes a recess brings the Senate back into legislative session where it was. I now make the motion that the Senate, sitting as a court of impeachment, take a recess until 3 o'clock.

The motion was agreed to, and at 1 o'clock and 45 minutes, p.m., the Senate, sitting as a court of impeachment, took a recess until 3 o'clock

[12] Record, p. 9117.

p. m., and a message notifying the House of this recess was transmitted [13] to the House.

503. The Archbald impeachment, continued.

The ceremony of formal demand by the managers that process issue in the trial of the Archbald impeachment.

On demand of the managers, the Senate ordered summons to be issued for the appearance of Judge Archbald, fixing the day and hour of return.

The proceedings of the Senate, sitting in the impeachment trial of Judge Archbald, were recorded in a separate journal.

In the meanwhile [14] the resolution notifying the House that the Senate was now organized for the trial was delivered in the House, and, at 3 o'clock and 1 minute p. m., the managers of the impeachment on the part of the House of Representatives appeared at the bar and their presence was announced by the Sergeant at Arms.

The PRESIDENT PRO TEMPORE. The Sergeant at Arms will conduct the managers to the seats provided for them within the bar of the Senate.

The managers were conducted to the seats assigned them within the space in front of the Secretary's desk.

The PRESIDENT PRO TEMPORE. Gentlemen managers, the Senate is now organized for the trial of the impeachment of Robert W. Archbald, additional circuit judge of the United States for the third judicial circuit, designated a judge of the Commerce Court.

Whereupon Mr. Manager Clayton, chairman of the managers on the part of the House, rose and said:

Mr. President, we, as managers on the part of the House of Representatives, are directed by the House of Representatives to appear at the bar of the Senate, which we now do, and demand that process be issued to Robert W. Archbald, additional circuit judge of the United States for the third judicial circuit, designated a judge of the Commerce Court, and that he be required to answer at the bar of the Senate the said articles of impeachment.

Thereupon Mr. Clark offered the following, which was agreed to by the Senate:

Ordered, That a summons be issued, as required by the Rules of Procedure and Practice in the Senate when sitting for the trial of the impeachment of Robert W. Archbald, returnable on Friday, the 19th day of the present month, at 12:30 o'clock in the afternoon.

Mr. Manager Clayton said:

Mr. President, I beg to say on behalf of the managers on the part of the House of Representatives that they will await the further pleasure of the Senate.

And then, at 3 o'clock and 5 minutes p.m., the managers on the part of the House retired from the Chamber.

On motion of Mr. Clark, the Senate, sitting for the trial of the impeachment, adjourned until Friday, July 19, at 12:30 o'clock in the afternoon. A message advising the House of this action on the part of the Senate was transmitted to the House.

The proceedings of the court of impeachment do not appear in the daily Journal of the Senate but are recorded in a separate journal appended thereto and entitled "Proceedings of the Senate on the Trial of Robert W. Archbald, etc."

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[13] Record, p. 9145.
[14] Second session Sixty-second Congress, Record, p. 9123.

The Daily Journal of the Senate merely records the announcement of the session of the Senate sitting on the trial, and in each instance concludes:

After proceedings had therein as stated in the record, the Senate resumed its legislative business.

504. The Archbald impeachment trial.

Form of oath of the Sergeant at Arms and form of proclamation opening sessions of the Senate sitting in the impeachment trial of Judge Archbald.

In response to the writ of summons, Judge Archbald appeared in person attended by counsel to answer the articles of impeachment.

In the Archbald trial the Senate adopted orders supplementing the rules of procedure and practice for the Senate when sitting in impeachment trials.

Order of the Senate prescribing method of submitting requests, applications, or objections, and regulating colloquys and questions.

In response to a motion by respondent's counsel that time be allowed to present the answer, the Senate granted 10 days.

On July 19,[15] in the Senate, the following appears:

THE PRESIDENT PRO TEMPORE. The hour of 12:30 o'clock, to which the Senate sitting as a court in the impeachment of Judge Robert W. Archbald adjourned, has arrived. The Sergeant at Arms will make the opening proclamation.

The SERGEANT AT ARMS. Hear ye! Hear ye! Hear ye! All persons are commanded to keep silence on pain of imprisonment while the Senate of the United States is sitting for the trial of the articles of impeachment exhibited by the House of Representatives against Robert W. Archbald, additional circuit judge of the United States for the third judicial circuit, designated a judge of the United States Commerce Court.

By direction of the President pro tempore, the names of those Senators who had not been sworn were called. There were no responses.

Mr. Clark offered this resolution, which was agreed to:

Ordered, That the Secretary inform the House of Representatives that the Senate is sitting in its Chamber and ready to proceed with the trial of the impeachment of Robert W. Archbald.

On motion of Mr. Clark, it was:

Ordered, That the Presiding Officer on the trial of the impeachment of Robert W. Archbald, circuit judge of the United States, be, and is hereby, authorized to sign all orders, mandates, writs, and precepts authorized by the Rules of Procedure and Practice in the Senate when sitting on impeachment trials and by the Senate.

At 12 o'clock and 39 minutes p.m. the Assistant Doorkeeper announced the managers on the part of the House, who were conducted to the seats assigned to them in the area in front of the Secretary's desk, on the left of the Chair.

At 12 o'clock and 39 minutes p.m. the respondent, Robert W. Archbald, and his counsel, A. S. Worthington and Robert W. Archbald, jr., entered the Chamber and were conducted to seats assigned them in the space in front of the Secretary's desk on the right of the Chair.

The PRESIDENT PRO TEMPORE. The Secretary will read the Journal of the proceedings of the last session of the Senate while sitting in the trial of the impeachment of Robert W. Archbald.

[15] Second session Sixty-second Congress, Record, p. 9275; Senate Journal, p. 629.

The Secretary read the Journal of proceedings of the Senate sitting for the trial of the impeachment of Tuesday, July 16, 1912.

By direction of the President pro tempore, the Secretary read the following return appended to the writ of summons and administered the following oath to the Sergeant at Arms:

"I, Daniel M. Ransdell, Sergeant at Arms of the Senate of the United States, do solemnly swear that the return made by me upon the process issued on the 16th day of July, 1912, by the Senate of the United States, against Robert W. Archbald, additional circuit judge of the United States for the third judicial circuit and designated a judge in the Commerce Court, is truly made, and that I have performed such service therein described. So help me, God."

Whereupon the Sergeant at Arms made proclamation:

Robert W. Archbald! Robert W. Archbald! Robert W. Archbald, circuit judge of the United States and designated as a judge of the United States Commerce Court: Appear and answer to the articles of impeachment exhibited by the House of Representatives against you.

The President pro tempore announced:

Counsel for the respondent are informed that the Senate is now sitting for the trial of Robert W. Archbald, additional circuit judge of the United States for the third judicial circuit and designated a judge of the Commerce Court, upon articles of impeachment exhibited by the House of Representatives, and will hear his answer thereto.

Mr. Worthington, of counsel for the respondent, entered formal appearance, which was read by the Secretary and ordered placed on file.

Mr. Worthington then submitted a motion on behalf of the respondent praying that time be granted in which to prepare an answer to the articles of impeachment.

On motion of Mr. Clark, of Wyoming, amended by motion of Mr. Porter J. McCumber, of North Dakota, and further modified on suggestion of Mr. Henry Cabot Lodge, of Massachusetts, it was:

Ordered, That the respondent present the answer to the articles of impeachment at 12 o'clock and 30 minutes post meridian on Monday, the 29th day of July, 1912.

The following orders were then severally agreed to:

Ordered, That the managers on the part of the House be allowed until the 1st day of August, 1912, at 1 o'clock in the afternoon, to present a replication, or other pleading, of the House of Representatives to the answer of the respondent. That any subsequent pleadings, either on the part of the managers or of the respondent, shall be filed with the Secretary of the Senate, of which notice shall be given to the House of Representatives and the respondent, respectively, so that all pleadings shall be closed on or before the 4th day of August, 1912.

Ordered, That in all matters relating to the procedure of the Senate, sitting in the trial of the impeachment of Robert W. Archbald, circuit judge of the United States, whether as to form or otherwise, the managers on the part of the House or the counsel representing the respondent may submit a request or application orally to the Presiding Officer, or, if required by him or requested by any Senator, shall submit the same in writing.

In all matters relating immediately to the trial, such as the admission, rejection, or striking out of evidence, or other questions usually arising in the trial of causes in courts of justice, if the managers or counsel for the respondent desire to make any application, request or objection, the same shall be addressed directly to the Presiding Officer, and not otherwise.

It shall not be in order for any Senator to engage in colloquy or to address questions either to the managers on the part of the House or the counsel for the respondent, nor shall it be in order for Senators to address each other, but they shall address their remarks directly to the Presiding Officer.

Ordered, That the proceedings of the Senate sitting in the trial of impeachment of Robert W. Archbald be printed daily for the use of the Senate as a separate document.

And then, at 1 o'clock and 10 minutes p.m., the Senate, sitting for the trial of the impeachment, adjourned, and the managers on the part of the House and the respondent and his counsel withdrew from the Chamber.

505. The Archbald impeachment continued.

The answer of Judge Archbald to the articles of impeachment was signed by himself and his counsel.

The answer in the Archbald case was read by the Secretary of the Senate.

The answer of Judge Archbald demurred severally to all the articles of impeachment, alleging that no impeachable offense had been charged and then replying in detail to the charges set forth in each article.

The managers were not supplied with a copy of the answer of Judge Archbald at the time of filing.

On July 29 [16] the Senate, at the appointed hour, discontinued its legislative business, and the session for the impeachment proceedings was opened with the usual proclamation by the Sergeant at Arms.

The oath was administered to certain Senators not previously sworn.

The managers, and the respondent with his counsel, having attended, the President pro tempore directed the Journal of the last session's proceedings to be read. The Journal having been approved, Mr. Worthington presented the respondent's answer, consisting of a separate demurrer and answer to each of the 13 articles of impeachment, which was read by the Secretary.

This answer of respondent appears in full in the Journal.[17]

At the conclusion of the reading Mr. Manager Clayton inquired if the counsel could furnish the managers on the part of the House of Representatives with a copy of this answer by the respondent to the articles of impeachment.

Mr. Worthington, of counsel for the respondent, replied:

Mr. President, I regret to say that we had obtained a copy for that purpose, but different newspapers and press associations exhausted the copies, even our own office copy. Otherwise we should be very happy to hand a copy to the managers.

And then, on motion of Mr. Lodge, at 2 o'clock and 5 minutes p.m., the Senate, sitting on the trial of impeachment, adjourned until Thursday, August 1, 1912, at 1 o'clock, p.m.

506. The Archbald impeachment continued.

An attested copy of Judge Archbald's answer, having been messaged to the House by the Senate, was referred to the managers.

The managers having prepared a replication to the answer of Judge Archbald, submitted it to the House for approval and adoption.

The House notified the Senate by message that it had adopted a replication in the Archbald trial and had authorized its managers to file with the Secretary of the Senate any further pleading deemed necessary.

[16] Second session Sixty-second Congress, Senate Journal, p. 630; Record, p. 9795.
[17] Senate Journal, pp. 630–639.

On July 31,[18] in the House, the Speaker announced the reference to the managers on the part of the House of Representatives of an attested copy of the answer of Robert W. Archbald to the articles of impeachment messaged to the House from the Senate on the previous day.

Mr. Manager Clayton said:

Mr. Speaker, I am directed by my associate managers on the part of the House to say that the managers were furnished on yesterday with a certified copy of the answer of Judge Archbald, additional circuit judge for the first judicial circuit, designated a judge in the Commerce Court.

And I am further directed to say that the managers have considered the answer in the matter of the impeachment proceedings against Judge Archbald and have directed me to present to the House, and ask its adoption, the replication [19] to such answer, and I ask that the Clerk read the replication, which I send to the desk.

The Clerk read the replication. On motion of Mr. Manager Clayton, the replication was unanimously adopted.

Mr. Manager Clayton then offered the following resolution, which was agreed to:

Resolved, That a message be sent to the Senate by the Clerk of the House informing the Senate that the House of Representatives has adopted a replication to the answer of Robert W. Archbald, additional circuit judge of the United States for the third judicial circuit, and designated a judge of the United States Commerce Court, to the articles of impeachment exhibited against him, and that the same will be presented to the Senate by the managers on the part of the House; and also that the managers have authority to file with the Secretary of the Senate, on the part of the House of Representatives, any subsequent pleadings which they shall deem necessary.

507. The Archbald impeachment, continued.

The replication in the Archbald trial was presented by the managers and read by the Secretary of the Senate.

The replication of the House to the answer of Judge Archbald was submitted without signature.

The replication of the House consisted of a general denial of all allegations set forth in Judge Archbald's answer and an averment that the charges contained in the articles of impeachment set forth impeachable offenses.

On August 1 [20] the Senate went into session for the trial in the usual form.

The President pro tempore laid before the Senate a message received from the House of Representatives, which was read by the Secretary, as follows:

Resolved, That a message be sent to the Senate by the Clerk of the House informing the Senate that the House of Representatives has adopted a replication to the answer of Robert W. Archbald, additional circuit judge of the United States for the third judicial circuit and designated a judge of the United States Commerce Court, to the articles of impeachment exhibited against him, and that the same will be presented to the Senate by the managers on the part of the House; and also that the managers have authority to file with the Secretary of the Senate, on the part of the House of Representatives, any subsequent pleadings which they shall deem necessary.

Mr. Manager Clayton said:

Mr. President, on behalf of the House of Representatives and on behalf of the managers of the House of Representatives I now present the replication of the

[18] Second session Sixty-second Congress, House Journal, p. 910; Record, p. 9954.
[19] House Report No. 1119.
[20] Second session Sixty-second Congress, Senate Journal, p. 688; Record, p. 9983.

House of Representatives to the answers made by Robert W. Archbald, United States circuit judge for the third judicial circuit and designated a judge of the United States Commerce Court. The replication is to the answer of the respondent. I ask that it be read by the Secretary.

The replication was read by the Secretary and ordered to be printed.

Mr. Manager Clayton then submitted the following order for adoption by the Senate.

Ordered, That lists of witnesses be furnished the Sergeant at Arms by the managers and the respondent, who shall be subpoenaed by him to appear at 12 o'clock and 30 minutes postmeridian on the 7th day of August, 1912.

Ordered, That the cause shall be opened and the trial proceeded with at 12 o'clock and 30 minutes postmeridian on the 7th day of August, 1912.

Mr. Worthington, of counsel for the respondent, objected:

The President, as far as I know, it is unprecedented to ask the court to fix a time for the trial of a case until it is at issue. By an order which has heretofore been made by the Senate it is provided that after this replication shall have been filed further pleadings on either side may be filed with the Secretary of the Senate, the pleadings to be closed by next Saturday. Having heard the replication read. I am quite clear that it will be necessary to file a further pleading on behalf of the respondent in order to have this case in such shape that it can be legally determined. So far as we are concerned, I think that further pleading may in all probability be filed certainly by 12 o'clock to-morrow.

I would respectfully suggest that it is not in order to fix a time for the trial until what is to be tried in fixed by the pleadings in the case.

Upon further argument by Mr. Manager Clayton and Mr. Worthington—

The PRESIDENT PRO TEMPORE. The Chair will be glad to submit any motion which counsel for the respondent may make.

Mr. WORTHINGTON. The rule which you have adopted would permit counsel for the respondent or the managers to make orally any request for an order, but it must be reduced to writing if required.

I make orally the motion that the question of fixing a date for the trial be postponed until the court convenes on Saturday next.

After further discussion, Mr. Thomas S. Martin, of Virginia, suggested that the managers on the part of the House permit consideration of their motion to go over until Saturday, August 1.

The President pro tempore submitted:

Counsel on the part of the respondent asks that the consideration of the question as to when the trial shall be proceeded will be postponed for determination until Saturday. Is there objection? If not, by unanimous consent it is so ordered. Is there any other matter the managers on the part of the House desire to present?

Mr. Manager CLAYTON. There is nothing else, Mr. President, and having no other business before the Senate, we beg leave at this time to retire.

Thereupon the managers and respondent, with his counsel, withdrew and adjournment was taken until August 3, at 2 o'clock p.m.

508. The Archbald impeachment, continued.

Counsel for Judge Archbald having elected not to plead further notified the managers by letter of that decision.

In response to an objection by the managers to the designation "board of" managers, contained in a communication incorporated in the record of proceedings, the Secretary of the Senate was authorized to correct the designation.

In the Archbald trial the Senate provided that lists of witnesses to be subpoenaed should be furnished by managers or counsel to the Sergeant at Arms and that additional witnesses desired later should be subpoenaed on application to the Presiding Officer.

The Senate considered in secret session a motion by the managers fixing the date on which the Archbald trial should be opened.

The Senate declined to grant the motion of the managers, submitted August 3, that the trial of Judge Archbald begin August 7, and, on motion of a Senator, set the opening of the trial for December 3.

On August 3,[21] a letter addressed to Mr. Manager Clayton by Mr. Worthington, of counsel for the respondent, was, by request of Mr. Worthington, seconded by Mr. Manager Clayton, read and incorporated in the record as follows:

WASHINGTON, D. C., *August 2, 1912.*

Hon. HENRY D. CLAYTON,

Chairman Board of Managers in the matter of the impeachment of Robert W. Archbald.

DEAR SIR: Inasmuch as counsel for Judge Archbald have decided not to file any further pleadings in his case, it is due to the board of managers that I should notify them of that fact and inform them why counsel have changed their minds on this subject since the argument in the Senate yesterday.

In the respondent's first answer to each of the articles of impeachment he avers in substance that the article does not set forth an impeachable offense. In the first paragraph of the replication filed on behalf of the House of Representatives issue was joined on these answers. But as to whole of the sixth article and as to part of the thirteenth article the respondent pleads in substance that even if the article sets forth an impeachable offense it sets it forth in such general and indefinite terms that the respondent should not be called upon to answer it. And as to the thirteenth article, the plea is made that it is bad because it undertakes to charge in one article two separate and distinct offenses.

We do not find in the replication any distinct reference to either of these two last-mentioned defenses, relating one to both the sixth and the thirteenth articles and the other to the thirteenth article alone. It was our impression yesterday that for this reason some further pleading would be necessary on our part as to these two matters. However, as you stated in the Senate yesterday that it is the understanding of the board of managers that their replication is a denial of all of our allegations as to the insufficiency of the articles of impeachment, whether on one ground or another, counsel for the respondent have decided that they will accept this construction of the replication made by the board of managers. This being so, no further pleading seems to be necessary, and we will be ready, when the Senate meets to-morrow, to take up the question of the date of trial.

Yours, very truly,

A. S. WORTHINGTON,
Of Counsel for Respondent.

Thereupon Mr. Manager Clayton said:

Mr. President, I do not desire to be hypercritical of the language employed by the counsel, but so far as my investigation goes, I am led to understand that the managers of the House have never before been spoken of as a board of managers. I therefore ask the counsel to strike from his letter the words "board of" wherever they occur. We are not a board of managers. We are managers on the part of the House of Representatives; and while not a purist, not a hairsplitting dealer in technicalities, I think it is proper that in papers of this character and of this solemnity the usual forms be followed.

The PRESIDENT PRO TEMPORE. The Secretary will make the correction.

On request of Mr. Manager Clayton, the order pending before the Senate at adjournment was reported. On motion of Mr. Manager Clayton, the order was amended to read as follows:

Ordered, That lists of witnesses be furnished the Sergeant at Arms by the managers and the respondent, who shall be subpœnaed by him to appear at 12 o'clock and 30 minutes postmeridian on the 7th day of August, 1912.

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[21] Second session Sixty-second Congress, Senate Journal, p. 638; Record, p. 10132.

And further ordered, That in case hereafter the managers or the respondent may desire the attendance of additional witnesses, in such case the managers or the respondent may have the witness or witnesses desired subpœnaed, in accordance with the practice and usage of the Senate, upon application in such form as may be approved by the Presiding Officer.

Ordered, That the cause shall be opened and the trial proceeded with at 12 o'clock and 30 minutes postmeridian on the 7th day of August, 1912.

The PRESIDENT PRO TEMPORE. The Presiding Officer would inquire whether the counsel for the respondent desires to submit any order.

Mr. WORTHINGTON. No, Mr. President.

After argument by Mr. Manager Clayton and Mr. Worthington on the adoption of the order as amended, Mr. Clark, of Wyoming, submitted:

Mr. President, anticipating that the decision of this matter will lead to some debate, and as under the rules it must be considered behind closed doors, I move that the doors be closed for the purpose of deliberation.

The motion was agreed to, and the President pro tempore directed the Sergeant at Arms to clear the galleries and close the doors. The managers and the respondent, with his counsel, withdrew, and at 4 o'clock and 30 minutes p.m., the doors were closed until 5 o'clock and 32 minutes p. m., when the doors were reopened.

The managers on the part of the House and the respondent, accompanied by counsel, entered the Chamber and took the seats assigned them.

Mr. Jacob H. Gallinger, of New Hampshire, offered the following order:

Ordered, That lists of witnesses be furnished the Sergeant at Arms by the managers and the respondent, who shall be subpœnaed by him to appear at 12 o'clock and 30 minutes postmeridian on the 3d day of December, 1912.

Ordered, That the cause shall be opened and the trial proceeded with at 12 o'clock and 30 minutes postmeridian on the 3d day of December, 1912.

Mr. Henry L. Meyers, of Montana, offered the following as a substitute for the order submitted by Mr. Gallinger:

Ordered, That the trial of the accused under these impeachment proceedings and charges be, and is hereby, set for the 15th day of August, 1912, at 12:30 p.m., and that orders for witnesses be filed on or before August 10, 1912, and thereafter as the Senate may order.

The order submitted by the managers on the part of the House of Representatives was also read. The pending question was then put by the President pro tempore, as follows:

The several orders are before the Senate for consideration. Under the view taken by the Presiding Officer, the question should first be put on the order fixing the most distant time. That is in accordance with parliamentary procedure and also in accordance with such procedure as might be considered proper in a court. The order proposed by the Senator from New Hampshire, Mr. Gallinger, is the one which fixes the longest period, and the vote will first be taken upon that. The rule [23] of the Senate requires that the vote shall be taken by yeas and nays. It is therefore not necessary that the yeas and nays should be ordered as in other instances. As Senators' names are called, those who favor the date fixed by the order proposed by the Senator from New Hampshire will vote "yea." Those who are opposed to that date and favor other dates will as their names are called, vote "nay." The Secretary will call the roll.

The roll being called, it was decided in the affirmative, yeas 44, nays 19, and the order submitted by Mr. Gallinger was agreed to.

[23] Standing Rules of the Senate, Rule V, p. 174.

The managers on the part of the House thereupon retired from the Chamber.

The Senate sitting for the trial of the impeachment continued in session and considered briefly a matter of procedure [23] relating to the trial.

Following the disposition of the question of procedure, the respondent retired from the Chamber, and the Senate, sitting for the trial of the impeachment adjourned until Tuesday, December 3, at 12:30 o'clock p.m.

509. The Archbald impeachment, continued.

The opening addresses in the Archbald trial were regulated by order of the Senate.

Managers and counsel made extended opening statements in the Archbald trial, the managers outlining charges which they proposed to establish and counsel for the respondent setting forth the contention that impeachment could be sustained only on conviction of offenses punishable in criminal court and controverting charges preferred in the articles of impeachment.

On December 3, 1912,[24] Mr. Worthington introduced Mr. Alexander Simpson, jr., of the Philadelphia bar, as associate counsel for the respondent.

The following orders were severally agreed to:

Ordered, That the daily sessions of the Senate sitting in the trial of impeachment of Robert W. Archbald, additional circuit judge of the United States, shall, unless otherwise ordered, commence at 2 o'clock in the afternoon.

Ordered, That the opening statement on behalf of the managers shall be made by one person, to be immediately followed by one person who shall make the opening statement on behalf of the respondent.

Upon suggestion of Mr. Manager Clayton and Mr. Worthington, respectively, it was agreed that the managers on the part of the House of Representatives and the respondent and his counsel should, during the remainder of the proceedings, appear without the formality of an announcement.

Mr. Manager Clayton opened the case for the House of Representatives as follows:

Mr. President, as I understand the action of the Senate, it contemplated that at this time the managers should proceed to make a statement embodying the facts upon which the articles of impeachment are predicated in this case.

Mr. Manager Clayton then proceeded with a statement of what the managers proposed to prove.

He was followed by Mr. Worthington, who said:

Mr. President and Senators, for the first time in an impeachment trial in this tribunal the opening statement for the respondent is to be made at the beginning of the case instead of at the close of the testimony on behalf of the managers. We have desired to do this and are doing it with the acquiescence of the honorable managers for two reasons. One is that the Members of the Senate may know when the introduction of testimony is going on what are the questions of fact in dispute. The other is that Senators may know from the beginning what we rely upon as the law of the case.

Mr. Worthington then stated the contention of counsel on behalf of the respondent, that Judge Archbald could be properly convicted in impeachment proceedings only when convicted of an offense punish-

[23] See section 7714, Chapter CXCI in this volume.
[24] Third session Sixty-second Congress, Senate Journal, p. 317; Record, p. 21.

able in a criminal court, and controverted and discussed in detail allegations contained in the charges preferred in the articles of impeachment.

In reply to an allusion made by Mr. Worthington in discussing the theory that impeachment could be only for indictable offenses, Mr. Manager Clayton said by way of rebuttal:

Mr. President, in reply to the complaint which has been made by the honorable gentleman who represents the respondent that we did not go into the discussion of the law in the preliminary statement which the managers had the honor to submit this afternoon, I beg to say that we followed what we believed to be the practice in such cases. I have before me the record in the case of Judge Swayne. I observe that Judge Palmer, who was then the manager speaking for all the managers, after he concluded his statement of facts, winding up, with a condensed summary of all the statements which he had made at length, ended the preliminary statement of facts which is required according to the rules and practice of the Senate. He did not at that time present any brief or any argument or any views on the law of impeachment. The managers, Mr. President, have already prepared in a formal way a brief, and can present that brief, and in argument fully cover their views as to the law of impeachment; but we thought that this brief and what the managers said last summer, which is in the Record and to which I have referred, would amply apprise the honorable counsel for the respondent of the line of argument on the law in this case that the managers would pursue.

On December 5,[25] on motion of Mr. John D. Works, of California, it was—

Ordered, That such briefs and citations of authorities as have already been prepared by the managers on the part of the House and counsel for the respondent be filed with the Secretary and printed in the Record for the immediate use of Senators.

510. The Archbald impeachment, continued.

The presentation of evidence in the Archbald trial.

Instances wherein the Senate by order restricted the number of character witnesses which might be called to testify.

An instance in which the Senate by order disregarded an established rule of evidence.

On December 4,[26] following the reading and approval of the Journal, the names of witnesses on behalf of the managers were read to ascertain their presence, and the introduction of testimony on behalf of the managers began.

This presentation of testimony continued on December 5, 6, 7, 9, 10, 11, 12, and was concluded on December 14, when Mr. Manager Clayton announced that examination in chief had been concluded.

The introduction of testimony on behalf of the respondent was begun on December 16 and continued until December 19, when adjournment was taken until January 3, 1913.

On December 17,[27] following the introduction of a number of witnesses called by counsel on behalf of the respondent to testify as to respondent's character, Mr. Manager Clayton said:

Mr. President, the managers have offered no character witnesses anywhere in these proceedings; it is not their purpose to offer any character witnesses. Ten character witnesses have been examined. The rule adopted, or the practice I may say, to be more accurate, in all the courts of justice so far as I know is that the court has the discretionary power to limit the number of witnesses as to character.

[25] Record, p. 151.
[26] Third session Sixty-second Congress, Record, p. 98.
[27] Record, p. 774.

I take it that that power is an inseparable incident of the court to regulate its proceedings and for the purpose, among others, of bringing the trial to an end.

In so far as I know, all courts permit a reasonable number of witnesses to be examined on character; but where the testimony of the character of the party is not controverted, the court has always, after a reasonable number of witnesses have been examined, held that no more should be examined on that particular matter. Some of the courts of the Union hold that four character witnesses are sufficient where the testimony of those witnesses is not controverted.

So, Mr. President, I respectfully submit to you and to the Senate that after these gentlemen have examined 10 witnesses on character and when the testimony of those character witnesses is not disputed—is not controverted—and when the managers tell the Senate it will not be controverted, it seems to me that the further examination of character witnesses might well be dispensed with.

The Presiding Officer said:

The Chair recognizes, of course, that the practice is such as the manager has indicated, and the necessity of it is apparent. Otherwise the time of a court might be indefinitely taken up through the introduction of innumerable witnesses. At the same time the Chair recognized that in this case the character of the respondent is necessarily in issue, and on account of the gravity of the case and the peculiar position which the Presiding Officer holds, simply as the mouthpiece of the Senate, the Chair does not feel authorized to take the responsibility of shutting off the respondent in the proof which he seeks to make upon this line. The Senate has full control over the matter whenever it sees proper to exercise it.

Thereupon, on motion of Mr. James A. Reed, of Missouri, it was—

Ordered, That the number of character witnesses shall be limited to 15.

On December 18,[28] on cross-examination, Mr. Manager Webb proposed to interrogate Miss Mary F. Boland, a witness called in behalf of the respondent, about certain matters relative to a conversation which had not been referred to in the examination in chief. Objection by counsel for the respondent was sustained by the presiding officer.

The PRESIDING OFFICER. The rule is plain that the counsel can only cross-examine the witness about matters upon which the witness has been interrogated on direct examination.

Whereupon, on motion of Mr. James A. Reed, of Missouri, it was—

Ordered, That the witness now on the stand, Miss Mary F. Boland, be at this time interrogated by the managers relative to that part of the conversation sought to be elicited.

511. The Archbald impeachment, continued.

In the impeachment trial of Judge Archbald the respondent took the stand and testified in his own behalf.

No rebuttal evidence was offered by the managers in the Archbald trial.

The Senate limited the time of the final arguments in the impeachment trial of Judge Archbald.

The order in which closing arguments in the Archbald trial should be made was arranged by stipulation between managers and counsel.

The Senate permitted argument in manuscript to be filed with the reporter and included in the printed report of the proceeding.

Counsel having withheld remarks from the record in violation of the rule, the managers called attention to the infraction and asked that the rule be enforced.

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[28] Third session Sixty-second Congress, Senate Journal, p. 322; Record, p. 841.

The Senate fixed the time at which a final vote should be taken on the articles of impeachment presented against Judge Archbald and notified the House by message.

The voting on the articles in the Archbald impeachment was without debate but each Senator was permitted to file an opinion to be published in the printed proceedings.

The presentation of testimony on behalf of the respondent was resumed on January 3, 1913, and continued on January 4 and January 6, and concluded on January 7. On the last two days the respondent was called to the stand in person by counsel and testified in his own behalf,[29] being cross-examined by the managers and answering numerous questions propounded by Senators in writing. No rebuttal evidence was presented by the managers.

The taking of evidence having been concluded on both sides, on suggestion of the managers, all witnesses summoned on behalf of either side were finally discharged.

On motion of Mr. Reed Smoot, of Utah, it was:

Ordered, That hereafter the daily sessions of the Senate sitting in the trial of impeachment of Robert W. Archbald, additional circuit judge of the United States, shall commence at 1 o'clock in the afternoon and shall continue until 6 o'clock p.m.; that the time for final argument of the case shall be limited to three days from and including January 8, 1913, and shall be divided equally between the managers on the part of the House of Representatives and the counsel for the respondent, the time thus assigned to each side to be divided as each side may for itself determine.

On January 8[30] agreement between managers and counsel for the respondent as to order in which argument should be made was indicated by Mr. Worthington, as follows:

Mr. President, I may say it is entirely agreeable to counsel for the respondent. We have had some conference with the managers about it, and we understand that all the managers who are to speak, except the one who is to make the closing argument, will speak before we begin.

The following orders were severally agreed to:

Ordered, That the time for final arguments in the trial of impeachment of Robert W. Archbald, additional circuit judge of the United States, shall be limited to three days from and including January 8, 1913, and shall be divided equally between the managers on the part of the House of Representatives and the counsel for the respondent, the time thus assigned to each side to be divided as each side may for itself determine.

Ordered, That any of the managers or counsel for the respondent having all or any portion of his argument in manuscript may deliver a copy of the same to the Reporter or any portion thereof, which for lack of time or to save the time of the Senate the managers or counsel shall omit to deliver or read, and the same shall be incorporated by the Reporter as a part of the argument delivered, and any manager or counsel who does not address the court may file and have printed as a part of the proceedings an argument before the close of the discussion.

Mr. Manager Sterling, on behalf of the managers, began the argument in support of the articles of impeachment, and was followed by Messrs. Manager Webb and Manager Floyd. Mr. Manager Howland also addressed the Senate and had not concluded at adjournment. On January 9[31] Mr. Manager Howland concluded his argument, and

[29] This is apparently the only instance in which a respondent in an impeachment case before the Senate has taken the stand in his own behalf.
[30] Third session Sixty-second Congress, Senate Journal, p. 325; Record, p. 1208.
[31] Record, p. 1258.

Messrs. Manager Norris and Manager Davis continued for the managers.

Mr. Simpson then opened the argument on behalf of the respondent, and was followed by Mr. Worthington, who concluded his argument on January 10.[32] Mr. Worthington was followed by Mr. Manager Clayton, who closed the argument on behalf of the managers.

At the conclusion of the argument, Mr. Reed, proposed to submit to the respondent for answer the following question which he sent to the desk in writing:

You have testified that you were in doubt with reference to the proper construction to be placed upon the testimony of Mr. Compton, and that thereupon you wrote a letter to Helm Bruce, the attorney, asking him for his construction of the evidence; and you have further stated that you attached the reply written by Helm Bruce to the record. It appears in the original record that in the sentence which appears in typewriting, "We did apply it there," an alteration is made by pen and ink, a caret being inserted between the words "did" and "apply," and a line is drawn from the caret to the margin, and the word "not" written. Did you make this alteration?

On motion of Mr. Clark, of Wyoming, the doors were closed for deliberation. After one hour and four minutes the doors were reopened, and the President pro tempore announced that the Senate in private conference had determined that the question should not be asked. Mr. Reed withdrew the request.

On January 11,[33] upon the approval of the minutes, Mr. Clark, of Wyoming, moved that the doors be closed for deliberation on the parts of the Senators, and the question was put, when Mr. Manager Clayton said:

Before the motion is announced as having been carried, I will state that I submitted a communication to the President of the Senate this morning directing attention to what I think is an infraction of the rules of the Senate on the part of Mr. Worthington, of counsel for the respondent, who has withheld his remarks from the Record.

Mr. President, everyone else printed his remarks when those remarks were completed without withholding them, and I know of no rule of any court which permits this to be done. Against that, Mr. President, I desire to say that I think it is improper. I have called the attention of the Presiding Officer to that fact, and I hope that the order made in this case will be observed.

Mr. Worthington said:

I have only to say, Mr. President, that after the late hour when we adjourned here last night, as soon as possible I got to work at the manuscript which had been forwarded to me and continued to work on it until midnight. I was then told that it was too late to get it in the Record of to-day.

I was not aware of any rule of the Senate which prevented this from being done, and I observed I think that the remarks of one of the managers, Mr. Manager Howland, had been withheld.

To which Mr. Manager Clayton rejoined:

Mr. President, may I not make, with the permission of the Senator, another suggestion? The manager who is now addressing you remained at his office last night until the hour of 12:30 in order to read the manuscript of the report of his remarks made here yesterday, made after the gentleman who has just addressed you made his. And it will be borne in mind that Mr. Worthington made part of his argument day before yesterday.

Mr. President, it seems to me that in all fairness and due observance of this rule his remarks should have been in the Record this morning. This manager, who labored under greater disadvantage than he did, has put his in the Record this morning.

[32] Record, p. 1329.
[33] Record, p. 1385.

Mr. Frank B. Brandegee, of Connecticut, having made the point of order that the motion to close the doors is not debatable, the President pro tempore said:

The Chair withheld the announcement of the vote out of courtesy to the manager on the part of the House of Representatives, which the Chair supposed would meet with the acquiescence and approval of the Senate. Strictly, of course, the order to close the doors ought to have been made, but this was the only opportunity, and the manager on the part of the House of Representatives, in the opinion of the Chair, was entitled to that courtesy. The Chair will now, however, declare that the motion of the Senator from Wyoming is carried, and the Sergeant at Arms is directed to clear the galleries and close the doors.

The doors having been reopened, on motion of Mr. Clark of Wyoming, it was severally:

Ordered, That on Monday, January 13, 1913, at the hour of 1 o'clock p. m., a final vote be taken on the articles of impeachment presented by the House of Representatives against Robert W. Archbald, additional circuit judge of the United States.

Ordered, That the Secretary of the Senate do acquaint the House of Representatives that the Senate sitting as a High Court of Impeachment will on Monday, the 13th day of January instant, at the hour of 1 o'clock, p. m., proceed to pronounce judgment on the articles of impeachment exhibited by the House of Representatives against Robert W. Archbald.

Mr. Elihu Root of New York then submitted the following:

Ordered, That upon the final vote in the pending case each Senator may, in giving his vote, state his reasons therefor, occupying not more than one minute, which reason shall be entered in the Journal in connection with his vote; and each Senator may, within two days after the final vote, file his opinion, in writing, to be published in the printed proceedings in the case.

Mr. McCUMBER. I move to amend the proposed order by striking out the first of it, relating to the one-minute explanation of a vote, so that the latter portion may still stand.

The amendment was agreed to, yeas 40, nays 31, and the order as amended was unanimously adopted.

512. The Archbald impeachment, continued.

Forms of voting on the articles and declaring the results in the Archbald impeachment.

The Presiding Officer announced the result of the vote on each article of the Archbald impeachment and the conviction or acquittal of respondent on each.

The respondent, who had attended throughout the Archbald trial, was represented by counsel, but not present at the time of rendering judgment.

Having found Judge Archbald guilty, the Senate proceeded to pronounce judgment of removal and disqualification.

The Presiding Officer held that the question on removal and disqualification was divisible.

Form of judgment pronounced by the Presiding Officer in the Archbald case.

The Archbald trial being concluded, the Senate, on motion, adjourned without day.

No report, on the conclusion of the Archbald trial, was made to the House by the managers, but the Senate, by message, announced the judgment.

On January 13,[34] the President pro tempore announced that the time had arrived for the consideration of the impeachment. Mr. Worthing-

[34] Third session Sixty-second Congress, Senate Journal, p. 326; Record, p. 1438.

ton, Mr. Robert W. Archbald, jr., and Mr. Martin, of counsel for the respondent, and the managers on the part of the House of Representatives appeared in the seats provided for them.

The Sergeant at Arms made the usual proclamation and the Journal was read and approved.

On motion of Mr. Root, it was:

Ordered, That upon the final vote in the pending impeachment the Secretary shall read the articles of impeachment successively, and when the reading of each article is concluded the Presiding Officer shall state the question thereon as follows:

"Senators, How say you? Is the respondent, Robert W. Archbald, guilty or not guilty as charged in this article?"

Thereupon the roll of the Senate shall be called, and each Senator as his name is called shall arise in his place and answer "guilty" or "not guilty."

Several Senators were by unanimous consent excused from voting on plea of having been unavoidably detained from the Senate during a portion of the trial or having come into the Senate since the beginning of the trial. Other Senators were excused from voting on those articles specifying offenses occurring prior to appointment of the respondent as circuit judge, expressing themselves as entertaining doubts as to his impeachability for offenses committed in an office other than that he held at time of impeachment. Mr. Benjamin R. Tillman, of South Carolina, was excused from voting on all save the first count. The Speaker pro tempore, as presiding officer, was also excused from voting except in the case of an article where his vote would affect the result.

By direction of the President pro tempore, the first article of impeachment was read.

The PRESIDENT PRO TEMPORE.

The Chair now submits article 1 to the judgment of the Senate.

Senators, how say you? Is the respondent, Robert W. Archbald, guilty or not guilty as charged in this article? The Secretary will call the roll of the Senate for the separate response of each Senator.

The roll was called and the President pro tempore announced:

It appears from the response given by Senators that 68 Senators voted guilty and 5 Senators have voted not guilty. More than two-thirds of the Senators having voted guilty, the Senate adjudges the respondent, Robert W. Archbald, guilty as charged in the first article of impeachment.

The Secretary proceeded to read the second article, when Mr. Hoke Smith, of Georgia, moved that the Senate close the doors and go into secret session.

Mr. CULBERSON. Mr. President, a point of order. The Senate has already decided to vote at this hour on the articles of impeachment.

The President pro tempore said:

That is true; and in the absence of any order to the contrary, that order would undoubtedly be carried out. It is, however, for the Senate to determine whether it will at any time suspend that order. It is not a matter of unanimous consent, but it is an order which can be changed or not changed, as the Senate may see proper to do.

Pending the vote, Mr. Worthington inquired:

Mr. President, before the question is put, I ask, if the motion be carried, whether it will result in excluding counsel for the respondent from the Senate Chamber?

The PRESIDENT PRO TEMPORE. Yes; it would, while the Senate was in secret deliberation, exclude everybody except Senators and those who are privileged under such circumstances.

Mr. WORTHINGTON. I trust that nothing will be done which will exclude counsel for the respondent while the vote is being taken.

The PRESIDENT PRO TEMPORE. There will be no vote taken in secret session; there can not be. The question is on the motion of the Senator from Georgia [Mr. Smith], to now close the doors.

Thereupon Mr. Smith withdrew his motion.

The remaining articles of impeachment were read by the Secretary, and at the conclusion of the reading of each article the roll was called. After each roll call the vote was recapitulated and the President pro tempore announced the result.

The results were as follows:

	Guilty	Not guilty
Article 1	68	5
Article 2	46	25
Article 3	60	11
Article 4	52	20
Article 5	66	6
Article 6	24	45
Article 7	29	36
Article 8	22	42
Article 9	23	39
Article 10	1	65
Article 11	11	51
Article 12	19	46
Article 13	42	20

At the conclusion of the voting Mr. James A. O'Gorman, of New York, presented the following:

Ordered, That the respondent, Robert W. Archbald, circuit judge of the United States from the third judicial circuit and designated to serve in the Commerce Court, be removed from office and be forever disqualified from holding and enjoying any office of honor, trust, or profit under the United States.

A division being demanded, the first portion of the order was agreed to.

The question being taken on the second portion of the order, it was decided in the affirmative—yeas 39, nays 35. So the order was adopted.

The President pro tempore thereupon pronounced the judgment of the Senate as follows:

The Senate therefore do order and decree, and it is hereby adjudged, that the respondent Robert W. Archbald, circuit judge of the United States from the third judicial circuit, and designated to serve in the Commerce Court, be, and he is hereby, removed from office; and that he be and is hereby forever disqualified to hold and enjoy any office of honor, trust, or profit under the United States.

On motion of Mr. Gallinger, it was:

Resolved, That the Secretary be directed to communicate to the President of the United States and to the House of Representatives the foregoing order and judgment of the Senate and transmit a certified copy of the same to each.

Whereupon, on motion of Mr. Gallinger, the Senate, sitting for the trial of the article of impeachment against Robert W. Archbald, adjourned without day.

On January 14, in the House, a message was received from the Senate, by one of its clerks, announcing that the Senate had passed the following order:

Ordered, That the respondent, Robert W. Archbald, circuit judge of the United States from the third judicial circuit, and designated to serve in the Commerce Court, be removed from office and be forever disqualified from holding and enjoying any office of honor, trust, or profit under the United States.

Resolved, That the Secretary be directed to communicate to the President of the United States and to the House of Representatives the foregoing order and judgment of the Senate and transmit a certified copy of the same to each.

No report was made by the managers to the House.

The Impeachment and Trial of Harold Louderback [1]

513. The impeachment and trial of Harold Louderback, Judge of the Northern District of California.

Instances wherein the local bar association initiated proceedings by recommending impeachment.

The impeachment proceedings were set in motion through a resolution introduced by delivery to the Clerk and referred to the Committee on the Judiciary.

Form of resolution authorizing investigation with a view to impeachment.

On May 26, 1932,[2] Mr. Fiorello H. LaGuardia, of New York, introduced, by delivery at the Clerk's desk, the following resolution (H. Res. 329):

Resolved, That a special committee of five Members of the House of Representatives who are members of the Committee on the Judiciary of the House, the same to be designated by the chairman of said committee, be, and is hereby, authorized and directed to inquire into the official conduct of Harold Louderback, a district judge of the United States District Court for the Northern District of California, and to report to the Committee on the Judiciary of the House whether in their opinion the said Harold Louderback has been guilty of any acts which in contemplation of the Constitution are high crimes or misdemeanors requiring the interposition of the constitutional powers of the House; and that the said special committee have power to hold meetings in the city of Washington, D. C., and elsewhere, and to send for persons and papers, to administer the customary oaths to witnesses, all process to be signed by the Clerk of the House of Representatives under its seal and be served by the Sergeant at Arms of the House or his special messenger; to sit during the session of the House and until adjournment of the first session of the Seventy-second Congress and thereafter until said inquiry is completed, and report to the Committee on the Judiciary of the House; and be it further

[1] Cannon's Precedents, vol. 6, p. 709 (1936).
[2] First session Seventy-second Congress, Record, p. 11358.

Resolved, That said special committee be, and the same is hereby, authorized to employ such stenographic, clerical, and other assistance as they may deem necessary; and all expenses incurred by said special committee, including the expenses of such committee when sitting in or outside the District of Columbia, shall be paid out of the contingent fund of the House of Representatives on vouchers ordered by said committee, signed by the chairman of said committee: *Provided, however*, That the total expenditures authorized by this resolution shall not exceed the sum of $5,000.

The resolution was referred to the Committee on the Judiciary, which reported it back on May 31 [3] with the conclusion that—

the committee feels that under the circumstances the matter of Judge Louderback's conduct should be investigated.

On June 9,[4] on motion of Mr. Hatton W. Sumners, of Texas, from the Committee on the Judiciary, by unanimous consent, the House proceeded to the consideration of the resolution and after brief debate agreed to it without division.

Mr. Sumners included as a part of his remarks a letter from the Bar Association of San Francisco reciting certain occurrences leading up to the proposal of impeachment as follows:

SAN FRANCISCO, CALIF., *May 24, 1932.*

JUDICIARY COMMITTEE,
House of Representatives, Washington, D.C.

SIRS: Under date of May 2, 1932, the Bar Association of San Francisco addressed a communication to His Excellency Herbert Hoover, President of the United States, with reference to certain matters published in the press of San Francisco concerning Hon. Harold C. Louderback, judge of the United States district court at San Francisco, Calif., accompanying said communication with clippings from San Francisco newspapers.

Under date of May 9, 1932, we received an acknowledgment of said communication from Mr. Lawrence Richey, Secretary to the President, stating that the matter "is being referred for consideration of the Attorney General," and thereafter we received a letter dated May 12, 1932, from Mr. Charles P. Sisson, Assistant Attorney General, stating in effect that our letter addressed to the President had been referred to the Department of Justice for consideration, and further stating "that the Department of Justice has no jurisdiction whatsoever over the United States judges. Criticisms of Federal judges are ordinarily addressed to the Judiciary Committee of the House of Representatives."

Pursuant to the suggestion contained in the letter from the Assistant Attorney General, we are hereby addressing your honorable committee and forwarding copies of the above-mentioned correspondence, together with duplicate press clippings, for such action as your committee may deem proper.

We feel certain that you will readily realize that the interest of the Bar Association of San Francisco in this matter is solely a public one and that it is concerned only in preserving the integrity of the bench, public confidence in, and respect for, the courts and the due administration of justice. We believe that no department of the Government should occupy a higher position in the public mind, or performs a more important function, than that of the courts, and that it is of the utmost importance they shall be maintained on a plane of the strictest honesty and efficiency and shall be above suspicion. Charges against a court or judge, especially when publicly made, require thorough investigation, not only in the interest of the public and report for our judicial system but also in the interest of the incumbent.

If your committee should undertake an investigation of the matters in question, our association will cheerfully render such assistance as is within its power, in the hope that whatever the outcome may be the result will contribute to the maintenance of public confidence in our courts.

Respectfully submitted.

BAR ASSOCIATION OF SAN FRANCISCO,
By RANDOLPH V. WHITING, *President.*

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[3] House report No. 1461.
[4] Record, p. 12470.

514. The special committee authorized to conduct the investigation held hearings at which Judge Louderback appeared in person and by counsel.

A resolution proposing abatement of impeachment proceedings was held to be of high privilege.

The member reporting a bill from a committee is entitled to recognition when the bill is taken up for consideration in the House.

The House, disregarding the majority report of the committee, adopted the minority recommendation and passed articles of impeachment.

The House by resolution elected five managers, chosen from the Committee on the Judiciary and from both parties, to carry the impeachment of Judge Louderback to the Senate.

Pursuant to the terms of the resolution, a special committee was appointed by the Chairman of the Committee on the Judiciary, from the membership of the committee, consisting of Mr. Sumners, Mr. Tom D. McKeown, of Oklahoma, Mr. Gordon Browning, of Tennessee, Mr. Leonidas C. Dyer, of Missouri, and Mr. LaGuardia.

The special committee held hearings in San Francisco the week of September 6, 1932, at which Judge Louderback was presented by counsel, and in Washington, January 16 and 17, at which he appeared in person.

The special committee then submitted a divided report to the Committee on the Judiciary.

On February 17, 1933,[5] Mr. McKeown, by direction of the Committee on the Judiciary, presented a report to the effect that the special committee authorized to conduct the investigation had transmitted its conclusions to the Committee on the Judiciary, and that after consideration of the findings—

> The committee censures the judges for conduct prejudicial to the dignity of the judiciary in appointing incompetent receivers, for the method of selecting receivers, for allowing fees that seem excessive, and for a high degree of indifference to the interest of litigants in receiverships.

The committee, however, did not consider the circumstances sufficient flagrant to warrant impeachment and recommended the adoption of this resolution:

> *Resolved*, That the evidence submitted on the charges against Honorable Harold Louderback, district judge for the northern district of California, does not warrant the interposition of the constitutional powers of impeachment of the House.

The minority dissented from the majority recommendation and, after summarizing the several charges of misconduct involved, proposed articles of impeachment.

On February 24, 1933,[6] Mr. Sumners, who had submitted minority views, rising in the House, asked whether he as Chairman of the Committee on the Judiciary or the Member reporting the resolution by direction of the committee, was entitled to recognition to debate it.

The Speaker[7] replied:

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[5] H. Rept. No. 2065.
[6] Second session Seventy-second Congress, Record, p. 4913.
[7] John N. Garner, of Texas, Speaker.

The usual custom is that the Member who has been directed by the committee to report the bill and who reports the legislation coming before the House is the one the Chair recognizes.

Whereupon, the Speaker recognized Mr. McKeown, who called up the resolution reported by the committee.

Mr. Bertrand H. Snell, of New York, inquired whether a resolution of this character could be considered as privileged.

The Speaker replied that, inasmuch as it related to the abatement of impeachment proceedings, it was of the highest privilege.

In the course of the debate on the resolution, Mr. LaGuardia offered the following as a substitute:

Resolved, That Harold Louderback, who is a United States district judge of the northern district of California, be impeached of misdemeanors in office; and that the evidence heretofore taken by the special committee of the House of Representatives under House Resolution 239 sustains five articles of impeachment, which are hereinafter set out; and that the said articles be, and they are hereby, adopted by the House of Representatives, and that the same shall be exhibited to the Senate in the following words and figures, to wit:

Articles of impeachment of the House of Representatives of the United States of America in the name of themselves and of all of the people of the United States of America against Harold Louderback, who was appointed, duly qualified, and commissioned to serve during good behavior in office as United States district judge for the northern district of California on April 17, 1928.

(The substitute then set forth the articles of impeachment proposed by the minority.)

After extended debate, the substitute was agreed to on a yea and nay vote, and on February 27,[8] on motion of Mr. Sumners, it was—further:

Resolved, That Hatton W. Sumners, Gordon Browning, Malcolm C. Tarver, Fiorello H. LaGuardia, and Charles I. Sparks, Members of this House, be, and they are hereby, appointed managers to conduct the impeachment against Harold Louderback, United States district judge for the northern district of California; and said managers are hereby instructed to appear before the Senate of the United States and at the bar thereof in the name of the House of Representatives and of all the people of the United States to impeach the said Harold Louderback of misdemeanors in office and to exhibit to the Senate of the United States the articles of impeachment against said judge which have been agreed upon by the House; and that the said managers do demand the Senate take order for the appearance of said Harold Louderback to answer said impeachment, and demand his impeachment, conviction, and removal from office.

Of the five managers thus selected to conduct the impeachment proceedings on behalf of the House, three were of the majority party, two were of the minority, and all were members of the Committee on the Judiciary.

515. The ceremonies of presenting to the Senate the articles of impeachment.

The impeachment proceedings having been presented in the Senate during the closing days of the Seventy-second Congress, were made the special order for the first day of the first session of the succeeding Congress.

A decision holding that a motion relating to a question of the Senate sitting as a court of impeachment is not debatable.

The Senate having been informed, on February 28,[9] by message, of the action [10] of the House of Representatives, transmitted to the House on the same day [11] a message announcing its readiness to receive the

[8] Second session Seventy-second Congress, Record, p. 5177.
[9] H. Res. 403, Record, p. 5178.
[10] Record, p. 5193.
[11] Record, p. 5195.

managers appointed by the House for the purpose of exhibiting the articles of impeachment.

On March 3,[12] the managers on the part of the House appeared before the Senate and were received with the formalities customarily observed on such occasions.

Mr. Manager Summers read the resolution [13] agreed to by the House appointing its managers, and yielded to Mr. Manager Browning, who read the articles of impeachment, as follows:

ARTICLES OF IMPEACHMENT AGAINST HAROLD LOUDERBACK

CONGRESS OF THE UNITED STATES OF AMERICA,

IN THE HOUSE OF REPRESENTATIVES,

February 24, 1933.

Resolution

Resolved, That Harold Louderback, who is a United States district judge of the northern district of California, be impeached of misdemeanors in office; and that the evidence heretofore taken by the special committee of the House of Representatives under House Resolution 239, sustains five articles of impeachment, which are hereinafter set out; and that the said articles be, and they are hereby, adopted by the House of Representatives, and that the same shall be exhibited to the Senate in the following words and figures, to wit:

Articles of impeachment of the House of Representatives of the United States of America in the name of themselves and of all of the people of the United States of America against Harold Louderback, who was appointed, duly qualified, and commissioned to serve during good behavior in office, as United States district judge for the northern district of California, on April 17, 1928.

ARTICLE I

That the said Harold Louderback, having been nominated by the President of the United States, confirmed by the Senate of the United States, duly qualified and commissioned and while acting as a district judge for the northern district of California did on divers and various occasions so abuse the power of his high office, that he is hereby charged with tyranny and oppression, favoritism and conspiracy, whereby he has brought the administration of justice in said district in the court of which he is a judge into dispute, and by his conduct is guilty of misbehavior, falling under the constitutional provision as ground for impeachment and removal from office.

In that the said Harold Louderback or about the 13th day of March, 1930, at his chambers and in his capacity as judge aforesaid, did willfully, tyrannically, and oppressively discharge one Addison G. Strong, whom he had on the 11th day of March, 1930, appointed as equity receiver in the matter of Olmsted against Russell-Colvin Co. after having attempted to force and coerce the said Strong to appoint one Douglas as attorney for the receiver in said case.

In that the said Harold Louderback improperly did attempt to cause the said Addison G. Strong to appoint the said Douglas Short as attorney for the receiver by promises of allowance of large fees and by threats of reduced fees did he refuse to appoint said Douglas Short.

In that the said Harold Louderback improperly did use his office and power of district judge in his own personal interest by causing the appointment of the said Douglas Short as attorney for the receiver, at the instance, suggestion or demand of one Sam Leake, to whom the said Harold Louderback was under personal obligation, the said Sam Leake having entered into a certain arrangement and conspiracy with the said Harold Louderback to provide him, the said Harold Loulerback, with a room at the Fairmont Hotel in the city of San Francisco, Calif., and made arrangements for registering said room in his, Sam Leake's name and paying all bills therefor in cash under an arrangement with

[12] Record, p. 5473.
[13] H. Res. 402, Record, p. 5177.

the said Harold Louderback, to be reimbursed in full or in part in order that the said Harold Louderback might continue to actually reside in the city and county of San Francisco after having improperly and unlawfully established a fictitious residence in Contra Costa County for the sole purpose of improperly removing for trial to said Contra Costa County a cause of action which the said Harold Louderback expected to be filed against him; and that the said Douglas Short did receive large and exorbitant fees for his services as attorney for the receiver in said action, and the said Sam Leake did receive certain fees, gratuities, and loans directly or indirectly from the said Douglas Short amounting approximately to $1,200.

In that the said Harold Louderback entered into a conspiracy with the said Sam Leake to violate the provisions of the California Political Code establishing a residence in the county of Contra Costa when the said Harold Louderback in fact did not reside in said county and could not have established a residence without the concealment of his actual residence in the county of San Francisco, covered and concealed by means of the said conspiracy with the said Sam Leake, all in violation of the law of the State of California.

In that the said Harold Louderback, in order to give cover to his fictitious residence in the county of Contra Costa, all for the purpose of preparing and falsely creating proof necessary to establish himself as a resident of Contra Costa County in anticipation of an action he expected to be brought against him, for the sole purpose of meeting the requirements of the Code of Civil Procedure of the State of California providing that all causes of action must be tried in the county in which the defendant resides at the commencement of the action, did in accordance with the conspiracy entered into with the said Sam Leake unlawfully register as a voter in said Contra Costa County, when in law and in fact he did not reside in said county and could not so register, and that the said acts of Harold Louderback constitute a felony defined by section 42 of the Penal Code of California.

Wherefore the said Harold Louderback was and is guilty of a course of conduct improper, oppressive, and unlawful and is guilty of misbehavior in office as such judge and was and is guilty of a misdemeanor in office.

ARTICLE II

That Harold Louderback, judge as aforesaid, was guilty of a course of improper and unlawful conduct as a judge, filled with partiality and favoritism in improperly granting excessive, exorbitant, and unreasonable allowances as disbursements to one Marshall Woodward and to one Samuel Shortridge, jr., as receiver and attorney, respectively, in the matter of the Lumbermen's Reciprocal Association.

And in that the said Harold Louderback, judge as aforesaid, having improperly acquired jurisdiction of the case of the Lumbermen's Reciprocal Association contrary to the law of the United States and the rules of the court did, on or about the 29th day of July, 1930, appoint one Marshall Woodward and one Samuel Shortridge, jr., receiver and attorney, respectively, in said case, and after an appeal was taken from the order and other acts of the judge in said case to the United States Circuit Court of Appeals for the Ninth Circuit and the said order and acts of the said Harold Louderback having been reversed by said United States Circuit Court of Appeals and the mandate of said circuit court of appeals directed the court to cause the said receiver to turn over all of the assets of said association in his possession as receiver to the commissioner of insurance of the State of California, the said Harold Louderback unlawfully, improperly, and oppressively did sign and enter an order so directing the receiver to turn over said property to said State commissioner of insurance but improperly and unlawfully made such order conditional that the said State commissioner of insurance and any other party in interest would not take an appeal from the allowance of fees and disbursements granted by the said Harold Louderback to the said Marshall Woodward and Samuel Shortridge, jr., receiver and attorney, respectively, thereby improperly using his said office as a district judge to favor and enrich his personal and political friends and associates to the detriment and loss of litigants in his, said judge's court, and forcing said State commissioner of insurance and parties in interest in said action unnecessary delay, labor, and expense in protecting the rights of all parties against such arbitrary, improper, and unlawful order of said judge; and that the said Harold Louderback did improperly

and unlawfully seek to coerce said State commissioner of insurance and parties in interest in said action to accept and acquiesce in the excessive fees and the exorbitant and unreasonable disbursements granted by him to said Marshall Woodward and Samuel Shortridge, jr., receiver and attorney, respectively, and did improperly and unlawfully force and coerce the said parties to enter into a stipulation modifying said improper and unlawful order and did thereby make it necessary for the State commissioner of insurance to take another appeal from the said arbitrary, improper, and unlawful action of the said Harold Louderback.

In that the said Harold Louderback did not give his fair, impartial, and judicial consideration to the objections of the said State commissioner of insurance against the allowance of excessive fees and unreasonable disbursements to the said Marshall Woodward and Samuel Shortridge, jr., receiver and attorney, respectively, in the case of the Lumbermen's Reciprocal Association, in order to favor and enrich his friends at the expense of the litigants and parties in interest in said matter, and did thereby cause said State commissioner of insurance and the parties in interest additional delay, expense, and labor in taking an appeal to the United States Circuit Court of Appeals in order to protect their rights and property in the matter against the partial, oppressive, and unjudicial conduct of said Harold Louderback.

Wherefore, said Harold Louderback was and is guilty of a course of conduct oppressive and unjudicial and is guilty of misbehavior in office as such judge and was and is guilty of a misdemeanor in office.

ARTICLE III

The said Harold Louderback, judge aforesaid, was guilty of misbehavior in office resulting in expense, disadvantage, annoyance, and hindrance to litigants in his court in the case of the Fageol Motor Co., for which he appointed one Guy H. Gilbert receiver, knowing that the said Gilbert was incompetent, unqualified, and inexperienced to act as such receiver in said case.

In that the said Harold Louderback, judge as aforesaid, oppressively and in disregard of the rights and interests of litigants in his court did appoint one Guy H. Gilbert as receiver for the Fageol Motor Co., knowing the said Guy H. Gilbert to be incompetent, unfit, and inexperienced for such duties, and did refuse to grant a hearing to the plaintiff, defendant, creditors, and parties in interest in the matter of the Fageol Motor Co. on the appointment of said receiver, and the said Harold Louderback did cause said litigants and parties in interest in said matter to be misinformed of his action while said Guy H. Gilbert took steps necessary to qualify as receiver, thereby depriving said litigants and parties in interest of presenting the facts, circumstances, and conditions of the said equity receivership, the nature of the business and the type of person necessary to operate said business in order to protect creditors, litigants, and all parties in interest, and thereby depriving said parties in interest of the opportunity of protesting against the appointment of an incompetent receiver.

Wherefore the said Harold Louderback was and is guilty of a course of conduct constituting misbehavior as said judge and that said Harold Louderback was and is guilty of a misdemeanor in office.

ARTICLE IV

That the said Harold Louderback, judge aforesaid, was guilty of misbehavior in office, filled with partiality and favoritism, in improperly, willfully, and unlawfuly granting on insufficient and improper papers an application for the appointment of a receiver in the Prudential Holding Co. case for the sole purpose of benefiting and enriching his personal friends and associates.

In that the said Harold Louderback did on or about the 15th day of August, 1931, on insufficient and improper application, appoint one Guy H. Gilbert receiver for the Prudential Holding Co. case when as a matter of fact and law and under conditions then existing no receiver should have been appointed, but the said Harold Louderback did accept a petition verified on information and belief by an attorney in the case and without notice to the said Prudential Holding Co. did so appoint Guy H. Gilbert the receiver and the firm of Dinkelspiel and Dinkelspiel attorneys for the receiver; that the said Harold Louderback in an attempt to benefit and enrich the said Guy H. Gilbert and his attorneys, Dinkelspiel and Dinkelspiel, failed to give his fair, impartial, and judicial consideration to the application of the said Prudential Holding Co. for a dismissal of the petition and a discharge of the receiver, although the said Prudential Holding Co. was in

law entitled to such dismissal of the petition and discharge of the receiver; that during the pendency of the appliction for the dismissal of the petition and for the discharge of the receiver a petition in bankruptcy was filed against the said Prudential Holding Co. based entirely and solely on an allegation that a receiver in equity had been appointed for the said Prudential Holding Co., and the said Harold Louderback then and there willfully, improperly, and unlawfully, sitting in a part of the court to which he had not been assigned at the time, took jurisdiction of the case in bankruptcy and though knowing the facts in the case and of the application then pending before him for the dismissal of the petition and the discharge of the equity receiver, granted the petition in bankruptcy and did on the 2d day of October, 1930, appoint the same Guy H. Gilbert receiver in bankruptcy and the said Dinkelspiel and Dinkelspiel attorneys for the receiver, knowing all of the time that the said Prudential Holding Co. was entitled as a matter of law to have the said petition in equity dismissed; in that through the oppressive, deliberate, and willful action of the said Harold Louderback acting in his capacity as a judge and misusing the powers of his judicial office for the sole purpose of benefiting and enriching said Guy H. Gilbert and Dinkelspiel and Dinkelspiel, did cause the said Prudential Holding Co. to be put to unnecessary delay, expense, and labor and did deprive them of a fair, impartial, and judicial consideration of their rights and the protection of their property, to which they were entitled.

Wherefore the said Harold Louderback was, and is, guilty of a course of conduct constituting misbehavior as said judge and that said Harold Louderback was, and is, guilty of a misdemeanor in office.

ARTICLE V

That Harold Louderback, on the 17th day of April, 1928, was duly appointed United States district judge for the northern district of California, and has held such office to the present day.

That the said Harold Louderback as judge aforesaid, during his said term of office, at divers times and places when acting as such judge, did so conduct himself in his said court and in his capacity as judge in making decisions and orders in actions pending in his said court and before him as said judge, and in the method of appointing receivers and attorneys for receivers, in appointing incompetent receivers, and in displaying a high degree of indifference to the litigants in equity receiverships, as to excite fear and distrust and to inspire a widespread belief in and beyond said northern district of California that causes were not decided in said court according to their merits, but were decided with partiality and with prejudice and favoritism to certain individuals, particularly to receivers and attorneys for receivers by him so appointed, all of which is prejudicial to the dignity of the judiciary.

All to the scandal and disrepute of said court and the administration of justice therein.

Wherefore the said Harold Louderback was, and is, guilty of misbehavior as such judge and of a misdemeanor in office.

[SEAL.]

JNO. N. GARNER,
Speaker of the House of Representatives.

Attest:
SOUTH TRIMBLE, *Clerk.*

Mr. Manager Sumners then entered a reservation of the right to exhibit at any time thereafter any further articles of accusation or impeachment, and made formal announcement that the managers on the part of the House of Representatives—

do now demand that the Senate take order for the appearance of said Harold Louderback to answer said impeachment, and do now demand his impeachment, conviction, and removal from office.

The Vice President responded:

The Chair will state to the managers on the part of the House that the Senate will take proper order on the subject of impeachment, of which due notice shall be given to the House of Representatives.

On motion of Mr. George W. Norris, of Nebraska, the articles of impeachment were ordered printed for the use of the Senate.

Mr. Norris further submitted:

Mr. President, under the Rules of the Senate governing impeachment trials, it would be the duty of the Senate to-morrow at 1 o'clock to organize itself into a court and take the necessary oath, and then proceed with the trial.

It is evident that we shall not be able to comply with the rules now, because this session of Congress will adjourn at 12 o'clock to-morrow, and therefore I ask unanimous consent that the further consideration of the impeachment charges presented by the managers on the part of the House of Representatives be deferred until 2 o'clock on the first day of the first session of the Seventy-third Congress.

The Vice President submitted the request to the Senate, when Mr. Huey P. Long, of Louisiana, objected.

Thereupon, Mr. Norris moved that the impeachment proceedings be made the special order for 2 o'clock on the first day of the first session of the Seventy-third Congress.

Mr. Henry F. Ashurst, of Arizona, addressed the Chair and asked for recognition to debate the motion.

The Vice President held that inasmuch as the motion related to a question of the Senate sitting as a Court of Impeachment, it was not debatable, and recognized all who addressed themselves to the question by unanimous consent only.

Discussion by consent having been concluded, the motion was agreed to; the managers on the part of the House withdrew; and the Senate proceeded to its legislative business.

516. The organization of the Senate for the impeachment trial of Judge Louderback.

A Senator was designated by resolution to administer the oath to the Presiding Officer, who in turn administered the oath simultaneously to all Senators standing in their places.

Certain Senators on their statements were excused from participation in the impeachment proceedings.

Various Senators were excused from voting on a part or all of the articles of impeachment.

On March 9, 1933,[14] the Senate, sitting as a Court of Impeachment, met at 2 o'clock p.m. under its previous order.

On motion of Mr. Norris, Mr. William F. Borah, of Idaho, was designated by the Senate to administer the oath to the presiding officer of the Court of Impeachment.

Mr. Borah administered the oath to the Vice President as follows:

You do solemnly swear that in all things appertaining to the trial of the impeachment of Harold Louderback, a district judge for the northern district of California, now pending, you will do impartial justice according to the Constitution and laws. So help you God.

Mr. Borah then announced:

Mr. President. I want to make a personal statement before the oath is taken. I feel that I ought not to sit in this matter by reason of some things which transpired at the time of the appointment of Judge Louderback. The question which I wish to submit now is, Should I make that excuse definite at this time or will it be proper after the oath is taken?

Mr. Ashurst suggested:

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[14] First session, Seventy-third Congress, Record, p. 47.

In my judgment, such statement should be made after Senators shall have taken the oath as members of the court; only the court should excuse Senators from duties to be performed in the court. Care should be taken as to establishing precedents. In strict practice, under the English procedure and under the American procedure, there is no such thing as an impeachment juror or Senator escaping from his responsibility to compose the court. Indeed, in the Andrew Johnson impeachment case, Senator Ben F. Wade, then the President pro tempore, who would have become President had the impeachment succeeded, was asked to stand aside, but it was determined that there was no way by which he, Senator Wade, could be disqualified, and thus made to stand aside. But I am sure, if a Senator should declare that he is disqualified, he could not and should not be required to hear evidence or to render a verdict.

Mr. Hiram W. Johnson, of California, dissented and said:

Mr. President, in order that the matter may be brought to a head, I ask unanimous consent of those who sit here as a court of impeachment or are about to take the oath as jurors or Senators in the court of impeachment, that I be permitted to stand aside in this trial. There are certain incidents which have occurred which, in my opinion, render it improper that I should sit as a judge in this case. I do not wish to detail them, of course, because I feel that in the detailing of them I might do or say something which ought not to be done or said. But while certain of myself, Mr. President, perhaps feeling that I might lean backward one way or the other in a case of this sort, I do not think that I ought to sit in the case, and I ask unanimous consent of the Senate that I may stand aside in the trial of Harold Louderback about to begin.

The question being put, there was no objection and the Vice President announced that the Senator from California was excused.

A similar request by Mr. Borah was agreed to.

Subsequently,[15] Mr. John H. Overton, of Louisiana, requested:

Mr. President, I wish to make a statement. I was a Member of the House of Representatives at the time the articles of impeachment were preferred against Judge Louderback. I voted against the impeachment. I thought that matter should be tendered to the Chair and Members of the Senate before the court convened; but other Senators occupy the same position that I occupy and I wished to consult with them before making the statement. After consulting with them and consulting with some senior Senators who are experienced in such matters, I have come to the conclusion that under all the circumstances it would be proper that I ask to be excused from sitting as a member of the court which I accordingly do.

The request was granted.

Requests by Mr. Augustine Lonergan,[16] of Connecticut, and Mr. William H. Dieterich,[17] of Illinois, to be excused for the same reason were likewise agreed to.

Thereupon the Vice President said:

Will members of the court permit the Chair to make a statement? The Chair presided in the House at the time impeachment proceedings were considered by that body. The Chair did not have occasion to vote or in any way express himself concerning the merits of the case. The Chair thought that members of the court ought to know the situation so that if they have any doubt as to the qualifications of the Chair to act as the presiding officer of the court, they may act accordingly.

There was no response.

On May 23,[18] at the conclusion of the testimony in the trial, Mr. Royal S. Copeland, of New York, submitted:

Mr. President, on account of illness, I have been away from the Chamber for a number of days. I have heard none of the testimony, and feel myself incompetent either to vote or to continue as a member of the court. Therefore I ask

[15] First session, Seventy-third Congress, Record, p. 49.
[16] Record, p. 49.
[17] Record, p. 1469.
[18] Record, p. 3994.

unanimous consent that I may be excused from further attendance and from voting in the Impeachment Court.

The request being submitted to the Senate by the Presiding Officer, there was no objection, and Mr. Copeland was excused.

On the succeeding day [19] and following the deliberative session of the Senate immediately preceding the vote on the articles of impeachment, Mr. Carter Glass, of Virginia, requested:

Mr. President, on the advice of the distinguished chairman of the Judiciary Committee, the Senator from Arizona, Mr. Ashurst, I am taking the first and last opportunity to say that I shall ask the Senate to excuse me from voting on these various articles of impeachment, for the reason that other public duties have made it impossible for me to be present and hear more than fragments of the testimony adduced in this proceeding and none of the arguments presented. Therefore I feel that under my oath I am not so advised as to be able to render a verdict as a juror, and I shall ask the Senate to excuse me from voting.

There being no objection, the Senator was excused from voting on the impeachment.

At this stage of the proceedings, by unanimous consent, Mr. Thomas P. Gore, of Oklahoma, was also excused from voting, on account of unavoidable absence, and Mr. Henrik Shipstead, of Minnesota, and Mr. Edward P. Costigan, of Colorado, were excused from voting on the first four articles.

On motion of Mr. Joseph T. Robinson, of Arkansas, by unanimous consent, the oath was administered simultaneously to all the Senators present as follows:

You do each solemnly swear that in all things appertaining to the trial of the impeachment of Harold Louderback, United States district judge for the northern district of California, now pending, you will do impartial justice according to the Constitution and laws. So help you God.

On motion of Mr. Norris it was—

Ordered, That the Secretary notify the House of Representatives that the Senate is now organized for the trial of articles of impeachment against Harold Louderback, United States district judge for the northern district of California, and is ready to receive the managers on the part of the House at its bar.

On March 13, 1933,[20] at the hour previously designated for the court to assemble, the Senate sitting as a Court of Impeachment convened; by unanimous consent, the journal of the court was considered as read and approved; the managers of the impeachment on the part of the House of Representatives appeared, were announced, and conducted to the seats assigned them; and proclamation of the sitting of the court was made by the Sergeant at Arms.

Mr. Ashurst announced that if it met with the approval of the managers on the part of the House he proposed to submit the following:

Ordered, That a summons be issued as required by the rules of procedure and practice in the Senate, when sitting for the trial of the impeachment against Harold Louderback, United States district judge for the northern district of California, returnable on Tuesday, the 11th day of April, 1933, at 12:30 o'clock in the afternoon.

Mr. Manager Sumners, speaking for the managers, approved the form of the order and it was agreed to.

517. Managers of an impeachment being no longer Members of the House by reason of the expiration of their terms, successors were elected.

[19] Record, p. 4082.
[20] Record, p. 260.

Discussion of the power of the House to appoint managers to continue in office in that capacity after the expiration of the term for which they were elected to the House.

A resolution providing for the selection of managers of an impeachment was admitted as a matter of privilege.

Instance wherein the number of managers of an impeachment was increased after the institution of proceedings in the Senate.

On March 22,[21] Mr. Manager Sumners, rising in the House, offered this resolution:

Whereas in the Seventy-second Congress, on 27th day of February, 1933, Hatton W. Sumners, Gordon Browning, Malcolm C. Tarver, Fiorello H. LaGuardia, and Charles I. Sparks, Members of the House of Representatives, were appointed managers on the part of the House of Representatives to conduct the impeachment against Harold Louderback, a United States district judge for the northern district of California; and

Whereas the said LaGuardia and Sparks are no longer Members of the House of Representatives:

Resolved, That Randolph Perkins and U. S. Guyer, Members of the House of Representatives, be, and they are hereby, appointed to serve with the said Hatton W. Sumners, Gordon Browning, and Malcolm C. Tarver as the managers on the part of the House of Representatives to conduct the impeachment pending in the United States Senate against Harold Louderback, United States district judge for the northern district of California.

Mr. Edward W. Goss, of Connecticut, submitted a parliamentary inquiry as to the privilege of the resolution.

The Speaker held it to be privileged.

Mr. Robert Luce, of Massachusetts, raised a question as to the power of the House to appoint managers beyond the term of their office as Representatives.

In reply, Mr. Sumners said:

My judgment, after careful examination, is that the House of Representatives may appoint managers who can continue after the expiration of the term which that House has been elected.

I want to be very candid with the House. I am anxious to go as far as we may safely go toward establishing a precedent in that direction. We find upon examination of the Constitution that there lie between the provisions of the Constitution spaces that have to be filled in either by judicial construction or by precedent. Only precedent can occupy the space, for instance, which lies between the provision granting to the House—not as a part of the Congress, however—the power to originate and prosecute impeachment and that great constitutional guaranty of a speedy trial. Judicial construction may not enter there. We barely escaped a very difficult situation in this case. As the Members of the House here present who were Members of the preceding House will remember, this impeachment was sent to the Senate near the expiration of the Seventy-second Congress. If the Congress had not been called into extraordinary session, in the absence of any recognized right on the part of a House to empower managers to proceed after the expiration of that House, this judge would have rested under impeachment for a year, without possibility of trial, notwithstanding the general principles which run through our whole system of giving the right of speedy trial. Not only is the duty to make effective to the individual a great constitutional right but there is involved a great public interest. Precedents are not unakin to legislative enactments. When established they come to have the force of law. It is as much a duty to set helpful and proper precedents as it is to make wise and helpful laws. I am anxious to go as far in this instance as we may safely go in establishing a proper and helpful precedent.

Mr. Bertrand H. Snell, of New York, questioned the right of the House to extend the powers or privileges of such managers, or other

[21] Record, p. 768.

appointees, beyond the life of the House itself, and after debate, Mr. Sumners withdrew the resolution and reintroduced it in this form:

Whereas in the Seventy-second Congress on the 27th day of February, 1933, Hatton W. Sumner, Gordon Browning, Malcolm C. Tarver, Fiorello H. LaGuardia, and Charles I. Sparks, Members of the House of Representatives, were appointed managers on the part of the House of Representatives to conduct the impeachment against Harold Louderback, a United States district judge for the northern district of California; and

Whereas the said LaGuardia and Sparks are no longer Members of the House of Representatives:

Resolved, That Randolph Perkins and U.S. Guyer, Members of the House of Representatives, be, and they are hereby, appointed in lieu of the said LaGuardia and Sparks to serve with the said Hatton W. Sumners, Gordon Browning, and Malcolm C. Tarver as the managers on the part of the House of Representatives to conduct the impeachment pending in the United States Senate against Harold Louderback, a United States district judge for the northern district of California.

The resolution as revised was agreed to; the Clerk was directed to notify the Senate; and on the motion of Mr. Sumner, it was further—

Resolved, That the managers on the part of the House in the matter of the impeachment of Harold Louderback, United States district judge for the northern district of California, be, and they are hereby, authorized to employ legal, clerical, and other necessary assistants and to incur such experience as may be necessary in the preparation and conduct of the case, to be paid out of the contingent fund of the House on vouchers approved by the managers; and the managers have power to send for persons and papers, and also that the managers have authority to file with the Secretary of the Senate, on the part of the House of Representatives, any subsequent pleadings which they shall deem necessary: *Provided*, That the total expenditures authorized by this resolution shall not exceed $3,230.25, being the amount of the unexpended balance of $5,000 authorized to be expended by the special committee designated under authority of House Resolution 239, Seventy-second Congress, first session, approved June 9, 1932, to inquire into the official conduct of said Harold Louderback.

On March 27,[22] the Chair laid before the House the following communication:

HOUSE OF REPRESENTATIVES,
Washington, D.C., March 27, 1933.

Hon. HENRY T. RAINEY,
Speaker of the House of Representatives, Washington, D.C.

DEAR MR. RAINEY: I hereby submit my resignation as one of the managers on the part of the House in the pending impeachment proceedings against Harold Louderback, a United States judge for the northern district of California.

Yours truly,

M. C. TARVER.

The resignation was accepted, and on April 3,[23] a resolution offered by Mr. Sumners, as privileged, was agreed to and messaged to the Senate as follows:

Whereas Malcolm C. Traver, on the 27th day of March, 1933, submitted to the House of Representatives his resignation as a manager on the part of the House in the pending impeachment against Harold Louderback, a district judge of the United States for the northern district of California, which resignation on said date was accepted by the House of Representatives.

Resolved, That J. Earl Major and Lawrence Lewis, Members of the House of Representatives, be, and they are hereby, appointed managers on the part of the House of Representatives, with the managers on the part of the House heretofore appointed and acting, to conduct the impeachment pending in the United

[22] Record, p. 876.
[23] Record, p. 1155.

States Senate against Harold Louderback, a district judge of the United States for the northern district of California.

518. The respondent having waived personal service, the oath was not administered to the Sergeant at Arms on the return of the writ.

Form of proclamation by the Sergeant at Arms calling Judge Louderback to appear and answer the articles of impeachment.

Judge Louderback appeared in person, attended by counsel, to answer the articles.

The answer of Judge Louderback to the articles of impeachment.

A motion entered by respondent to make more definite and certain an article of the articles of impeachment was agreed to by the managers on the part of the House without action by the Senate.

Allowance of time in which to file pleadings.

On April 11,[24] the managers on the part of the House were received in the Senate with the usual formalities and the respondent, Harold Louderback, and his counsel, James M. Hanley, Esq., and Walter H. Linforth, Esq., appeared and were conducted to the seats assigned to them in the space in front of the Secretary's desk on the right of the Chair.

Mr. Ashurst offered the following resolution:

IN THE SENATE OF THE UNITED STATES,
SITTING AS A COURT OF IMPEACHMENT.

Whereas on March 13, 1933, John N. Garner, Vice President and President of the Senate, acting under authority of the Senate, sitting as a Court of Impeachment, and in accordance with the Rules for Impeachment Trials, issued a writ of summons to Harold Louderback, United States district judge for the northern district of California, commanding him to appear before the Senate of the United States of America at their Chamber in the city of Washington on the 11th day of April, 1933, at 12:30 o'clock afternoon, to answer to articles of impeachment exhibited against him by the House of Representatives of the United States of America, and addressed to Chesley W. Jurney, Sergeant at Arms of the Senate, a precept commanding him to serve true and attested copies of said writ of summons and precept upon the said Harold Louderback personally or by leaving same at his usual place of abode or at his usual place of business; and

Whereas since the recess of the Senate, sitting as a Court of Impeachment, the said Chesley W. Jurney, as Sergeant at Arms, acting upon a suggestion of the Committee on the Judiciary of the Senate, with a view to securing a waiver of personal service of said writ of summons as required by the precept, communicated by telegraph with the said Harold Louderback, who consented to such waiver, and who subsequently forwarded to said Chesley W. Jurney, as Sergeant at Arms, a waiver, in writing, of personal service of said writ of summons, signed by him and witnessed on the 28th day of March, 1933, agreeing voluntarily to appear in person before the Senate of the United States at the time and place specified in said writ of summons and acknowledging receipt of true and attested copies of said writ of summons and precept, transmitted to him by the said Chesley W. Jurney, Sergeant at Arms: Now, therefore, be it

Resolved, That the action of the said Chesley W. Jurney, Sergeant at Arms of the Senate, in securing waiver of personal service of said writ of summons upon the said Harold Louderback be, and the same is hereby, ratified and approved; that the delivery, by registered mail, of true and attested copies of the said writ of summons and precept to the said Harold Louderback, and his acceptance thereof, be deemed and taken to have been a satisfactory and sufficient compliance by the said Chesley W. Jurney, Sergeant at Arms, with the said precept, and that the said Chesley W. Jurney, as Sergeant at Arms, be, and he is hereby, authorized to make return of said writ of summons and precept accordingly.

[24] Record, p. 1462.

The resolution having been agreed to, the Secretary, by direction of the Vice President, read the return of the Sergeant at Arms to the summons as follows:

SENATE OF THE UNITED STATES,
OFFICE OF THE SERGEANT AT ARMS.

The foregoing writ of summons, addressed to Harold Louderback, and the foregoing precept, addressed to me, were duly served upon the said Harold Louderback by the transmittal, by registered mail, to the said Harold Louderback of true and attested copies of the same, and by his receipt thereof, as shown in the attached waiver by the said Harold Louderback of personal service of summons, said waiver being made a part of this return.

CHESLEY W. JURNEY,
Sergeant at Arms, United States Senate.

IN THE SENATE OF THE UNITED STATES, SITTING AS A COURT OF IMPEACHMENT IN THE CASE OF HAROLD LOUDERBACK, UNITED STATES DISTRICT JUDGE FOR THE NORTHERN DISTRICT OF CALIFORNIA

Waiver of personal service of Harold Louderback, United States district judge for the northern district of California.

I, Harold Louderback, United States district judge for the northern district of California, do hereby waive personal service of summons issued on the 13th day of March, 1933, by Hon. John N. Garner, Vice President and President of the Senate, which commands me to appear before the Senate of the United States on April 11, 1933, at 12:30 p. m., to answer specific articles of impeachment exhibited to the Senate by the House of Representatives, and agree to voluntarily appear in person before the Senate of the United States at the aforesaid time.

I acknowledge receipt of a true and attested copy of the writ of summons issued in this case, together with a like copy of the precept.

Witness my signature this 28th day of March, 1933, at the city of San Francisco, State of California.

HAROLD LOUDERBACK,
Respondent.

Signature of witness:
JAMES M. HANLEY.

The Vice President announced that in view of the waiver of summons by the respondent, the administration of the oath to the Sergeant at Arms would be dispensed with, and directed the Sergeant at Arms to make proclamation.

The Sergeant at Arms made proclamation:

Harold Louderback! Harold Louderback! Harold Louderback, United States district judge for the northern district of California: Appear and answer to the articles of impeachment exhibited by the House of Representatives against you.

The Vice President resumed:

The Chair advises the counsel for the respondent that the Senate is now sitting for the trial of Harold Louderback, United States district judge for the northern district of California, upon the articles of impeachment exhibited by the House of Representatives, and will hear his answer thereto.

Mr. Linforth, of counsel for the respondent, announced that the respondent appeared in person and by counsel, and submitted a written appearance which he asked to have filed and which was read by the Secretary as follows:

IN THE SENATE OF THE UNITED STATES,
SITTING AS A COURT OF IMPEACHMENT.

THE UNITED STATES OF AMERICA *v.* HAROLD LOUDERBACK, APPEARANCE OF RESPONDENT.

The respondent, Harold Louderback, having been served with a summons requiring him to appear before the Senate of the United States of America at their Chamber in the city of Washington, on the 11th day of April, 1933, at

12:30 o'clock afternoon, to answer certain articles of impeachment presented against him by the House of Representatives of the United States, now appears in his proper person and also by his counsel, who are instructed by this respondent to inform the Senate that respondent is ready to file his answer to said articles of impeachment at this time.

Dated this 11th day of April, 1933.

HAROLD LOUDERBACK.

WALTER H. LINFORTH,
JAMES M. HANLEY,
Counsel for Respondent.

The Vice President directed that the appearance be placed on file, and said:

Counsel for the respondent may make a statement, or the respondent in person may do so.

Mr. Linforth then presented the answer of the respondent to the articles of impeachment which, by direction of the Vice President, was read by the Secretary as follows:

IN THE SENATE OF THE UNITED STATES,
SITTING AS A COURT OF IMPEACHMENT.

THE UNITED STATES OF AMERICA *v.* HAROLD LOUDERBACK, UPON ARTICLES OF IMPEACHMENT BY THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA

Answer of respondent Harold Louderback to the articles of impeachment against him by the House of Representatives of the United States

ANSWER TO ARTICLE I

For answer to the first article the respondent says that this honorable court ought not to have or take further cognizance of the first of said articles of impeachment so exhibited and presented against him, because, he says, the facts set forth in said first article do not, if true, constitute an impeachable high crime and misdemeanor as defined in the Constitution of the United States, and that therefore the Senate, sitting as a Court of Impeachment, should not further entertain the charge contained in said first article.

And now, not waiving the foregoing plea to the jurisdiction of the honorable Senate of the United States, sitting as a Court of Impeachment, as to said first article, said respondent saving to himself all advantages of exception to said first article, for answer thereto saith:

I

Admits that he is now and was at all times mentioned in said article a duly appointed, qualified, and acting judge of the United States District Court for the Northern District of California.

II

Further answering said article, the respondent admits, denies, and alleges as follows:

Admits that on the 11th day of March, 1930, by an order duly made and entered in that certain action then pending in the United States District Court for the Northern District of California, in which Gardner M. Olmstead was plaintiff and Russell Colvin Co. was defendant, he appointed one Addison G. Strong as equity receiver.

Admits that on the 13th day of March, 1930, by an order duly made and entered in said action he revoked and set aside the order appointing said Addison G. Strong as receiver in said action.

Alleges that the facts and circumstances surrounding and leading up to the making of the said order on the 13th day of March, 1930, setting aside the appointment of the Addison G. Strong were as follows, and not otherwise:

(The remainder of Article II and Articles III, IV, and V set forth in detail the respondent's answer to the specific charges in the articles of impeachment.)

Article V of the answer includes the following:

I

That said Article V is so uncertain and indefinite as to time, place, and proceedings that respondent can not ascertain therefrom with reasonable, or any, certainty, in what proceeding or proceedings, or at what time or times, or at what place or places, his conduct was, as set forth in said Article V, and respondent can not safely proceed to trial as to said fifth article before this honorable Senate, sitting as a Court of Impeachment, at a distance of more than 3,000 miles from where respondent has presided as such judge, as aforesaid, without being apprised in advance in the particulars aforesaid, in order to procure the attendance of such witnesses as may be necessary to meet such charge or charges.

Wherefore respondent, upon the reading and filing of this answer will move the honorable Senate of the United States, sitting as a Court of Impeachment, to require the honorable House of Representatives of the United States, within a reasonable time, to be by it specified, to make said fifth article more definite and certain in the particulars aforesaid, and failing so to do, this honorable body dismiss said Article V.

And without waiving but expressly reserving his right to make said motion and to have the same passed upon by the honorable Senate of the United States, sitting as a Court of Impeachment, respondent, answering said Article V, admits and denies as follows, to wit:

The answer concluded:

V

Respondent further denies that he ever was or now is guilty of misbehavior as such judge and/or of a misdemeanor in office.

Except as hereinafter specifically admitted, respondent denies each and every allegation in said Article V contained.

And this respondent in submitting to this honorable court this his answer to the articles of impeachment exhibited against him, respectfully insists that he is not guilty of any of the charges contained in any of the said 5 articles of impeachment, and respectfully reserves leave to amend and add to this his said answer from time to time as may become necessary or proper and when said necessity and propriety shall appear.

Dated April 11, 1933.

HAROLD LOUDERBACK,
Respondent.
WALTER H. LINFORTH,
JAMES M. HANLEY,
Of Counsel for Respondent.

Mr. Linforth then submitted written notice of a motion to make the fifth article in the articles of impeachment more definite and certain. The notice was read by the Secretary, as follows:

IN THE SENATE OF THE UNITED STATES,
SITTING AS A COURT OF IMPEACHMENT.

THE UNITED STATES OF AMERICA *v.* HAROLD LOUDERBACK—MOTION TO MAKE ARTICLE V OF THE ARTICLES OF IMPEACHMENT MORE DEFINITE AND CERTAIN

The respondent, Harold Louderback, moves the honorable Senate sitting as a Court of Impeachment, for an order requiring the honorable House of Representatives of the United States, within a reasonable specified time, to make more definite and certain the charges contained in Article V of the articles of impeachment herein in the following particular or particulars, that is to say:

To specify the time and times, and the place or places, and the name or title of the proceeding or proceedings, and the circumstance or circumstances wherein in said fifth article it is claimed the said respondent was guilty of the conduct referred to and set forth therein.

Said motion is made for the reason and on the ground that it is impossible for respondent to be prepared to meet said charges and to summon witnesses in regard thereto without first being advised of the time and times, and the place and places, and the name or title of the proceeding or proceedings, and the circumstance or circumstances wherein in said fifth article it is claimed the said respondent was guilty of the conduct referred to and set forth therein.

And, in the event of the failure of said House of Representatives within the time so fixed to amend said fifth article in the particulars aforesaid, that this honorable body dismiss the charges contained in said fifth article.

Dated April 11, 1933.

WALTER H. LINFORTH,
JAMES M. HANLEY,
Counsel for Said Respondent.

In conformity with the notice, Mr. Linforth, on behalf of the respondent, moved to require the House to specify, in the particulars set forth, the fifth count of the articles of impeachment, and failing to do so within a reasonable time, that the article be dismissed.

Mr. Manager Sumners responded:

Mr. President, the managers on the part of the House, in order to comply with the suggestion of counsel for the respondent and to save the necessity of considering the motion, consent to attempt to make article 5 more specific and to procure the endorsement of the House of Representatives. It is understood that we can not of ourselves do these things. They have to be done through the House, but we will undertake to do the best we can.

Accordingly, on motion of Mr. Ashurst, it was—

Ordered, That the managers on the part of the House be allowed until the 15th day of May, 1933, at 1 o'clock in the afternoon, to present a replication or other pleading, of the House of Representatives to the answer of the respondent. That any subsequent pleadings, either on the part of the managers or of the respondent, shall be filed with the Secretary of the Senate, of which notice shall be given to the House of Representatives and the respondent, respectively, so that all pleadings shall be closed on or before the 15th day of May, 1933, and that the trial on Monday, the 15th day of May, 1933, at 1 o'clock p.m.

During the discussion occasioned by the proposed order, Mr. Long dissented and was proceeding in debate, when Mr. Sam G. Bratton, of New Mexico, made the point of order that under the rules governing impeachment trials Senators were not permitted to engage in colloquies.

The Vice President said:

The point of order is sustained.

An order having been made for printing the answers of the respondent for the use of the Senate, it was further:

Ordered, That lists of witnesses be furnished to the Sergeant at Arms by the managers and by the respondent, and said witnesses shall be subpoenaed to appear on Monday, the 15th day of May, 1933, at 1 o'clock p.m.

519. Certain rules adopted by the Senate for the trial of Judge Louderback.

Managers and counsel for respondent might submit applications orally to the Presiding Officer but if requested by any Senator should reduce them to writing.

Managers and counsel for respondent were required to address motions or objections directly to the Presiding Officer and not otherwise.

Senators might not engage in colloquies or address directly the managers, the counsel, or each other.

Stipulations in writing by parties were received by the Senate as though the facts therein agreed upon had been established by evidence.

Decisions of the Presiding Officer on questions raised by parties in the course of the trial stood as the judgment of the Senate unless a Senator made formal request for a vote thereon.

Mr. Bratton, from the Senate Committee on the Judiciary, offered the following:

Ordered, That in addition to the rules of procedure and practice in the Senate when sitting on impeachment trials, heretofore adopted, and supplementary to such rules, the following rules shall be applicable in the trial of the impeachment of Harold Louderback, United States judge for the northern district of California:

1. In all matters relating to the procedures of the Senate, whether as to form or otherwise, the managers on the part of the House or the counsel representing the respondent may submit a request or application orally to the Presiding Officer, or, if required by him or requested by any Senator, shall submit the same in writing.

2. In all matters relating immediately to the trial, such as the admission, rejection, or striking out of evidence, or other questions usually arising in the trial of causes in courts of justice, if the managers on the part of the House or counsel representing the respondent desire to make any application, request, or objection, the same shall be addressed directly to the Presiding Officer and not otherwise.

3. It shall not be in order for any Senator, except as provided in the rules of procedure and practice in the Senate when sitting on impeachment trials, to engage in colloquy or to address questions either to the managers on the part of the House or to counsel for the respondent, nor shall it be in order for Senators to address each other; but they shall address their remarks directly to the Presiding Officer and not otherwise.

4. The parties may, by stipulation in writing filed with the Secretary of the Senate and by him laid before the Senate or presented at the trial, agree upon any facts involved in the trial; and such stipulation shall be received by the Senate for all intents and purposes as though the facts therein agreed upon had been established by legal evidence adduced at the trial.

5. The parties or their counsel may interpose objection to witnesses answering questions propounded at the request of any Senator, and the merits of any such objection may be argued by the parties or their counsel; and the Presiding Officer may rule on any such objection, which ruling shall stand as the judgment of the Senate, unless some Member of the Senate shall ask that a formal vote be taken thereon, in which case it shall be submitted to the Senate for decision; or he may, at his option, in the first instance submit any such question to a vote of the Members of the Senate. Upon all such questions the vote shall be without debate and without a division, unless the ayes and nays be demanded by one fifth of the Members present, when the same shall be taken.

The order was agreed to, and the Senate sitting as a court of impeachment stood in recess.

520. In response to respondent's motion to make more certain, the House revised an article of the articles of impeachment and transmitted it to the Senate as amended—On April 17 [25] the Speaker laid before the House the following communication from the Senate:

I, Edwin A. Halsey, Secretary of the Senate of the United States of America, certify that the Senate, sitting for the trial of Harold Louderback, United States district judge for the northern district of California, upon articles of impeachment exhibited against him by the House of Representatives of the United States of America, did on April 11, 1933, adopt an order, of which the following is a full, true, correct, and compared copy:

"*Ordered*, That the Secretary of the Senate communicate to the House of Representatives an attested copy of the answer of Harold Louderback, judge of the United States district court in and for the northern district of California, to the articles of impeachment, and also a copy of the foregoing order."

I do hereby further certify that the document hereto attached, consisting of 38 sheets, is a photostatic copy of the answer of said Harold Louderback to the articles of impeachment exhibited against him by the House of Representatives, presented by said Harold Louderback to the Senate, sitting as Court of Impeachment, on April 11, 1933.

In testimony whereof I hereunto subscribe my name and affix the seal of the Senate of the United States of America this 12th day of April, A. D. 1933.

[SEAL.]

EDWIN A. HALSEY,
Secretary of the Senate of the United States.

[25] Record, p. 1846.

Mr. Sumners called up as privileged a proposed amendment to article 5 of the articles of impeachment as follows:

AMENDMENT TO ARTICLE 5 OF THE ARTICLE OF IMPEACHMENT BY THE HOUSE OF REPRESENTATIVES AGAINST HAROLD LOUDERBACK, JUDGE OF THE UNITED STATES IN AND FOR THE NORTHERN DISTRICT OF CALIFORNIA.

Article 5 is amended to read as follows:

"ARTICLE 5.

"It is intended by article 5 to charge, and it is charged, that the reasonable and probable result of Harold Louderback's action in his capacity as judge in making decisions and orders in actions pending in his court and before him as said judge and by the method of appointing receivers and attorneys for receivers, by appointing incompetent receivers and attorneys, by his relationship and transactions with one Sam Leake, and by the relationship and transactions of the said Sam Leake with such appointees of the said respondent made possible and probable by the action and attitude of the said Harold Louderback, and by displaying a high degree of indifference to the interest of estates and parties in interest in receivership before him and his court, and by displaying a high degree of interest in making it possible for certain individuals and firms to derive large fees from the funds of such estates, has been to create a general condition of wide-spread fear and distrust and disbelief in the fairness and disinterestedness of the official actions of the said Harold Louderback, and to create by his said acts, deeds, and relationships, contrary to his individual and official duty, a favorable condition and a cause for the development naturally and inevitably of rumors and suspicions destructive of public confidence in and respect for the said Harold Louderback as an individual and a judge to the scandal and disrepute of his said court and the administration of justice therein and prejudicial generally to the public respect for and public confidence in the Federal judiciary. Wherefore the said Harold Louderback was and is guilty of misbehavior as such judge and of misdemeanors in office.

"It is hereby alleged and charged that the conduct of said Harold Louderback as alleged in articles 1, 2, 3, and 4, and as hereinafter alleged, in its general and aggregate result has been such as reasonably and probably calculated to destroy public confidence in so far as he and his court are concerned in that degree of disinterestedness and fidelity to judicial duty and responsibility which the public interest requires shall be held by the people in the Federal courts and in those who administer them, and which for a Federal judge to hurt or destroy is a crime and misdemeanor of the highest order;

"First, specifying as indicative of and disclosing the character and judicial attitude of said Harold Louderback revealed by his acts and official conduct to the people among whom he has jurisdiction, and the cause of the loss of public confidence of the bar and people of the northern district of California and particularly of the city of San Francisco, where the principal business of such court is transacted, on or about December 19, 1929, the said Harold Louderback appointed one Guy H. Gilbert receiver of the Sonora Phonograph Co., a going concern extensively engaged in the business of receiving and distributing radios and phonographs, the said Guy H. Gilbert being a personal and political friend of the said Harold Londerback, and an intimate friend and financial contributor to one Sam Leake, hereinafter referred to, the said Harold Louderback knowing at the time of such appointment that the whole training and experience of the said Guy H. Gilbert had been as operator and employee of a telegraph company, and the said Harold Louderback at the time of such appointment knowing with certainty that the said Guy H. Gilbert was without qualification to discharge the duties of receivership, that the said Guy H. Gilbert was appointed such receiver by the said Harold Louderback without regard to the interest of such estate in receivership and in disregard thereof and of the interest of creditors and parties in interest and in violation of the official duty of the said Harold Louderback. That the said Gilbert after said appointment continued in his regular and usual duties and employment as employee of said telegraph company, drawing his accustomed salary during his employment of approximately 6 months as such receiver and received for such services from the funds of the estate of said Sonora Phonograph Co. the sum of $6,800, all of which facts became the subject of newspaper comments and matters of common knowledge

throughout and beyond the northern judicial district of California, to the hurt of public confidence in the said Harold Louderback, judge of said court, and to the hurt and standing of the Federal judiciary.

The proposed amendment then recounted the appointment of Guy H. Gilbert as receiver in various other cases and charged that he was incompetent and had not in fact discharged the duties of receiver but had merely signed the papers in such cases and accepted sums which were a small part of the compensation allowed by the respondent in his capacity as judge. The amendment concluded:

All of which facts and circumstances became published and known in said northern district of California. By such acts the said Harold Louderback exhibited himself to the public as being willing to obstruct the officials of the State of California in their effort to conserve for citizens of California the assets of said insurance company which they had impounded, willing to assert a jurisdiction which he did not possess, willing to defy a mandate of the circuit court of appeals and attach an illegal and unconscionable condition to said mandate in order to penalize and discourage the exercise of a constitutional right of appeal for the definite and obvious purpose of making sure, so far as possible by such illegal action and coercion, that the said Shortridge and his attorney would be paid from the assets of said insurance company so impounded the fees which he, the said Harold Louderback, had allowed, all to the scandal and discredit of the said Harold Louderback and his court and prejudicial to the dignity of the judiciary.

"Wherefore the said Harold Louderback has been and is guilty of high crimes and misdemeanors in office and has not conducted himself with good behavior."

After brief debate, the amendment was agreed to and on motion of Mr. Sumners it was—

Resolved, That a message be sent to the Senate by the Clerk of the House informing the Senate that the House of Representatives has adopted an amendment to article 5 of the articles of impeachment heretofore exhibited against Harold Louderback, United States district judge for the northern district of California, and that the same will be presented to the Senate by the managers on the part of the House.

And also that the managers have authority to file with the Secretary of the Senate, on the part of the House, any subsequent pleadings they shall deem necessary.

521. The amended article of impeachment when received in the Senate was filed without being read, it having previously appeared in full in the Record.

The answer of the respondent to the amended article of impeachment.

The managers were excused from attendance on the sessions of the House during the course of the trial in the Senate.

On April 18,[20] in the Senate sitting as a Court of Impeachment, on motion of Mr. Ashurst, by unanimous consent, the reading of the amendment adopted by the House to Article 5 of the articles of impeachment was dispensed with, it having appeared in full in the Record of the previous day.

The respondent, by counsel, tendered his answer to Article 5 as amended by the House and proposed to enter a motion to strike out certain portions of the amended article and asked to be heard on the motion.

The answer was received and filed without reading as follows:

ANSWER TO ARTICLE 5, AS AMENDED

For answer to Article 5, as amended, the respondent says that this honorable court ought not to have or take further cognizance of said fifth article of impeach-

[20] Record, p. 1877.

ment so exhibited and presented against him, because, he says, the facts set forth in said fifth article, as amended, do not, if true, constitute an impeachable high crime and misdemeanor as defined by the Constitution of the United States, and that therefore the Senate, sitting as a Court of Impeachment, should not further entertain the charge contained in said fifth article as so amended.

And now, not waiving the foregoing plea to the jurisdiction of the honorable Senate of the United States, sitting as a Court of Impeachment, as to said fifth article, as amended, said respondent saving to himself all advantages of exception to said fifth article, as amended, for answer thereto saith:

Further answering said Article 5 as so amended, the respondent admits, denies, and alleges as follows:

Then follow specific admissions, denials, and allegations.

The answer concluded:

And, except as hereinbefore specifically admitted herein, respondent denies each and every allegation contained in said article 5, as so amended, relating or referring to the said *Golden State Asparagus Co. case*, so called.

Wherefore respondent having fully answered said article 5, as amended, declares that he is not guilty of any of the charges therein contained and denies that he has been or that he is guilty of high crimes and misdemeanors in office, or has been guilty of any high crime or any misdemeanor in office, and likewise denies that he has not conducted himself with good behavior.

HAROLD LOUDERBACK,
Respondent.
WALTER H. LINFORTH,
JAMES M. HANLEY,
Attorneys for Respondent.

APRIL 18, 1933.

The following motion was filed on behalf of the respondent:

MOTION TO STRIKE OUT OR MAKE MORE CERTAIN PORTIONS OF ARTICLE 5, AS AMENDED

The respondent, Harold Louderback, moves the Honorable Senate, sitting as a Court of Impeachment, for an order as follows:

1. Striking from article 5, as amended, the first paragraph thereof, constituting the entire first page; and

2. Striking therefrom the following part and portion thereof contained in pages 3 and 4 and reading as follows:

"It also became a matter of newspaper comment in connection with that receivership matter and others that theretofore, about 1925 or 1926, the said Gilbert had been appointed by the said Harold Louderback well knowing at the time of such appointments that the said Gilbert was without any qualification to appraise the value of such real estate, and in truth the said Gilbert never saw said real estate, and that the said Gilbert did not undertake to assist in the appraisal of said real estate, only signing the report which was presented to him, for which services he was allowed the sum of $500."

The first part of said motion is based upon the ground and for the reason that it is impossible for respondent to be prepared to meet the said charge therein contained or to summon witnesses in respect thereto without being advised, first, the nature of the act or acts there attempted to be complained of; second, the time or times of said act or acts were committed by respondent; third, in what action or actions, proceeding or proceedings, such alleged acts occurred; fourth, the nature of the relationship and transactions of said Leake there attempted to be referred to and, fifth, with what appointee or appointees of respondent said "relationship and transactions" with the said Leake occurred.

And the second part of said motion is based upon the grounds that the alleged offense there referred to was not committed in the office now occupied by respondent and that this honorable Senate, sitting as a Court of Impeachment, has not jurisdiction to inquire into the transaction attempted to be complained of in said article 5, as amended, in that the act there attempted to be complained of is not and can not be the subject of this article of impeachment, and is not and can not be a high crime or misdemeanor as defined by the Constitution of the United States, but if true is an act committed by respondent while an officer of a State and not a Federal court.

And, in the event of the denial of said motion, or either part thereof, then and in such event, respondents moves this honorable Senate, sitting as a Court of Impeachment, to require the House of Representatives of the United States within a time so to be fixed, to further amend said article 5 in the particulars and each thereof specified herein as the reason and grounds for the making of said motion to strike therefrom the portions of said article 5, as amended, above specified.

Dated: April 18, 1933.

WALTER H. LINFORTH,
JAMES M. HANLEY,
Counsel for Said Respondent.

Mr. Hanley, of counsel for the respondent, being recognized, said that an agreement had been reached with the managers on the part of the House under which the reference in paragraph 1 of the amended article 5 should refer only to matters set out in articles 1, 2, 3, and 4 and the rest of the amended article 5, and that no testimony relating to other matters would be offered.

Mr. Hanley cited a reference in paragraph 1 of the articles of impeachment referring to the conduct of the respondent while he was serving as a State judge and submitted that the conduct of the respondent as State judge was not within the jurisdiction of the Senate.

Mr. Manager Sumners, in reply, corroborated the statement of respondent's counsel with reference to the terms of the agreement between counsel for respondent and the managers on the part of the House; disclaimed any intention on the part of the managers to impeach the respondent on the strength of his conduct as a member of the State judiciary; and justified the inclusion of the matter referred to as admissible under "at least two well-recognized rules" governing the admissibility of evidence.

In the House on May 9,[27] on motion of Mr. Sumners, by unanimous consent, the managers on the part of the House in the impeachment proceedings before the Senate were excused from attendance upon the sessions of the House until the conclusion of the trial.

522. The replication of the House to the answer of the respondent in the Louderback trial.

On motion of the managers, a clerk and additional counsel were authorized to sit with them in the conduct of the trial.

The managers announced that they had omitted the presentation of certain formal evidence, customary to impeachment proceedings, as relating to facts too obvious to require proof.

The Senate, by resolution, limited the opening statements to one person on each side.

The Vice President was authorized to name a Senator to preside in the absence of the President pro tempore.

Questions of order raised in the course of an impeachment trial are decided without debate.

A question put by a Senator to a witness in an impeachment trial is reduced to writing and put by the Presiding Officer.

On May 15,[28] in the Senate, sitting for the trial, Mr. Manager Sumners submitted the replication of the House of Representatives to the answer of the respondent as follows:

[27] Record, p. 3084.
[28] Record, p. 3394.

REPLICATION OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA TO THE ANSWER OF HAROLD LOUDERBACK, DISTRICT JUDGE OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA, TO THE ARTICLES OF IMPEACHMENT, AS AMENDED, EXHIBITED AGAINST HIM BY THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA

The House of Representatives of the United States of America, having considered the several answers of Harold Louderback, district judge of the United States for the northern district of California, to the several articles of impeachment, as amended, against him by them exhibited in the name of themselves and of all the people of the United States, and reserving to themselves all advantages of exception to the insufficiency, irrelevancy, and impertinency of his answer to each and all of the several articles of impeachment, as amended, so exhibited against the said Harold Louderback, judge as aforesaid, do say:

(1) That the said articles, as amended, do severally set forth impeachable offenses, misbehaviors, and misdemeanors as defined in the Constitution of the United States, and that the same are proper to be answered unto by the said Harold Louderback, judge as aforesaid, and sufficient to be entertained and adjudicated by the Senate sitting as a Court of Impeachment.

(2) That the said House of Representatives of the United States of America do deny each and every averment in said several answers, or either of them, which denies or traverses the acts, intents, misbehaviors, or misdemeanors charged against the said Harold Louderback in said articles of impeachment, as amended, or either of them, and for replication to said answers do say that Harold Louderback, district judge of the United States for the northern district of California, is guilty of the impeachable offenses, misbehaviors, and misdemeanors charged in said articles, as amended, and that the House of Representatives are ready to prove the same.

HATTON W. SUMNERS,
On Behalf of the Managers.

In response to the motion of the respondent that certain allegations in article 5 of the articles of impeachment be made more certain, Mr. Sumners presented the following:

MAKING MORE SPECIFIC AN ALLEGATION CONTAINED IN ARTICLE 5, ARTICLES OF IMPEACHMENT, AS AMENDED

Whereas on April 17, 1933, the managers on the part of the House of Representatives, in the impeachment against Harold Louderback, filed an amendment to article 5 of the Articles of Impeachment, which contains the following language:

"It also became a matter of newspaper comment in connection with that receivership matter and others that theretofore, about 1925 or 1926, the said Gilbert had been appointed by the said Harold Louderback when the said Harold Louderback was a judge of the Superior Court of California, an appraiser of certain real estate, the said Harold Louderback well knowing at the time of such appointment that the said Gilbert was without any qualification to appraise the value of such real estate, and in truth the said Gilbert never saw said real estate, and that the said Gilbert did not undertake to assist in the appraisal of said real estate, only signing the report which was presented to him, for which services he was allowed the sum of $500."

And whereas said language and allegation was objected to by counsel for Harold Louderback by a motion to strike out said language on the ground that the said Harold Louderback was not advised of "the time or times (of) said acts were committed by respondent," or "in what action or actions, proceeding or proceedings such alleged acts occurred;" whereupon the managers agreed with counsel for the said Harold Louderback that they would endeavor to give to said counsel more exact information with regard to said transaction, and failing to do so by the 5th of May the said allegations would be withdrawn and no evidence offered in their support, counsel for the said Harold Louderback agreeing that they would exert themselves to try to ascertain the facts with regard to the transaction referred to and advise the managers.

Since such agreement and understanding, the managers have ascertained more definite information with reference to this transaction, and now allege the facts to be that on or about April 5, 1927, in the matter of the estate of Howard Brickell, No. 46618, pending in probate that said Harold Louderback appointed

the said Guy H. Gilbert an appraiser of property of said estate and also appointed with him as appraiser of said property Sam Leake, referred to in said article 5 of the Articles of Impeachment as amended; that on or about December 21, 1927, the said Harold Louderback made an order awarding to the said Guy H. Gilbert and to the said Sam Leake the sum of $500 each for their services; which information has been furnished to the said counsel for Harold Louderback.

HATTON W. SUMNERS, *Chairman.*
On Behalf of the Managers.

Mr. William H. King, of Utah, offered a resolution which was agreed to as follows:

Ordered, That the opening statement on behalf of the managers shall be made by one person, to be immediately followed by one person who shall make the opening statement on behalf of the respondent.

The managers on the part of the House requested the privilege of having with them in the trial the clerk of the House Committee on the Judiciary to assist them in handling the documents in the case; and that Mr. Bianchi, a member of the bar of San Francisco, also be permitted to sit with them.

Mr. Hanley inquired whether Mr. Bianchi was to be called as a witness, and Mr. Manager Sumners, in reply, proposed to discuss the question, when Mr. Bratton raised the question of order that under the rules of the Senate the point should be decided by the Chair without comment or debate from the floor.

The Vice President sustained the point of order.

The Vice President, having entertained the request of the managers that the clerk of the House Judiciary Committee and Mr. Bianchi be permitted to sit with them, preferred to submit it to the Senate; and the question being put, it was decided in the affirmative, and the permission was granted, as requested.

By direction of the Vice President, on request of counsel for the respondent, the Secretary of the Senate read the answer of the respondent to article 5 as last amended, as follows:

Answer of respondent to Article V as last amended

Respondent admits that on or about the 5th day of April, 1927, while acting as judge of the Superior Court of the State of California in and for the city and county of San Francisco, in the matter of the estate of Howard Brickell, deceased, he made an order appointing Guy H. Gilbert, W. S. Leake, and R. F. Morgan appraisers; that in said matter Crocker First Federal Trust Co., of San Francisco, was special administrator of said estate; that in the first and final account of said trust company was included the sum of $500 each paid to said Gilbert and said Leake as appraisers' fees therein; that upon the hearing of the settlement of said account, an officer of said trust company testified that said account was in all respects true and correct; that the inventory on file in said estate showed its appraised value to be $1,020,804.38; that thereupon respondent, as judge of said superior court, made an order settling and allowing said account. Other than as hereinabove specifically set forth, respondent denies that he made any order awarding said Gilbert and said Leake, or either of them, $500 for their said services as such appraiser.

HAROLD LOUDERBACK,
Respondent.
WALTER H. LINFORTH,
JAMES M. HANLEY,
Attorneys for Respondent.

In his opening statement, Mr. Manager Sumners informed the Court that he would deviate from the practice usually observed in such proceedings and would not introduce the commission of the

respondent or make specific reference to the preliminary action on the part of the House of Representatives, taking it for granted that the respondent was known to be a Federal judge for the northern district of California, and that it was understood that the ordinary routine has been followed in the House leading up to the proceedings in the court of impeachment.

In the course of the opening statement in behalf of the respondent, Mr. Ashurst addressed the Chair and asked recognition to offer a resolution.

The Vice President inquired:

Will counsel suspend for that purpose?

The counsel for the respondent having answered in the affirmative, the resolution was offered by Mr. Ashurst and agreed to as follows:

Ordered, That during the trial of the impeachment of Harold Louderback, United States district judge for the Northern District of California, the Vice President, in the absence of the President pro tempore, shall have the right to name in open Senate, sitting for said trial, a Senator to perform the duties of the Chair.

The President pro tempore shall likewise have the right to name in open Senate, sitting for said trial, or, if absent, in writing, a Senator to perform the duties of the Chair; but such substitution in the case of either the Vice President or the President pro tempore shall not extend beyond an adjournment or recess, except by unanimous consent.

Under the provisions of the resolution, the Vice President called Mr. Bratton to the Chair, and the counsel for the respondent resumed his statement.

During the further course of the statement Mr. Long addressed the Chair and desired to submit a question to be answered by the counsel for the respondent.

Mr. Ashurst interposed the point of order that all questions propounded by Senators should be in writing.

The Presiding Officer sustained the point of order.

523. Witnesses in an impeachment trial were required to give their testimony standing, but this requirement was held not to apply to counsel.

In the Louderback impeachment trial witnesses were sworn as called and not en banc.

In the Louderback impeachment the Senate ordered process to compel the attendance of a witness who declined to appear in response to subpoena.

Evidence relating to events occurring prior to Judge Louderback's appointment to the Federal bench were admitted to establish matters pertinent to the impeachment proceedings.

Exhibits relating to the case at bar but also embodying extraneous and irrelevant material were admitted in full over the objection that only the pertinent matters should be read into the record.

The issuance of process for the attachment of a witness was held not to bar the admission of depositions by such witness pending his arrival.

The opening statements having been concluded, on the proposal of Mr. Ashurst it was—

Ordered, That the witnesses shall stand while giving their testimony.

In response to an inquiry by Mr. Manager Sumners, as to whether counsel should also stand while examining the witness, the Presiding Officer [29] held—

It is the judgment of the present occupant of the chair that counsel may sit or stand, according to their convenience.

Mr. Manager Sumners further inquired if each witness should be sworn as examined or if all witnesses should be called and sworn at once.

The Presiding Officer said:

The Chair thinks that the business of the court would be expedited by swearing each witness as he enters the Chamber. The oath can be administered quickly.

The introduction of testimony on behalf of the managers then began and continued through May 15, 16, 17, and 18. On May 18 [30] Mr. Manager Sumners announced that the managers had no further evidence to offer at that time, and the introduction of testimony on behalf of the respondent began and continued until May 23, when both parties rested.

On May 16 [31] the Vice President laid before the Senate the return of the Sergeant at Arms which was printed and noted in the Journal as follows:

SENATE OF THE UNITED STATES,
OFFICE OF THE SERGEANT AT ARMS,
Washington, D.C., May 15, 1933.

HON. JOHN N. GARNER,
Vice President and President of the Senate,
Washington, D.C.

MY DEAR MR. VICE PRESIDENT: There are attached hereto a list of witnesses for the Government submitted to me by the managers on the part of the House of Representatives, and a list of witnesses for the respondent submitted to me by his counsel, all of said witnesses to be subpoenaed for the trial of Harold Louderback, United States district judge for the northern district of California

There are also attached hereto original subpoenas personally served by me on the witnesses desired by both parties, said subpoenas being duly served and return made according to law.

Respectfully,

CHESLEY W. JURNEY,
Sergeant at Arms.

(Then followed the list of witnesses for the Government and the list of witnesses for the respondent.)

On motion of Mr. Ashurst it was—

Ordered, That the daily sessions of the Senate sitting for the trial of the impeachment of Harold Louderback, United States district judge for the northern district of California, shall, unless otherwise ordered, commence at 10 o'clock in the forenoon.

Mr. Hanley, of counsel for the respondent, moved that commission issue for taking the deposition of one W. S. Leake in San Francisco, and in support of his motion read this telegram:

HON. JOHN N. GARNER,
Vice President of the United States and President of Senate,
Washington, D.C.

Mr. Leake, under subpoena Louderback trial, quite weak physically, due age and cerebral arteriosclerosis. Been his family doctor many years. Travel to Wash-

[29] Sam G. Bratton, of New Mexico, Presiding Officer.
[30] Record, p. 3633.
[31] Record, p. 3444.

ington impractical, but if imperative should be accompanied by a nurse. Please instruct.

RUSSEL C. RYAN, M.D.,
Fairmont Hotel.

Mr. Manager Perkins resisted the motion and submitted the following excerpt from stipulations, previously entered into by counsel for the respondent and the managers on the part of the House, relative to certain testimony elicited before the special committee of the House of Representatives in San Francisco, in September, 1932.

It is further stipulated that the testimony of W. S. Leake and Miriam McKenzie, hotel maid, taken at the hearing above referred to, may be read upon said trial by either party hereto with the same force and effect as if said witness were present and testified in person. This stipulation, however, in so far as the said W. S. Leake is concerned without waiver by either party hereto to insist upon the attendance of said Leake before the court above referred to, and shall become operative only in the event of the nonappearance of the said Leake at Washington before the said Court of Impeachment.

Dated May 3, 1933.

GORDON BROWNING,
RANDOLPH PERKINS,
For the House Managers.
JAMES M. HANLEY,
WALTER H. LINFORTH,
Attorneys for Respondent.

The question being submitted to the court by the Vice President it was ordered, on motion of Mr. Bratton, that the Vice President be authorized to arrange for the attendance of the witness, to be accompanied by a nurse if that was deemed necessary.

Subsequently,[32] Mr. Manager Browning proposed to offer the testimony referred to in the stipulation before the arrival of the witness.

Mr. Hanley, of counsel for the respondent, objected on the ground that the witness would shortly arrive for examination in person.

The Vice President ruled:

The Chair overrules the objection. It seems to the Chair that reading the testimony, in view of the fact that Mr. Leake may be present in the Chamber, will not injure the cause of the respondent in any way.

In the course of the proceedings Mr. Manager Perkins proposed to offer in evidence certified copies of orders made by Judge Louderback appointing W. S. Leake and G. H. Gilbert appraisers in cases which had come before him in 1927 while on the State bench and prior to his appointment and confirmation by the Senate as a Federal judge.

Counsel for the respondent objected to the admission of the evidence on the ground that it related to matters occurring prior to the respondent's appointment as Federal judge and which for that reason were without the jurisdiction of the Court of Impeachment.

Mr. Manager Perkins rejoined that the orders were offered for the purpose of showing the long and intimate relation existing between Judge Louderback and W. S. Leake and G. H. Gilbert with whose appointment by respondent the case in trial was largely concerned.

The Presiding Officer[33] ruled:

The present occupant of the chair is very clear that it is admissible for whatever it may be worth for the purpose stated by the manager on the part of the House.

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[32] Record, p. 3503.
[33] Daniel O. Hastings, of Delaware, Presiding Officer.

The orders being produced, respondent's counsel objected to their being admitted in full and contended that the announced purpose for which they were offered was fully served by the reading into the Record of the material parts germane to the case and that to admit them in full would admit many irrelevant matters not pertinent to the issues of the case at bar.

The Presiding Officer submitted the question of admissibility to the Court and in stating the question said:

The managers on the part of the House offered these papers for the record. Objection was made, and, after argument, the Chair held that these records were pertinent for one purpose, namely, to show the connection between the persons named in the papers and the respondent. The Chair sought to have the counsel on both sides agree that the material parts should be read into the record; but that was not satisfactory to the managers on the part of the House, who insisted that the whole records should be admitted. Counsel for the respondent objects to that because there are many things in the records themselves that are not in any sense material; and the question is whether or not the papers offered for the record shall be admitted.

The question having been taken, the Presiding Officer announced:

On this vote the yeas are 67 and the nays are 4, so the papers are admitted.

The Vice President laid before the Senate the following communication:

SENATE OF THE UNITED STATES,
OFFICE OF THE SERGEANT AT ARMS,
Washington, D.C., May 17, 1933.

Hon. JOHN N. GARNER,
Vice President and President of the Senate, Washington, D.C.

MY DEAR MR. VICE PRESIDENT: I was commanded to serve and return a subpoena issued in the impeachment trial of Harold Louderback on one W. S. Leake, of San Francisco, Calif. Said subpoena was personally served by me on the said W. S. Leake on May 2, 1933, at San Francisco, and a return was duly made by me.

W. S. Leake was commanded to appear and testify on the 15th day of May, 1933, at 1 p.m., at the Senate Chamber in the city of Washington, and he has not appeared and refuses to appear and testify for the reason as stated by him to me personally on this day, that he is physically unable to do so.

This information is given to you so that the Senate of the United States may be officially informed in the matter.

Respectfully,

CHESLEY W. JURNEY,
Sergeant at Arms.

Thereupon, a resolution presented by Mr. Ashurst was agreed to, as follows:

Whereas the Senate of the United States pursuant to House Resolution 403, Seventy-second Congress, second session, and orders of the Senate of the United States adopted in relation thereto, has authorized that witnesses be summoned as required by the rules of procedure and practice of the Senate; and

Whereas it appears from the letter of Chesley W. Jurney, Sergeant at Arms of the United States Senate, to Hon. John N. Garner, Vice President and President of the Senate, dated May 15, 1933, that one W. S. Leake, of San Francisco, Calif., was duly served with a subpoena on May 2, 1933, to appear on Monday, May 15, 1933, at 1 p.m., before the Senate of the United States at Washington, D.C., and then and there to testify his knowledge in the cause which is before the Senate in which the House of Representatives have impeached Harold Louderback, district judge of the United States for the Northern District of California; and

Whereas it appears from a letter of Chesley W. Jurney, Sergeant at Arms of the United States Senate to Hon. John N. Garner, Vice President and President of the Senate, dated May 16, 1933, that said W. S. Leake has not appeared in

response to said subpoena duly issued and served, and the said W. S. Leake has failed, in disobedience of such subpoena, so to appear and answer; and

Whereas the appearance and testimony of said W. S. Leake is material and necessary in order that the Senate of the United States may properly execute the functions imposed upon it by the Constitution of the United States, and other action as the Senate may deem necessary and proper: Therefore be it

Ordered, That the Vice President and President of the Senate issue his warrant commanding the Sergeant at Arms or his deputy, to take into custody the body of the said W. S. Leake, whereever found, to bring the said W. S. Leake before the bar of the Senate, then and there to answer such questions pertinent to the matter under inquiry; and to keep the said W. S. Leake to await the further order of the Senate.

On May 22, the Vice President laid before the Senate a further communication as follows:

SENATE OF THE UNITED STATES,
OFFICE OF THE SERGEANT AT ARMS,
Washington, D.C., May 20, 1933.

HON. JOHN N. GARNER,
Vice President and President of the Senate, Washington, D.C.

MY DEAR MR. VICE PRESIDENT: In pursuance of the order of the Senate dated May 17, 1933, commanding me to forthwith arrest and take into custody and bring to the bar of the Senate W. S. Leake, of San Francisco, Calif., I did, acting through my deputy, W. A. Rorer, on May 17, 1933, arrest and take Mr. Leake into custody.

The said W. S. Leake is now in my custody, and I await the further order of the Senate.

The original warrant issued in the case is attached hereto.

Respectfully yours,

CHESLEY W. JURNEY,
Sergeant at Arms.

Whereupon counsel for respondent called the witness W. S. Leake who appeared and testified.

524. The respondent in impeachment proceedings attended throughout the trial and was present when the articles were voted on and judgment rendered.

In the Louderback impeachment trial the respondent appeared and testified at length in his own behalf.

After testimony had been closed and the opening argument concluded in the Louderback trial, further questions were propounded in writing and were answered by the respondent.

The Senate limited the time but did not restrict the number participating in the final arguments in the Louderback impeachment.

The counsel for the respondent having touched on extraneous matters in his final argument in the Louderback trial, was admonished by the presiding officer to confine himself to the record.

In the Louderback trial the Senate deliberated behind closed doors before voting on the articles of impeachment.

Form of question prescribed for ascertaining the judgment of the court in the Louderback trial.

It was announced that pairs would not be arranged or recognized in the final vote on the articles of impeachment in the Louderback trial.

Senators were permitted to excuse themselves from voting on articles of impeachment as they were reached without having given notice of such intention prior to the vote on Article 1.

Two-thirds not having voted guilty on any article, the presiding officer declared Judge Louderback acquitted.

On May 23,[34] the respondent, Harold Louderback, was called and testified in his own behalf on direct examination by his counsel and on cross-examination by the managers. At the conclusion of his testimony, Mr. Linforth announced that the respondent rested. After brief testimony in rebuttal introduced by the managers, Mr. Manager Sumners on conference with Mr. Linforth, informed the court that all testimony had been concluded.

Whereupon, on motion of Mr. Ashurst, an order was entered finally excusing all witnesses from further attendance, and it was further—

Ordered, That the time for final argument of the case of Harold Louderback shall be limited to 4 hours, which said time shall be divided equally between the managers on the part of the House of Representatives and the counsel for the respondent, and the time thus assigned to each side shall be divided as each side for itself may determine.

On May 24,[35] Mr. Manager Browning opened the argument on behalf of the House of Representatives. At the conclusion of his remarks, Mr. Tom Conally, of Texas, addressed the Chair and asked, as a parliamentary inquiry, if it would be in order to propound further questions in writing to the respondent.

The Vice President replied:

The Chair does not think so. The case has been closed, as the Chair understands it, unless the Senate orders otherwise. If there is no objection on the part of the respondent, the Chair will admit the question.

There was no objection and Mr. Connally submitted certain questions in writing which were answered by the respondent.

Mr. Linforth then argued in behalf of the respondent. In the course of Mr. Linforth's argument, Mr. Manager Sumners interposed and said:

Mr. President, I do not desire to interrupt counsel, but I give notice that if this is going to be the line of argument we shall endeavor to some degree to avail ourselves of it. We say that counsel is testifying at this time. I do not desire to object. I merely desire to serve notice now that we are going to avail ourselves of that line of argument.

The Presiding Officer admonished:

Counsel will confine themselves to the record.

Mr. Manager Sumners concluded the argument on behalf of the managers.

Thereupon, a motion presented by Mr. Ashurst that the doors of the Senate be closed for deliberation was agreed to; the managers on the part of the House and the respondent with his counsel withdrew from the Chamber; the galleries were cleared; and at 3 o'clock and 5 minutes p.m. the Senate proceeded to deliberate with closed doors.

At 4 o'clock and 45 minutes p.m. the doors were reopened, and the managers on the part of the House and respondent with his counsel appeared in the seats provided for them.

Mr. Joseph T. Robinson, of Arkansas, announced:

I have been requested to state that on these votes pairs will not be arranged or recognized.

The following order submitted by Mr. Ashurst was agreed to:

Ordered, That upon the final vote in the pending impeachment of Harold Louderback, the Secretary shall read the articles of impeachment separately and successively, and when the reading of each article shall have been concluded the Presiding Officer shall state the question thereon as follows:

[34] Record, p. 3971.
[35] Record, p. 4064.

"Senators, how say you? Is the respondent, Harold Louderback, guilty or not guilty as charged in this article?"

Thereupon the roll of the Senate shall be called, and each Senator, as his name is called, unless excused, shall arise in his place and answer "Guilty" or "Not guilty."

In response to a parliamentary inquiry from Mr. Alben W. Barkley, of Kentucky, as to whether a Senator could be excused from voting on any article as it was reached in its order or whether notice should be given in advance of the reading of the first article, the Vice President, held:

The Chair is of opinion that a Senator can ask to be excused from voting on any article at any time.

On motion of Mr. Ashurst, it was further—

Ordered, That upon the final vote in the pending impeachment of Harold Louderback, each Senator may, within 2 days after the final vote, file his opinion in writing to be published in the printed proceedings in the case.

The Vice President directed the Secretary to read the first article of the articles of impeachment, and following the reading, put the question:

Senators, how say you? Is the respondent, Harold Louderback, guilty or not guilty as charged in this article? The secretary will proceed to call the roll, and as the name of each Senator is called, he will rise in his place and deliver his vote.

The roll having been called, the Vice President announced:

On the first article of impeachment 34 Senators have voted "guilty" and 42 Senators have voted "not guilty." Less than two-thirds having voted in favor of his guilt, the Senate adjudges that the respondent, Harold Louderback, is not guilty as charged in the article.

The clerk will read the next article.

In like manner the vote was taken and announced on each of the remaining articles, with the following results:

	Guilty	Not guilty
Article I	34	42
Article II	23	47
Article III	11	63
Article IV	30	47
Article V (as amended)	45	34

The Vice President summarized:

That completes the articles of impeachment, and, with the permission of the Senate sitting as a court, the Chair will enter in the record the following judgment, which the clerk will read.

The legislative clerk read:

JUDGMENT

The Senate having tried Harold Louderback, judge of the District Court of the United States for the Northern District of California, upon five several articles of impeachment exhibited against him by the House of Representatives, and two-thirds of the Senators present not having found him guilty of the charges contained therein: It is therefore

Ordered and adjudged, That the said Harold Louderback be, and he is, acquitted of all the charges in said articles made and set forth.

And then,

On motion of Mr. Ashurst, at 6 o'clock and 5 minutes p.m. the Senate sitting as a court of impeachment in the case of Harold Louderback adjourned sine die.

Impeachment Proceedings Not Resulting in Trial*

525. The inquiry into the conduct of Lebbeus R. Wilfley, Judge of United States Court for China.

A Member having risen in his place and impeached Judge Wilfley and offered a resolution providing for an investigation, the House referred the matter to the Judiciary Committee.

In the investigation into the conduct of Judge Wilfley, he appeared before the committee and testified under oath.

The report of a subcommittee was disregarded and was not included as a part of the report of the committee to the House.

The committee, after conducting an investigation, acted adversely on a proposition to impeach Judge Wilfley and the House declined to take further action.

A Member being criticized by the President for instituting impeachment proceedings, rose to a question of personal privilege.

On February 20, 1908,[1] Mr. George E. Waldo, of New York, presented as a privileged matter the following:

I desire to impeach Lebbeus R. Wilfley, of the United States court of China, of mal and corrupt conduct in office, and of high crimes and misdemeanors, and I present the following articles of impeachment and ask that they may be read at the Clerk's desk.

* Cannon's Precedents, vol. 6, p. 743 (1936).
[1] First session, Sixtieth Congress, Journal, p. 497; Record, 2262.

The Clerk read the articles of impeachment, which detailed at length the charges upon which the proposed impeachment was based.

Mr. Waldo then submitted a resolution authorizing and directing the Committee on the Judiciary to investigate the charges, and, after debate, made the following motion, which was agreed to:

I move that this resolution and the articles be referred to the Committee on the Judiciary, to report back by resolution within ten days what, if any, proceedings should be taken.

The motion was agreed to.

The investigation was delegated to a subcommittee of the Committee on the Judiciary, which reported to the committee in part as follows:

It is obviously true that an aggregation of entirely legal acts may develop into a system of tyranny and oppression; and that an inequitable exercise of judicial discretion may convert the machinery of justice into an engine of despotic and autocratic power. This may be accomplished without the taint of individual corruption and with a laudable purpose of purifying a community and of inaugurating civic reform.

Terror to evil doers if purchased at the price of judicial fairness and overtrained legal authority is achieved at too great an expense, for it defeats its own high aim and warps the very fabric of the law itself.

Such acts of legal oppression and of abuse of judicial discretion lie at the base of these charges. They are made before the House of Representatives in the form prescribed by law and custom, and are presented as a question of high privilege upon the solemn responsibility of a Member of the House. Charges so presented against this court have a peculiar and dangerous significance. In this case they are dismissed as falling short of impeachable offenses, by what we believe to be sound principles of legal construction, and Judge Wilfley is therefore denied any opportunity of defense. He can file no answer, make no denial, nor explain to the House the legality or necessity for his action.

These charges therefore stand uncontroverted, and if Judge Wilfley's judicial acts in the future are marked by the rigorous and inflexible harshness imputed to him they will hang as a portentous cloud over this new court, impairing his usefulness, impeding the administration of justice, and challenging the integrity of American institutions.

During the investigation Judge Wilfley appeared before the committee and testified under oath.

On May 8, 1908,[2] Mr. Reuben O. Moon, of Pennsylvania, from the Committee on the Judiciary, submitted the following report:

The Committee on the Judiciary, to whom was referred the articles of impeachment of Lebbeus R. Wilfley, judge of the United States court for China, in compliance with the action of the House, begs leave to report that, after investigation, it is the opinion of the committee that no proceedings should be taken on the said resolutions.

The report was referred, under the rule, to the Committee of the Whole House.

On March 3, 1909,[3] Mr. Waldo rose to a question of personal privilege and said:

Mr. Speaker, on February 20, 1908, at the request of Hon. Lorrin Andrews, late attorney general of Hawaii, and who represented the American lawyers and other American citizens, residents of Shanghai, China, I presented to the House articles of impeachment against Lebbeus R. Wilfley, judge of the United States court for China.

These articles charged judicial outrages and gross abuse of power which, in my judgment, showed Judge Wilfley to be utterly unfit to hold judicial office.

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[2] House Report 1626.
[3] Second session Sixtieth Congress, Record, p. 3813.

The President, without any investigation of the facts, except to hear Judge Wilfley and his friends, sent to the subcommittee of the Judiciary Committee, which was then investigating the facts, a copy of a letter from himself to Secretary Root, in which the President used this language:

"I have received and read your report of February 29 upon the charges submitted by Lorrin Andrews, under date of November 19, 1907, against Judge Wilfley; it appearing from your report that Congressman Waldo stands sponsor for the charges."

And concluded letter as follows:

"It is not too much to say that this assault on Judge Wilfley in the interest of the vicious and criminal classes is a public scandal."

This was evidently an intentional reflection upon the uprightness of my motives and conduct and an invasion of my privileges as a Member of this House.

Mr. Sereno E. Payne, of New York, made the point of order that the gentleman was not stating a question of personal privilege.

The Speaker [4] sustained the point of order, and Mr. Waldo continued his remarks by unanimous consent.

526. The inquiry into the conduct of Judge Cornelius H. Hanford, United States circuit judge for the western district of Washington, in 1912.

A Member on his authority as a Member of the House impeached Judge Hanford and offered a resolution providing for investigation of charges.

Pending motion to refer a resolution providing for an investigation looking to impeachment the resolution is not open to amendment.

The House referred the charges made against Judge Hanford to the Judiciary Committee for investigation.

During the investigation of Judge Hanford with a view to impeachment, he was represented by counsel who cross-examined witnesses and produced evidence in his behalf.

Judge Hanford having resigned his office, the House discontinued its investigation into his conduct.

The report of the subcommittee, while recommending the discontinuance of impeachment proceedings against Judge Hanford, declared him to be disqualified for his position and recommended acceptance of his resignation.

On June 7, 1912,[5] Mr. Victor L. Berger, of Wisconsin, presented, as a matter of privilege, the following:

Mr. Speaker, I rise to a question of the highest privilege and also of the greatest importance. By virtue of my office as a Member of the House of Representatives, I impeach Cornelius H. Hanford, judge of the western district of the State of Washington, of high crimes and misdemeanors.

I charge him with having annulled, on May 13, 1912, in violation of the Constitution and on a frivolous charge, the naturalization papers of Leonard Oleson.

I charge him with having been guilty of a long series of unlawful and corrupt decisions.

I charge him with having issued in the collusive suit of Augustus Peabody *v.* The Seattle, Renton & Southern Railway, in August, 1911, an injunction in the interests of the company and against the interests of the citizens of Seattle, flagrantly in violation of justice and law.

I charge him with being an habitual drunkard.

I charge him with being morally and temperamentally unfit to hold a judicial position.

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[4] Joseph G. Cannon, of Illinois, Speaker.

[5] Second session Sixty-second Congress, Journal, p. 772; Record, p. 7799.

Mr. Berger then submitted the following resolution and moved that it be referred to the Committee on the Judiciary:

Resolved, That the Committee on the Judiciary be directed to inquire and report whether the action of this House is necessary concerning the official misconduct of Cornelius H. Hanford; whether he has been in a drunken condition while presiding in court; whether he has been guilty of corrupt conduct in office; whether his administration has resulted in injury and wrong to litigants of his court and to others affected by his decisions; and whether he has been guilty of any misbehavior for which he should be impeached.

That this committee is hereby authorized and empowered to send for persons and papers, to administer oaths, to employ, if necessary, an additional clerk and stenographer, and to appoint and send a subcommittee whenever and wherever necessary to take testimony for the use of said committee.

That the subcommittee shall have the same powers in respect to obtaining testimony as are herein given to the said Committee on the Judiciary.

That the expenses incurred in this investigation shall be paid out of the contingent fund of the House.

Mr. Samuel W. McCall, of Massachusetts, proposed to amend the resolution by inserting the word "alleged" before the word "misconduct."

A point of order by Mr. James R. Mann, of Illinois, that in view of the motion to refer the resolution it was not open to amendment, was sustained.

Thereupon Mr. Berger asked unanimous consent to amend the resolution as proposed by Mr. McCall. There was no objection and the resolution was so modified. The motion to refer the amendment to the Committee on the Judiciary was then agreed to.

On June 13 [6] Mr. Henry D. Clayton, of Alabama, from the Committee on the Judiciary, presented as privileged the report of that committee, with the recommendation that the resolution be amended to read as follows:

That the Committee on the Judiciary be directed to inquire and report whether the action of this House is requisite concerning the official misconduct of Cornelius H. Hanford, United States judge for the western district of the State of Washington, and say whether said judge has been in a drunken condition while presiding in court; whether said judge has been guilty of corrupt conduct in office; whether the administration of said judge has resulted in injury and wrong to litigants in his court and others affected by his decisions; and whether said judge has been guilty of any misbehavior for which he should be impeached.

And in reference to this investigation the said committee is hereby authorized to send for persons and papers, administer oaths, take testimony, employ a clerk and stenographer, if necessary, and to appoint and send a subcommittee whenever and wherever it may be necessary to take testimony for the use of said committee. The said subcommittee while so employed shall have the same powers in respect to obtaining testimony as are herein given to said Committee on the Judiciary, with a sergeant at arms, by himself or deputy, who shall serve the process of said committee and the process and orders of said subcommittee, and shall attend the sitting of the same as ordered and as directed thereby, and that the expense of such investigation shall be paid out of the contingent fund of the House.

The report was adopted and the resolution as amended was agreed to.

On August 6 [7] Mr. Clayton, from the Committee on the Judiciary, submitted the unanimous report of the committee, incorporating the report of an investigation made by a subcommittee pursuant to the following resolution passed by the committee:

Resolved, That James M. Graham, Walter I. McCoy, and Edwin W. Higgins, members of this committee, be appointed the subcommittee by virtue of the au-

[6] House Report No. 880.
[7] House Report No. 1152.

thority given under House Resolution No. 576, passed by the House of Representatives on June 13, 1912, authorizing an inquiry into the alleged misconduct of Cornelius H. Hanford, United States judge for the western district of the State of Washington, and that the said subcommittee shall have all the powers authorized by said resolution hereinbefore named.

This report relates:

In pursuance of said resolution, the subcommittee left Washington on June 21, 1912, and reached Seattle the evening of June 25. Wednesday, June 26, was spent in making the necessary preliminary arrangements for proceeding with the hearings, and on Thursday, the 27th, the taking of testimony was begun in a court room of the Federal Building in Seattle, and was concluded on Monday, July 22, 1912. The subcommittee sat every day between those days except Sundays and the Fourth of July, making in all 21 days of actual work, including several evening sessions. Two hundred and three witnesses were examined and 3,291 typewritten pages of testimony were taken.

Immediately upon the arrival of the subcommittee in Seattle, the following communication was addressed to Judge Hanford by Mr. Graham, chairman of the subcommittee.

SEATTLE, WASH., *June 26, 1912.*

DEAR SIR: The subcommittee on the Committee of the Judiciary of the House of Representatives, Washington, D.C., will convene to-morrow June 27, in the court room, Federal Building, in Seattle, for the purpose of taking testimony under House Resolution 576, a copy of which is attached hereto. You can, of course, be present at the session of the subcommittee, in person and by counsel, if you so desire.

JAMES M. GRAHAM, *Chairman.*

Hon. C. H. Hanford.

The report says:

The subcommittee further reports that Judge Hanford was represented during the hearings by able and learned counsel, namely, Mr. E. C. Hughes, Mr. Harold Preston, and Mr. C. W. Dorr, and that they were given wide latitude in the examination of all the witnesses and in the production of evidence on behalf of Judge Hanford, so that the record contains such evidence in defense as counsel desired to offer, as well as the incriminating evidence.

The report continues:

The subcommittee had almost, but not quite, completed the taking of testimony when, at the morning session on Monday, July 22, counsel representing Judge Hanford asked for a conference with the members of the subcommittee, and the request was granted. They then informed the subcommittee that Judge Hanford had concluded to send his resignation to the President.

The subcommittee thereupon decided:

That there was no good reason why the resignation of the judge should not be accepted. And it appears to the committee that the further prosecution of the impeachment proceedings is inadvisable. Among the reasons for this conclusion may be stated in substance the reasons assigned by the subcommittee:

(1) The chief good which successful impeachment proceedings could effect would be the removal of Judge Hanford from the bench. That good his resignation accomplished.

(2) The record of the evidence shows that he is 64 years old his next birthday, and hence not entitled to retire on pay. Therefore, his resignation brings him no emolument or reward and involves no expenditure of public money.

(3) The committee do not think it necessary or advisable to pursue the impeachment further merely for the purpose of making him ineligible to hold office in the future, as his age and the circumstances disclosed by the testimony render such a contingency highly improbable.

(4) Bringing the witnesses from Seattle and vicinity to Washington, a distance of over 3,000 miles, to prosecute an impeachment proceeding before the Senate would involve an expenditure approximating $70,000. This expenditure of public money could not be justified in this case where the judge is now out of office and doubtless will never again be appointed to office.

The subcommittee further concluded:

On the whole record it clearly appears that Judge Hanford's usefulness as a Federal judge is over; that his personal and judicial conduct disqualify him for that position and that this committee recommend that his resignation be accepted.

The committee therefore recommended the following resolution:

Resolved, That the Committee on the Judiciary be discharged from further consideration of the action under House Resolution 576.

Resolved further, That the testimony taken by the subcommittee of the Committee on the Judiciary under the authority conferred by House Resolution 576 be printed as a part of this report and transmitted by the Clerk of the House of Representatives to the Attorney General for his consideration and with the recommendation that the Department of Justice take cognizance thereof, and take whatever action may be deemed advisable in case said testimony discloses or tends to disclose any infractions of the laws of the United States.

On the same day, after brief debate, Mr. Clayton moved to amend the resolution by inserting after the word "printed" the words "as a part of this report." The amendment was agreed to and the resolution as amended was adopted without division.

527. The investigation into the conduct of Judge Emory Speer.

A resolution proposing investigation with a view to impeachment was referred, under the rule, to the appropriate committee.

A resolution proposing investigation with a view to impeachment was considered by unanimous consent.

A subcommittee, with power to send for persons and papers, was sent to Georgia to investigate the conduct of Judge Speer.

During the investigation of Judge Speer, looking to impeachment, he attended each session, accompanied by counsel, and cross-examined witnesses.

The most liberal latitude was allowed in the examination of witnesses before the committee which investigated Judge Speer.

While declining to recommend acquittal, and declaring Judge Speer's acts merited condemnation, the Judiciary Committee remended that no further proceedings be had in the matter.

On August 26, 1913,[8] Mr. Henry D. Clayton, of Alabama, asked unanimous consent for the consideration of the following resolution:

Whereas on the 16th day of August, 1913, the Attorney General of the United States transmitted to the Committee on the Judiciary of the House of Representatives a report of a special examiner duly designated by the Attorney General to investigate various charges of alleged misconduct of Emory Speer, a United States district judge for the southern district of Georgia, which charges had been brought to the attention of the Department of Justice; and

Whereas the charges embodied in said report are accompanied by exhibits and affidavits and are of such grave nature as to warrant further investigation: Therefore be it

Resolved, That the Committee on the Judiciary be, and it is hereby authorized to inquire into and concerning the official conduct of Emory Speer, United States district judge for the southern district of Georgia, touching his conduct in regard to the matters and things set forth in said report; and further to inquire whether said judge has been guilty of any misbehavior for which he should be impeached and report to the House of Representatives the conclusions of the committee in respect thereto, with appropriate recommendations; and said committee is hereby authorized to send for persons and papers, administer oaths, take testimony, employ a clerk and stenographer if necessary, and to appoint and send a subcommittee whenever and wherever it may be necessary to take testimony for the use of said committee; the said subcommittee, while so employed, shall have the same powers in respect to obtaining testimony as are herein given to said

[8] First session Sixty-third Congress, Journal, p. 254; Record, p. 3777.

Committee on the Judiciary, with a sergeant at arms, by himself or deputy, who shall serve the process of said committee and the process and orders of said subcommittee and shall attend the sittings of the same as ordered and as directed thereby, and that the expense of such investigation shall be paid out of the contingent fund of the House; that said Committee on the Judiciary, or subcommittee thereof, shall have power to sit during the sessions of this House or in vacation.

Mr. James R. Mann, of Illinois, objected and, under the rule, the resolution was referred to the Committee on Rules.

On the following day Mr. Clayton again submitted a unanimous-consent request for consideration of the resolution. There was no objection, and after debate the resolution was agreed to, with the following amendment:

Amend, page 2, by inserting after the word "House," in line 19 and before the semicolon, the following: "On vouchers ordered by the Committee on the Judiciary, signed by the chairman thereof and approved by the Committee on Accounts and evidenced by the signature of the chairman thereof."

On October 2, 1914,[9] Mr. Edwin Yates Webb, of North Carolina, from the Committee on the Judiciary, submitted the report of the majority of that committee on the investigation authorized by the resolution.

The committee incorporate as a part of their report the report of the majority of a subcommittee which conducted the investigation, signed by Mr. Webb and Mr. Louis Fitzhenry, of Illinois. The history of the investigation is thus detailed in the majority report:

Your special subcommittee made a trip to the southern district of Georgia, leaving Washington on the evening of Saturday, January 17, and arriving at Macon, the seat of the court, on the evening of the following day. Monday morning, January 19, at 10 o'clock, the subcommittee opened its public hearings in the United States court room in the Federal Building at Macon, and examined witnesses who were caused to appear for the purpose of giving testimony. These hearings were held continuously throughout the week, ending Saturday, January 24. The committee then went to Savannah, Ga., in said district, and examined witnesses during the entire of the following week, concluding its hearings there on Saturday, January 31.

All of the hearings were public. Judge Speer attended each session of the committee and was accompanied by counsel, who were permitted to cross-examine the several witnesses.

A digest of the testimony of the witnesses examined is appended, and the committee thus summarize the evidence.

The conclusion of the subcommittee, deduced from the evidence taken and from the construction of the precedents of impeachment trials, is that at the present time satisfactory evidence sufficient to support a conviction upon a trial by the Senate is not obtainable.

The report continues:

A phase of the record is that it details a large number of official acts on the part of Judge Speer which are in themselves legal, yet, when taken together, develop into a system tending to approach a condition of tyranny and oppression. There has been an inequitable exercise of judicial discretion, many instances of which have been frequently criticized where the cases in which they were committed have been reviewed by the courts of appeal, while in others litigants were unable, financially, to prosecute appeals. That the power of the court has been exercised in a despotic and autocratic manner by the judge can not be questioned.

[9] House Report No. 1176.

As to examination of witnesses and admission of evidence, the committee say:

In the conduct of the hearings the committee was extremely liberal and did not confine the witnesses to the giving of technically legal evidence. Some evidence of a hearsay nature was received. The committee felt justified in such a course in the light of the fact that it came to the attention of the committee that many witnesses were apprehensive of the consequences of giving evidence against Judge Speer in the event of his acquittal.

The committee also say:

The record shows instances where the judge, sitting in the trial of criminal cases, apparently forced pleas of guilty from defendants or convictions and there is strong evidence tending to show that in one case, at least, he forced innocent parties to enter such pleas through a fear of the consequences in the event of an unfavorable verdict at the hands of a jury presided over by the judge in the manner peculiar to himself.

The committee, however, decide:

The subcommittee regrets its inability to either recommend a complete acquittal of Judge Speer of all culpability so far as these charges are concerned, on the one hand, or an impeachment on the other. And yet it is persuaded that the competent legal evidence at hand is not sufficient to procure a conviction at the hands of the Senate. But it does feel that the record presents a series of legal oppressions and shows an abuse of judicial discretion which, though falling short of impeachable offenses, demand condemnation and criticism.

If Judge Speer's judicial acts in the future are marked by the rigorous and inflexible harshness shown by this record, these charges hang as a portentous cloud over his court, "impairing his usefulness, impeding the administration of justice, and endangering the integrity of American institutions."

The committee therefore recommend the adoption of the following resolution:

Resolved, That no further proceedings be had with reference to H. Res. 234.

Mr. Andrew J. Volstead, of Minnesota, a member of the subcommittee, in an accompanying minority report concurs in recommending the adoption of the resolution reported by the majority, but takes sharp issue with other conclusions set out in the majority report. After discussing in detail each charge considered in the majority report and warmly controverting conclusions reached by the majority, the minority views say:

While I concur in the recommendations made in the majority report, that no further proceedings be had upon the charges against Judge Speer, I desire to express in as emphatic language as possible my protest against the methods that have been pursued; but I desire to have it distinctly understood that I do not criticize the motives of my associates; for them I have the highest personal regards. In this investigation no effort was made to protect the judge against mere slander and abuse that could serve no other purpose than to disgrace and humiliate him. Every enemy that 29 years on the bench had produced was invited and eagerly encouraged to detail his grievance and to supplement that with all sorts of innuendoes, insinuations, and insulting opinions, utterly illegal as evidence and incompetent for any proper purpose. To add to this, the methods pursued in framing the majority report are equally reprehensible. It is apparent throughout that nothing has been considered pertinent that did not support some charge against the judge. As matters of explanation or denial do not meet this requirement, they are quite generally omitted, not only from the findings, but also from the summary of the evidence. Still this is not all. Although the majority report announces that there is not sufficient evidence to support any of the charges, that announcement is in the nature of a "Scotch verdict," or worse, because it is accompanied in almost every instance with an insinuation that the judge may be guilty, notwithstanding such finding. If anything could be more unfair or unjust, it is difficult to imagine what it could be.

The minority views conclude:

It is not necessary to say anything in commendation of Judge Speer. The last line in the majority report, recommending no further action upon the charges, is despite all criticism to the contrary, a complete vindication. It would not have been written if the evidence had pointed to anything worthy of real criticism. In conclusion let me add, the day will come when Judge Speer will be remembered with pride by the people of Georgia, not only for his ability and integrity, but especially for what Mr. Wimberly called his many beautiful acts of mercy to the oppressed.

On October 21, 1914, the House agreed to the majority report without debate or division.

528. The investigation into the conduct of Daniel Thew Wright, associate justice of the Supreme Court of the District of Columbia.

A Member, rising in his place, impeached Judge Wright on his responsibility as a Member of the House.

A committee charged with an investigation looking to impeachment delegated the inquiry to a subcommittee.

During the investigation of Judge Wright with a view to impeachment he was permitted to appear before the committee with counsel.

Judge Wright having resigned his office before final report by the committee charged with the investigation, the House agreed to the recommendation of the committee and that it be discharged.

On March 20, 1914,[10] Mr. Frank Park, of Georgia, rose in his place and proposed as a matter of privilege the impeachment of Daniel Thew Wright, an associate justice of the Supreme Court of the District of Columbia. In the absence of a quorum, the House adjourned.

On the following day, immediately after the reading of the Journal, Mr. Park again rose and presented, as privileged, the following:

Mr. Speaker, at the adjournment hour on yesterday I brought to the attention of the House certain charges which I was about to deliver to the House.

Mr. Speaker, I rise to a question of the highest privilege and of the greatest importance. By virtue of my office as a Member of the House of Representatives I impeach Daniel Thew Wright, an associate justice of the Supreme Court of the District of Columbia, of high crimes and misdemeanors.

I charge him with having accepted favors from practitioners at the bar of his court and of having permitted counsel for a street railway company to indorse his notes while said counsel was retained by said street railway company in business and causes before his court.

I charge him with performing the service of a lawyer and accepting a fee during his tenure of judicial office, in violation of the statute of the United States.

I charge him with collecting and wrongfully appropriating other people's money.

I charge him with purposely changing the record to prevent reversal of causes wherein he presided.

I charge him with bearing deadly weapons in violation of law.

I charge him with judicial misconduct in the trial of a writ of habeas corpus to an extent which provoked a reviewing court of the District of Columbia to justly characterize the trial as a "travesty of justice."

I charge him with arbitrarily revoking, without legal right, the order of a judge of concurrent jurisdiction, appointing three receivers, so as to favor his friend by appointing him sole receiver.

I charge him with being guilty of various other acts of personal and judicial misconduct for which he should be impeached.

I charge him with being morally and temperamentally unfit to hold judicial office.

[10] Second session Sixty-third Congress, Record, p. 5204.

Mr. Park continued:

Mr. Speaker, in accordance with former proceedings before the House in like cases, I submit the following resolution which I send to the Clerk's desk.

The resolution was as follows:

Resolved, That the Committee on the Judiciary be directed to inquire and report whether the action of this House is necessary concerning the alleged official misconduct of Daniel Thew Wright; whether he has accepted favors from lawyers appearing before him; whether he has permitted counsel for a street railway company to indorse his notes while said counsel was retained in business and causes before his court; whether he has performed the services of lawyer and accepted a fee during his tenure of judicial office, in violation of the statutes of the United States; whether he has collected and wrongfully appropriated other people's money; whether he has purposely changed the record in order to prevent reversal of causes wherein he presided; whether he has borne deadly weapons in violation of law; whether he is guilty of judicial misconduct in the trial of a writ of habeas corpus to an extent which provoked a reviewing court of the District of Columbia to justly characterize the trial as a "travesty of justice"; whether he has arbitrarily revoked, without legal right, an order of a judge of concurrent jurisdiction, appointing three receivers, so as to favor his friend by appointing him sole receiver; whether he is morally and temperamentally unfit to hold judicial office; and whether he has been guilty of various acts of personal and judicial misconduct for which he should be impeached.

That this committee is hereby authorized and empowered to send for persons and papers, to administer oaths, to employ, if necessary, an additional clerk and stenographer, and to appoint and send a subcommittee whenever and wherever necessary to take testimony for the use of said subcommittee.

That the subcommittee shall have the same power in respect to obtaining testimony as is herein given to the said Committee on the Judiciary; and the Speaker shall have authority to sign and the Clerk to attest subpoenas for any witness or witnesses.

That the expenses incurred in this investigation shall be paid out of the contingent fund of the House.

On motion of Mr. Park, the resolution was referred to the Committee on the Judiciary without debate.

On April 10 [11] Mr. Henry D. Clayton, of Alabama, from the Committee on the Judiciary, submitted, as privileged, the following:

The Committee on the Judiciary, having had under consideration House resolution No. 446 report the same back with the recommendation that it be amended to read as follows, and as so amended that it be adopted:

"*Resolved*, That the Committee on the Judiciary be directed to inquire and report whether the action of this House is necessary concerning the alleged official misconduct of Daniel Thew Wright, an associated justice of the Supreme Court of the District of Columbia; whether he has corruptly accepted favors from lawyers appearing before him; whether he has corruptly permitted counsel for a street railway company to indorse his notes while said counsel was retained in business and causes before his court; whether he has performed the services of a lawyer and accepted a fee during his tenure of judicial office, in violation of the statute of the United States; whether he has purposely and corruptly changed the record in order to prevent reversal of causes wherein he presided; whether he has borne deadly weapons in violation of law; whether he has arbitrarily revoked, without legal right, an order of a judge of concurrent jurisdiction appointing three receivers, so as to favor his friend by appointing him sole receiver; and whether said judge has been guilty of any misbehavior for which he should be impeached.

"And in making this investigation the said committee is hereby authorized to send for persons and papers, administer oaths, take testimony, employ a clerk and stenographer, and is also authorized to appoint a subcommittee to act for and on behalf of the whole committee whenever and wherever it may be deemed advisable to take testimony for the use of said committee. The said subcommittee while so employed shall have the same powers in respect to obtaining testimony

[11] House Report No. 514.

as are herein given to said Committee on the Judiciary, with a sergeant at arms, by himself or deputy, who shall serve the process of said committee or subcommittee and shall attend the sitting of the same as ordered and directed thereby. The Speaker shall have authority to sign and the Clerk to attest subpœnas for any witness or witnesses.

"The expense of such investigation shall be paid out of the contingent fund of the House."

In response to an inquiry as to wherein the resolution proposed by the committee differed from the original resolution, Mr. Clayton said:

It does not differ in any material respect, but it puts it in better form.

On October 14 [12] Mr. Jack Beall, of Texas, from the Committee on the Judiciary, submitted, through the Clerk of the House, the final report of that committee.

The committee reported the delegation of the inquiry to a subcommittee, the report of which is appended to and made a part of the report of the committee.

The subcommittee report says:

On May 1, 1914, the subcommittee began the examination of witnesses and held sessions on 43 days, including three night sessions, as well as numerous conferences with Mr. Justice Wright and his counsel, the taking of testimony being concluded on August 26, 1914. Such of the testimony and exhibits pertinent to the charges affecting Associate Justice Wright's official conduct that your subcommittee deemed necessary to print have been printed and a copy thereof is submitted herewith. Associate Justice Wright was duly notified and was present at each session of the subcommittee in person and was represented by counsel, Mr. J. J. Darlington, who was given opportunity to cross-examine the witnesses. Several witnesses were called on behalf of Mr. Justice Wright and examined by his counsel.

The committee report adds:

On October 6, 1914, Mr. Justice Wright tendered his resignation to the President, which was duly accepted October 7, 1914, to become effective November 15, 1914, and that because Judge Wright is not eligible under the law to retire with pay this resignation, when it becomes effective, will entirely separate him from the public service. Because of this fact the committee is of the opinion that further proceedings under House resolution 446 are unnecessary.

The committee therefore recommend the adoption of the following resolution:

Resolved, That the Committee on the Judiciary be discharged from further consideration of and action under House resolution 446.

The report of the committee was, under the rules, referred to the Committee of the Whole House on the state of the Union. On March 3 [13] Mr. Beall moved the adoption of the report. The motion was agreed to without debate or division.

529. The investigation into the conduct of Alston G. Dayton, United States district judge for the northern district of West Virginia in 1915.

A Member having presented charges against Judge Dayton, the House ordered an investigation.

In the investigation of Judge Dayton the respondent appeared before the subcommittee charged with the investigation and made an extended statement concerning the matters involved.

[12] House Report No. 1191.
[13] Third session Sixty-third Congress, Journal, p. 301; Record, p. 5485.

The Judiciary Committee authorized to make an investigation committed the matter to a subcommittee, the report of which was made a part of the committee report to the House.

A subcommittee visited West Virginia and took testimony in the case of Judge Dayton.

While the subcommittee, in its report, criticized Judge Dayton, it concluded there was little possibility of maintaining impeachment proceedings.

Minority views, although agreeing with the majority report in the findings of fact, held that the evidence warranted further proceedings toward impeachment.

The committee and the House acted adversely on the proposition to impeach Judge Dayton.

On May 11, 1914,[14] Mr. M. M. Neeley, of West Virginia, submitted a resolution directing the Committee on the Judiciary to make an investigation of the official conduct of Alston G. Dayton, United States district judge for the northern district of West Virginia. Under the rule, the resolution was referred to the Committee on Rules.

On June 12 [15] Mr. Neeley rose in his place and presented as a privileged matter, the following:

Mr. Speaker, I rise to a question of the highest privilege. By virtue of my office as a Member of the House of Representatives, I impeach Alston G. Dayton, Judge of the District Court of the United States for the Northern District of West Virginia, of high crimes and misdemeanors.

At the conclusion of his arraignment, which consisted of 26 separate charges, Mr. Neeley offered the following:

Resolved, That the Committee on the Judiciary be directed to inquire and report whether the action of the House is necessary concerning the alleged official misconduct of Alston G. Dayton; whether he has unlawfully conspired with certain corporations and individuals to bring about the removal from office of the late John J. Jackson, judge of the District Court of the United States for the Northern District of West Virginia; whether he has shown marked favoritism to certain corporations having extensive litigation in his court; whether he has had summoned on juries in his court persons connected with certain corporations to which he has shown marked favoritism during his term of office; whether he has assisted his son, Arthur Dayton, in the preparation of the defense and trial of numerous cases against certain corporations for which the said Arthur Dayton is attorney, which cases were tried before him, the said Alston G. Dayton, and whether he has unlawfully used his high office and influence in behalf of said corporations; whether he has abused his power and influence as judge to further the interests of his son, Arthur Dayton; whether he has used the funds of the United States for an improper purpose; whether he has violated the acts of Congress regulating the selection of jurors; whether he has actively engaged in politics and used his high office as judge to further the political ambitions and aspirations of his friends; whether he has lent his services as judge to the coal operators of West Virginia by improperly issuing injunctions; whether he has shown hatred and bitterness toward miners on trial in his court; whether he has used his office as judge to discourage and prevent said miners from exercising their lawful right to organize and peacefully assemble under the laws of the United States and the State of West Virginia; whether he has wrongfully expressed his own opinions in charging grand juries in his court; whether he has conspired with certain corporations and individuals in the formation of a carbon trust in violation of law; whether he has unlawfully had an order entered staying a proceeding the object of which was the condemnation of a lot in Philippi, W. Va., for a site for a Federal building; whether he has publicly denounced the President of the United States from the bench and before a jury; whether he has unlawfully used the funds of the United States Government for

[14] Second session Sixty-third Congress, Record, p. 8417.
[15] Journal, p. 645; Record, p. 10327.

his own private use; whether he has wrongfully collected from the Government funds as expenses not due or allowed to him under the statute; whether he has wrongfully kept open the books of his court at Philippi, W. Va.; whether he has, in open court and before a jury, accused witnesses of swearing falsely in cases then on trial before him; whether he has directed the marshal of his district to refuse to pay the fees of witnesses whom he had accused of testifying falsely; whether he has refused to enforce certain laws of the United States; whether he has openly denounced and criticised the United States Supreme Court; whether he has discharged jurors for rendering verdicts not agreeable to him; whether he has openly stated that he would not permit the United Mine Workers of America to exist within the jurisdiction of his court; whether he has refused to permit certain defendants in a case in his court to have an interpreter; whether he has stated in open court that the United Mine Workers of America are criminal conspirators; whether he is so prejudiced as to unfit him temperamentally to hold a judicial office; and whether he has been guilty of various other acts of personal and judicial misconduct for which he should be impeached.

That this committee is hereby authorized and empowered to send for persons and papers, to administer oaths, to employ, if necessary, an additional clerk and stenographer, and to appoint and send a subcommittee whenever and wherever necessary to take testimony for the use of said subcommittee.

That the subcommittee shall have the same power in respect to obtaining testimony as is herein given to the said Committee on the Judiciary; that the Speaker shall have authority to sign and the Clerk to attest subpoenas for any witness or witnesses.

That the expenses incurred in this investigation shall be paid out of the contingent fund of the House.

Mr. Neeley moved that the resolution be referred to the Committee on the Judiciary without debate, and on that motion demanded the previous question.

The motion was agreed to without division.

On February 9, 1915,[16] Mr. Edwin Yates Webb, of North Carolina, from the Committee on the Judiciary, reported the resolution back, with the recommendation that it be amended to read as follows:

Resolved, That the Committee on the Judiciary be directed to inquire and report whether the action of this House is necessary concerning the alleged official misbehavior of Alston G. Dayton, United States district judge for the northern district of West Virginia; whether he, the said Alston G. Dayton, has unlawfully conspired with certain corporations and individuals to bring about the removal from office of the late John J. Jackson, judge of the District Court of the United States for the Northern District of West Virginia; whether he has shown marked favoritism to certain corporations having extensive litigation in his court; whether he has summoned on juries in his court persons connected with certain corporations to which he has shown marked favoritism during his term of office; whether he has abused his power and influence as judge to further the interests of his son, Arthur Dayton; whether he has violated the acts of Congress regulating the selection of jurors; whether he has lent his services as judge to the coal operators of West Virginia by improperly issuing injunctions; whether he has shown hatred and bitterness toward miners on trial in his court; whether he has used his office as judge to discourage and prevent said miners from exercising their lawful right to organize and peaceably assemble under the laws of the United States and the State of West Virginia; whether he has conspired with certain corporations and individuals in the formation of a carbon trust, in violation of law; whether he has openly stated that he would not permit the United Mine Workers of America to exist within the jurisdiction of his court; whether he has stated in open court that the United Mine Workers of America are criminal conspirators; and whether he has been guilty of any misbehavior for which he should be impeached.

And in making this investigation the said committee is hereby authorized to send for persons and papers, administer oaths, take testimony, employ a clerk and stenographer if necessary, and is also authorized to appoint a subcommittee to act for and on behalf of the whole committee whenever and wherever it may be deemed advisable to take testimony for the use of said committee. The said sub-

[16] House Report No. 1381.

committee while so employed shall have the same powers in respect to obtaining testimony as are herein given to said Committee on the Judiciary, with a sergeant at arms, by himself or deputy, who shall serve the process of said committee or subcommittee, and shall attend the sittings of the same as ordered and directed thereby.

The Speaker shall have authority to sign and the Clerk to attest subpoenas for any witness or witnesses.

The expense of such investigation shall be paid out of the contingent fund of the House on vouchers approved by the chairman of the Judiciary Committee and approved by the Committee on Accounts and evidenced by the signature of the chairman thereof.

The amendment recommended by the committee was agreed to, and the resolution as amended was unanimously adopted.

On March 3,[17] Mr. Warren Gard, of Ohio, from the Committee on the Judiciary, submitted a report incorporating the report of a majority of the subcommittee to which the investigation had been committed, accompanied by minority views signed by Mr. Daniel J. McGillicuddy, of Maine, a member of the subcommittee.

The report of the majority of the subcommittee is prefaced as follows:

The subcommittee appointed by the Committee on the Judiciary to make investigation of the charges contained in the foregoing resolution heard the testimony of numerous witnesses in Parkersburg and Wheeling, W. Va., and in Washington, D.C., on February 12, 13, 15, 16, 17, 22, 23, 24, and 26, at all of which hearings, except that of February 26 last, the Hon. A. G. Dayton, respondent, was present in person and attended by legal counsel; and on February 26 the hearing was had with the consent and approval of said Hon. A. G. Dayton, who was represented at that hearing by legal counsel.

The Hon. A. G. Dayton appeared before the subcommittee and made full and extended statement of and concerning the matters involved in said investigation.

The witnesses and respondent were each and all sworn, their evidence taken by shorthand reporters, the evidence reduced to writing and is on the file with this committee.

The report then takes up the items of impeachment in their order and summarizes the evidence adduced on each charge.

The conclusion reached by the majority, after hearing the testimony, is that:

This evidence shows many matters of individual bad taste on the part of Judge Dayton, some not of that high standard of judicial ethics which should crown the Federal judiciary, but a careful consideration of all the evidence and attendant circumstances convinces us that there is little possibility of maintaining to a conclusion of guilt the charges made, and impels us therefore to recommend that there be no further proceedings herein.

Mr. McGillicuddy filed the following minority views:

I concur with my colleagues in the above findings of fact, but I do not concur in the recommendation that no further proceedings be had, as it is my opinion that the evidence taken by the subcommittee and findings of fact above made warrant further proceedings looking toward impeachment.

The committee recommend:

The Committee on the Judiciary considered the report of said subcommittee and the evidence thereon and came to the conclusion that no further proceedings should be had with reference to said resolution, and the Committee on the Judiciary beg to report the same to the House and recommend that no further proceedings be had with reference to said resolution.

The report was agreed to without debate or division.

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[17] House Report No. 1490.

530. The investigation into the conduct of H. Snowden Marshall,[18] United States district attorney for the southern district of New York.

The House declined to order an investigation of District Attorney Marshall on evidence presented by a Member and referred the subject to a committee.

Form of resolution providing for an investigation by the Judiciary Committee and authorizing a subcommittee to exercise powers delegated to the committee.

On January 12, 1916,[19] Mr. Frank Buchanan, of Illinois, presented, as a privileged matter, a resolution detailing at length numerous charges alleging official misconduct on the part of H. Snowden Marshall, United States district attorney for the southern district of New York, and directing the Committee on the Judiciary to conduct an investigation of the charges and report their conclusions to the House.

After debate, on motion of Mr. John J. Fitzgerald, of New York, this resolution was referred to the Committee on the Judiciary.

On January 27[20] Mr. Edwin Yates Webb, of North Carolina, from the Committee on the Judiciary, offered, as privileged, the following resolution:

Resolved, That the Committee on the Judiciary in continuing their consideration of House Resolution 90 be authorized and empowered to send for persons and papers, to subpoena witnesses, to administer oaths to such witnesses, and take their testimony.

The said committee is also authorized to appoint a subcommittee to act for and on behalf of the whole committee wherever it may be deemed advisable to take testimony for said committee. In case such subcommittee is appointed it shall have the same powers in respect to obtaining testimony as are herein given to the Committee on the Judiciary, with a sergeant at arms, by himself or deputy, who shall attend the sittings of such subcommittee and serve the process of same.

In case the Committee on the Judiciary or a subcommittee thereof deems it necessary it may employ such clerks and stenographers as are required to carry out the authority given in this resolution, and the expenses so incurred shall be paid out of the contingent fund of the House.

The Speaker of the House of Representatives shall have authority to sign, and the Clerk thereof to attest, subpoenas for witnesses, and the Sergeant at Arms or a deputy shall serve them.

Mr. Finis J. Garrett, of Tennessee, raised a question as to the privilege of the resolution, when, on motion of Mr. Webb, the resolution was considered by unanimous consent.

Mr. Webb said:

Mr. Speaker, the Committee on the Judiciary has had under consideration House Resolution No. 90, which was referred to that committee some 10 days ago. The committee has not come to any conclusion yet on the resolution, but feels that it should ask the House for the authority to subpoena some witnesses before it that might throw some light upon the charges made. The resolution was unanimously adopted by the Committee on the Judiciary to-day, and I trust that it may pass and that the committee may secure the authority, which it will immediately exercise.

The resolution was agreed to.

531. The case of H. Snowden Marshall, continued.

A witness having refused to testify before a subcommittee was arrested and detained in custody.

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[18] For preliminary proceedings in this case see section 468 of this volume.
[19] First session Sixty-fourth Congress, Journal, p. 204; Record, p. 963.
[20] Record, p. 1658.

The action of a subcommittee in arresting a recalcitrant witness having been criticized in a letter addressed to the chairman, the committee reported the proceedings to the House with recommendations for an investigation.

Instance in which the House authorized an investigation of purported violations of its privileges and its power to punish for contempt.

On April 5, 1916,[21] Mr. Edwin Yates Webb, of North Carolina, from the Committee on the Judiciary, as a question of privilege, reported:

While considering House Resolution 90 and House Resolution 110, on the 31st day of January, 1916, the Committee on the Judiciary authorized the chairman to appoint a subcommittee of three to execute the purposes of House Resolution 110 to act for and on behalf of the full committee wherever it may be deemed advisable to take testimony for said committee, and on February 1, 1916, the chairman appointed Messrs. Charles C. Carlin, Warren Gard, and John M. Nelson as members of such subcommittee.

Thereafter the said subcommittee organized and heard the testimony of certain witnesses in the Judiciary Committee rooms in the city of Washington. The subcommittee determined, for its further information and in carrying out the duties assigned it under the resolution of the House of Representatives, that it should hear the testimony of certain other witnesses in the city of New York, and on the 28th day of February, 1916, the said subcommittee, under subpoenas duly signed by the Speaker of the House of Representatives and attested by the Clerk thereof, caused certain witnesses to be brought before it, in the Federal post-office buildnig in the city of New York, and continued the examination of witnesses upon said charges up to and including the 4th day of March, 1916.

On the 3d day of March, 1916, there appeared in a New York newspaper an article containing among other things, the following language:

"It is the belief in the district attorney's office that the real aim of the Congress investigation is to put a stop to the criminal investigation of the pro-German partisans."

On the 3d of March, 1916, the subcommittee called before it one, Leonard R. Holme, who testified to the subcommittee that he wrote the article containing the foregoing language, but when asked whether or not he conferred with anybody in the district attorney's office before the article was written replied that he declined to give the source of his information. The chairman of the subcommittee then propounded this question to the witness, "Did you confer with Mr. Marshall before you wrote this article?" To which the witness replied, "I respectfully decline to answer the question, sir." The chairman of the subcommittee then propounded the following question to him, "Did you confer with anybody in Mr. Marshall's office?" To which the witness replied, "I respectfully decline to answer that question, sir."

Whereupon, the Sergeant at Arms was directed by the chairman of the subcommittee to take charge of the witness and keep him in custody until the further order of the committee.

The report appends an excerpt from the transcript of the testimony by Witness Holme before the subcommittee and continues:

On Saturday, the 4th day of March, 1916, the said H. Snowden Marshall, as district attorney for the southern district of New York, caused to be transmitted to C. C. Carlin, chairman of said subcommittee, then in the performance of its duties, as required by the House of Representatives, the following letter:

DEPARTMENT OF JUSTICE,
UNITED STATES ATTORNEY'S OFFICE,
New York, March 4, 1916.

SIR: Yesterday afternoon, as I am informed, your honorable committee ordered the arrest of Mr. L. R. Holme, a representative of a newspaper which had published an article at which you took offense. The unfortunate gentleman of the press was placed in custody under your orders. He was taken to the United

[21] First session Sixty-fourth Congress, House Report No. 494.

States marshal to be placed in confinement (I do not understand whether his sentence was to be one day or a dozen years). The marshal very properly declined to receive the prisoner. This left you at a loss, and I am advised that you tried to work your way out of the awkward situation by having Mr. Holme brought back and telling him that you were disposed to be "kind" to him and then discharged him for the purpose of avoiding unpleasant consequences to yourselves.

You are exploiting charges against me of oppressive conduct toward a member of your honorable body who is charged with a violation of law and of oppressive conduct on my part toward shysters in the blackmailing and bankruptcy business.

I may be able to lighten your labors by offering to resign if you can indicate anything I ever did that remotely approximates the lawless tyranny of your order of arrest of Mr. Holme.

The supposed justification of your order that Mr. Holme be placed in custody was his refusal to answer the question you asked as to where he got the information on which was based the article which displeased you.

It is not necessary for you to place anyone under arrest in order to get the answers to the question which you asked Mr. Holme, because I can and will answer it. I gave Mr. Holme information, part of which be published and from which he made deductions, so that if your honorable committee has a grievance it is against me and not against him.

What I told him was about as follows:

I said that your expedition to this town was not an investigation conducted in good faith, but was a deliberate effort to intimidate any district attorney who had the temerity to present charges against one of your honorable body.

I said that your whole proceeding here was irregular and extraordinary; that I had never heard of such conduct of an impeachment proceeding; that charges of this sort were not usually heard in public until the House of Representatives had considered them and were willing to stand back of them.

I pointed out to him that you, contrary to usual practice, had come here and had held public hearings; that among your witnesses you had invited every rogue that you could lay your hands on to come before you and blackguard and slander me and my assistants under the full privilege of testifying before a congressional committee.

I told him that you had called one of my junior assistants before you and had attempted to make it publicly appear that his refusal to answer your questions as to what occurred in the grand-jury room in the Buchanan case was due solely to my orders. I said that at the time you attempted to convey this public impression you knew that it was misleading because I had been asked by you to produce the minutes of the grand jury and had been instructed by the Attorney General not to comply with your request, as you well know. I showed him the telegram of the Attorney General to me and showed him a copy of my letter to you, dated February 29, 1916, in which I sent you a copy of the telegram of the Attorney General instructing me not to give you the grand-jury minutes.

I told him that you were traveling around in your alleged investigation of me with Buchanan's counsel, Walsh and David Slade, in constant conference with you. I said that I believed that every word of the evidence, whether in so-called secret sessions or not, had been placed at the disposal of these worthies, and that I would be just as willing to give the grand-jury minutes to a defendant as to give them to your honorable subcommittee.

I told him that I did not share the views which seemed to prevail in your subcommittee on this subject. I said that I regarded a Member of Congress who would take money for an unlawful purpose from any foreign agent as a traitor, and that it was a great pity that such a person could only be indicted under the Sherman law, which carries only one year in jail as punishment.

I said that it was incomprehensible to me how your honorable subcommittee should rush to the assistance of an indicted defendant; how you had apparently resolved to prevent prosecution by causing the district attorney in charge to be publicly slandered.

I told him that I would not permit the prosecution of the persons whose cause you had apparently espoused to be impeded by you; I said that if you wanted the minutes of the grand jury in any case, you would not get them as long as I remained in office.

You will observe from the foregoing statement that what Mr. Holme published may have been based on what I said. If you have any quarrel, it is with me, and not with him.

It is amazing to me to think that you supposed that I did not understand what you have been attempting to do during your visit here. I realized that your

effort was to ruin me and my office by publishing with your full approval the complaints of various persons who have run afoul of the criminal law under my administration. Your subcommittee has endeavored by insulting questions to my assistants and others, by giving publicity and countenance to the charges of rascals and by refusing to listen to the truth and refusing to examine public records to which your attention was directed, to publicly disgrace me and my office.

I propose to make this letter public.

Respectfully,

H. SNOWDEN MARSHALL,
United States Attorney.

Hon. C. C. CARLIN,
Chairman Subcommittee of the Judiciary Committee of the House of Representatives, 323 Federal Building, New York, N.Y.

The report continues:

At the same time or before this letter was sent to the subcommittee, it was given to the newspapers and published by them.

On the 9th day of March 1916, the subcommittee aforesaid, through its chairman, Hon. C. C. Carlin, submitted to the Committee on the Judiciary the foregoing letter of H. Snowden Marshall.

On or about the 11th day of March, 1916, the following letter was received by the chairman of the Judiciary Committee and immediately laid before the full committee:

DEPARTMENT OF JUSTICE,
UNITED STATES ATTORNEY'S OFFICE,
New York, March 10, 1916.

Hon. EDWIN Y. WEBB,
Chairman of the Judiciary Committee,
House of Representatives, Washington, D.C.

DEAR SIR: Referring to my letter of March 4, addressed to the chairman of the subcommittee which has recently taken testimony in New York concerning my administration of my office, I notice from the press that some persons appear to have construed my statements as directed toward your honorable committee as a whole. I beg to advise you that the criticisms in that letter were addressed to the methods pursued by the subcommittee. I do not retract nor modify any of those criticisms. But I did not intend (nor do I think my letter should be so construed) to reflect in any way upon the Judiciary Committee, nor did I question the power of the House of Representatives to order such an investigation.

If you and the other members of your committee, for whom I have high respect, have gained the impression that my letter carried any personal reflection upon your honorable committee, it gives me pleasure to assure you that I had no such purpose.

Respectfully,

H. SNOWDEN MARSHALL.

The report of the committee concludes:

The Judiciary Committee has carefully considered said letters in the light of congressional and judicial precedents as touching the prerogatives of the House of Representatives and its Members, and the committee has come to the determination that said letters, their publication and attendant circumstances, are of such nature, that they should be called to the attention of the House. For obvious reasons the committee deems it advisable to take this step rather than to report directly upon the facts and the law in the case. I am, therefore, directed by the committee to report the whole matter to the House of Representatives, with the recommendation that a select committee of five be appointed by the Speaker to report upon the facts in this case; the violations, if any, of the privileges of the House or the Committee on the Judiciary or the subcommittee thereof; the power of the House to punish for contempt; and the procedure in contempt proceedings, to the end that the privileges of the House shall be maintained and the rights of the Members protected in the performance of their official duties."

The House agreed to the following resolution:

Resolved, That a select committee of five members be appointed forthwith by the Speaker to consider the report, in the nature of a statement, from the

Judiciary Committee with reference to certain conduct of H. Snowden Marshall, and to report to the House of Representatives the facts in the case; the violations, if any, of the privileges of the House of Representatives or of the Committee on the Judiciary, or of the subcommittee thereof; the power of the House to punish for contempt; and the procedure in contempt proceedings, in case they find a contempt has been committed, to the end that the privileges of the House shall be maintained and the rights of Members protected in the performance of their official duties.

The select committee shall have the power to send for persons and papers and shall submit its report to the House not later than April fourteenth, nineteen hundred and sixteen.

The Speaker appointed as members of this committee Messrs. John A. Moon, of Tennessee; John N. Garner, of Texas; Charles R. Crisp, of Georgia; John A. Sterling, of Illinois; and Irvine L. Lenroot, of Wisconsin.

532. The case of H. Snowden Marshall, continued.

By direction of the House, the Speaker issued and the Sergeant at Arms served a warrant for the arrest of a person charged with contempt of the House.

A person arrested by order of the House secured a writ of habeas corpus and was released on his own recognizance.

Discussion of the delegation of power to subcommittees.

On April 14, 1916,[22] Mr. Moon, from the select committee, presented the report of that committee, accompanied by a transcript of testimony.

The report quotes the following letter addressed to H. Snowden Marshall by direction of the committee:

APRIL 7, 1916.

Hon. H. SNOWDEN MARSHALL,
United States District Attorney for the
Southern District of New York, New York City.

DEAR SIR: Inclosed is House Resolution 193 and Report No. 494, which explain themselves. The select committee appointed by the Speaker of the House of Representatives are now engaged in the investigation of the matters referred to herein. We will be glad to have you appear before us, if you so desire, at the rooms of the Committee on the Post Office and Post Roads of the House of Representatives, in the Capitol Building, Washington, D.C., on Monday, April 10, 1916, at 10 o'clock a.m., and make such statement as you may desire before the committee touching this matter. As the time of the committee is limited in which to report, you will oblige us by advising by wire whether you desire to be present or not. This communication is made to you by order of the select committee.

Very truly yours,

JOHN A. MOON,
Chairman Select Committee.

In response to this letter, Judge Marshall appeared before the committee, and the report incorporates the following findings reached by the committee after hearing his testimony:

We conclude and find that the letter written and published by said H. Snowden Marshall to Hon. C. C. Carlin, chairman of the subcommittee of the Judiciary Committee of the House of Representatives, on March 4, 1916, is as a whole and in several of the separate sentences defamatory and insulting and tends to bring the House into public contempt and ridicule, and that the said H Snowden Marshall, by writing and publishing the same, is guilty of contempt of the House of Representatives of the United States because of the violation of its privileges, its honor and its dignity.

We find that Mr. Marshall's testimony is an aggravation of his contempt.

In discussing the delegation of power to subcommittees, the report says:

[22] First session Sixty-fourth Congress, H. Rept. 544.

No legislative body consisting of a large number of members can move from one place to another to take testimony in cases where its power and authority or dignity is called into question. Its power in this respect must, therefore, necessarily be delegated to one of its committees or a subcommittee by a proper resolution, as was done in this case. This delegation of power to a subcommittee is lawful, and carries with it all of the authority belonging to the House in the execution of the immediate purpose for which the committee was called into existence.

Any conduct that would be a violation of the privileges of the House if directed against the House in the first place, would be a contempt against the House and a breach of its privileges when directed against one of its committees or subcommittees appointed by authority of the House to do a specific thing and acting within its delegated power and in the scope of its authority. Any other view would leave the House powerless to protect its honor and dignity and its constitutional rights. It would set at defiance the sovereignty of the people represented by the House. That the House as a representative body has the inherent power to protect itself from defamation and all slanderous and lawless conduct that would bring it into reproach and popular contempt, whether uttered or committed in the presence of the House or elsewhere, has not been disputed since the case of Anderson *v.* Dunn. Offensive, abusive, and defamatory language against a committee of the House acting within its authority is offensive, abusive, and defamatory against the House, and is just as dangerous to the integrity of that body as if had been committed in its presence.

As to the power of the House to punish for contempt, the committee decides:

We find, therefore, that the House has full power to punish for contempt committed in its presence, or not within its presence, by publication of matter that is defamatory against it or its committee lawfully constituted and acting within its authority. We find as stated that the privileges of the House in this case were breached by H. Snowden Marshall by the letter which he wrote to the subcommittee. This letter as a whole is insulting, defamatory, and a clear expression of contempt. The purpose for which it was written and printed was to defame—to bring into ridicule and contempt—the subcommittee of the Judiciary Committee having under investigation the impeachment charges against H. Snowden Marshall. It was as much a violation of the privileges of the House to have directed a scurrilous and offensive letter of this character against one of its committees, as if it had been addressed directly to the House.

It is proper for us to say that Mr. Marshall was given every opportunity to retract or apologize or in some way modify his statements contained in the letter. Parts of the letter containing the most defamatory matter were read to him, and he was asked if he meant to still say that that was true. He reaffirmed and reasserted the same, only with the statement that it was intended to criticize the procedure of the subcommittee and was not intended as a contempt of the House. It is clear that if the House could tolerate such a construction of this letter and could tolerate such vile and defamatory language against one of its committees, it would be powerless to conduct impeachment trials or perform any other duty without living under the disgrace of the contempt that would necessarily come to a body so unmindful of its duties to the people as to permit such insult and injury.

The committee therefore recommend:

As to the method of procedure that should be followed in the House in trial of the said H. Snowden Marshall for the contempt which the committee finds that he has committed, we recommend the passage of the following resolution:

Resolved, That the Speaker do issue this warrant, directed to the Sergeant at Arms, commanding him to take in custody, wherever to be found, the body of H. Snowden Marshall, of the State of New York, and to proceed forthwith to bring the said H. Snowden Marshall to the bar of the House of Representatives, to answer the charge that he, on March 4, 1916, in the city of New York, did violate the privileges of the House of Representatives of the United States by writing and causing to be published the following letter. (The letter is here quoted in full.)

Resolved, That the said H. Snowden Marshall, in writing and publishing said letter, was guilty of a breach of the privileges and a contempt of the House of Representatives, and that the said H. Snowden Marshall be furnished with a copy

of this resolution, and a copy of the report of the select committee of the House of Representatives, appointed to investigate the charges made against him in the House of Representatives.

Resolved, That when H. Snowden Marshall shall be brought to the bar of the House, to answer the charge of having violated the privileges of the House of Representatives, as afore set out, the Speaker shall then cause to be read to said H. Snowden Marshall the findings of fact and findings of law by the special committee of the House, charged with the duty of investigating whether or not the said H. Snowden Marshall had violated the privileges of the House of Representatives, or was in contempt of same; the Speaker shall then inquire of said H. Snowden Marshall if he desires to be heard, and to have counsel on the charge of being in contempt of the House of Representatives for having violated its privileges. If the said H. Snowden Marshall desires to avail himself of either of these privileges, the same shall be granted him. If not, the House shall thereupon proceed to take order in the matter.

This report was considered in the House on June 20. In the course of the debate, Mr. Andrew J. Montague, of Virginia, said:

Mr. Speaker, I beg to submit to this House, without fear of successful contradiction, that neither this House nor the Senate has ever heretofore undertaken to exercise jurisdiction in contempt proceedings of a case of the character we are now considering. No slander or libel of this body has ever heretofore been treated as contempt by this body. This statement can not be controverted. Therefore we are driven to the unfortunate predicament of making a new law to fit a new case. The report attempts to declare that to be contempt which has never heretofore been adjudged to be contempt by either House of Congress. In other words, Mr. Speaker, we now seek to declare that unlawful which when heretofore done was lawful.

After extended debate, the resolutions recommended by the committee were agreed to—yeas 209, nays 85.

On June 22 the Speaker announced:

The Chair directs the reporter to record the fact to go in the Record that the Speaker signs this warrant for H. Snowden Marshall in the presence of the House.

The Chair does not think it necessary, but some gentlemen did.

On June 26 [23] the Sergeant at Arms addressed a letter to the Speaker advising him that in compliance with this warrant he had arrested Judge Snowden, who had thereupon secured a writ of habeas corpus and had been released on his own recognizance. On the same day the House agreed to the following:

Resolved, That the Sergeant at Arms of the House is hereby authorized to employ legal counsel in the matter of the proceedings against H. Snowden Marshall, United States district attorney for the southern district of New York, for contempt, the expenses to be paid out of the contingent fund of the House.

The hearing in the habeas corpus proceedings was held in the United States District Court for the Southern District of New York, which dismissed the writ of habeas corpus, remanded Judge Marshall to the custody of the Sergeant at Arms and directed that he be brought before the House.[24] The relator thereupon appealed the case to the Supreme court.

533. The case of H. Snowden Marshall, continued.

A committee, after investigation of impeachment charges referred to it by the House, recommended that no further action be taken thereon.

[23] Record, p. 10372.
[24] First session Sixty-fourth Congress, Record, p. 11691.

On August 4, 1916,[25] Mr. Webb, from the Committee on the Judiciary, submitted the report of the committee on the resolution, proposing impeachment of H. Snowden Marshall, recommending that no further proceedings be had in the matter. The report was referred to the House Calendar and was not considered by the House.

534. The case of H. Snowden Marshall, continued.

Decision by the Supreme Court on the power of the House to punish for contempt.

The House is without constitutional jurisdiction to punish summarily for contempt in certain cases.

The power to punish contempt vested in the House of Commons is not conferred by the Constitution upon Congress.

While power to punish contempt is not expressly granted to Congress by the Constitution, it has the implied power to preserve itself and to deal by way of contempt with direct obstructions to its legislative duties.

The implied power to punish for contempt is limited to imprisonment and such imprisonment may not extend beyond the session of the body in which the contempt occurred.

In cases of contempt which it is not authorized to redress, the remedy of the House is resort to judicial proceedings under the criminal law.

On April 23, 1917,[26] the Supreme Court of the United States handed down a unanimous decision in the case of H. Snowden Marshall, appellant, *v.* Robert B. Gordon, Sergeant at Arms of the House of Representatives of the United States.[27]

As to the authority of the House of Commons to punish for contempt the decision says:

> Undoubtedly what went before the adoption of the Constitution may be resorted to for the purpose of throwing light on its provisions. Certain is it that authority was possessed by the House of Commons in England to punish for contempt directly—that is, without the intervention of courts—and that such power included a variety of acts and many forms of punishment including the right to fix a prolonged term of imprisonment. Indubitable also is it, however, that this power rested upon an assumed blending of legislative and judicial authority possessed by the Parliament when the Lords and Commons were one, and continued to operate after the division of Parliament into two houses either because the interblended power was thought to continue to reside in the Commons, or by the force of routine the mere reminiscence of the commingled powers led to a continued exercise of the wide authority as to contempt formerly existing long after the foundation of judicial-legislative power upon which it rested had ceased to exist. That this exercise of the right of legislative-judicial power to exert the authority stated prevailed in England at the time of the adoption of the Constitution and for some time after has been so often recognized as to make it too certain for anything but statement.

The opinion then differentiates between the power vested in the House of Commons and that conferred by the Constitution on the House of Representatives:

> No power was expressly conferred by the Constitution of the United States on the subject except that given to the House to deal with contempt committed by its own Members, Article 1, section 5. As the rule concerning the Constitution of the United States is that powers not delegated were reserved to the people or the States, it follows that no other express authority to deal with contempt can

[25] House Report No. 1077.
[26] First session Sixty-fifth Congress, Record, p. 1706.
[27] U.S. 243, p. 521.

be conceived of. It comes, then, to this: Was such an authority implied from the powers granted? As it is unthinkable that in any case from a power expressly granted there can be implied the authority to destroy the grant made, and as the possession by Congress of the commingled legislative-judicial authority as to contempts which was exerted in the House of Commons would be absolutely destructive of the distinction between legislative, executive, and judicial authority which is interwoven in the very fabric of the Constitution and would disregard express limitations therein, it must follow that there is no ground whatever for assuming that any implication as to such a power may be deduced from any grant of authority made to Congress by the Constitution. This conclusion has long since been authoritatively settled and is not open to be disputed.

The court holds, however, that, while not expressly granted, implied powers are conferred as follows:

As we have already said, the power possessed by the House of Commons was incompatible with the Constitution and could not be exerted by the House, it was yet explicitly decided that from the power to legislate given by the Constitution to Congress there was to be implied the right of Congress to preserve itself; that is, to deal by way of contempt with direct obstructions to its legislative duties.

As to the nature of these implied powers:

What does this implied power embrace, is thus the question. In answering, it must be borne in mind that the power rests simply upon the implication that the right has been given to do that which is essential to the execution of some other and substantive authority expressly conferred. The power is therefore but a force implied to bring into existence the conditions to which constitutional limitations apply. It is a means to an end and not the end itself. Hence it rests solely upon the right of self-preservation to enable the public powers given to be exerted.

Without undertaking to inclusively mention the subjects embraced in the implied power, we think from the very nature of that power it is clear that it does not embrace punishment for contempt as punishment, since it rests only upon the right of self-preservation; that is, the right to prevent acts which in and of themselves inherently obstruct or prevent the discharge of legislative duty or the refusal to do that which there is an inherent legislative power to compel in order that legislative functions may be performed. And the essential nature of the power also makes clear the cogency and application of two limitations; that is, that power, even when applied to subjects which justified its exercise, is limited to imprisonment, and such imprisonment may not be extended beyond the session of the body in which the contempt occurred. Not only the adjudged cases but the congressional action in enacting legislation as well as in exerting the implied power conclusively sustain the views just stated.

The court then cites instances of the exercise of the power by Congress and characterizes them as dealing—

with either physical obstruction of the legislative body in the discharge of its duties or physical assault upon its Members for action taken or words spoken in the body, or obstruction of its officers in the performance of their official duties, or the prevention of Members from attending so that their duties might be performed, or, finally, with contumacy in refusing to obey orders to produce documents or give testimony which there was a right to compel.

In the two or three instances not embraced in the classes we think it plainly appears that for the moment the distinction was overlooked which existed between the legislative power to make criminal every form of act which can constitute a contempt to be punished according to the orderly process of law and the accessory implied power to deal with particular acts as contempts outside of the ordinary process of law because of the effect such particular acts may have in preventing the exercise of legislative authority. And in the debates which ensued when the various cases were under consideration it would seem that the difference between the legislative and the judicial power was also sometimes forgotten—that is to say, the legislative right to exercise discretion was confounded with the want of judicial power to interfere with the legislative discretion when lawfully exerted. But these considerations are incidental and do not change the concrete result manifested by considering the subject from the beginning. Thus we have been able to discover no single instance wherein the exertion of the power to compel testimony restraint was ever made to extend beyond the time

when the witness should signify his willingness to testify, the penalty or punishment for the refusal remaining controlled by the general criminal law. So again we have been able to discover no instance, except the two or three above referred to, where acts of physical interference were treated as within the implied power unless they possessed the obstructive or preventive characteristics which we have stated, or any case where any restraint was imposed after it became manifest that there was no room for a legislative judgment as to the virtual continuance of the wrongful interference which was the subject of consideration. And this latter statement causes us to say that where a particular act because of interference with the right of self-preservation comes within the jurisdiction of the House to deal with directly under its implied power to preserve its functions and therefore without resort to judicial proceedings under the general criminal law, we are of opinion that authority does not cease to exist because the act complained of had been committed when the authority was exerted, for to so hold would be to admit the authority and at the same time deny it. On the contrary, when an act is of such a character as to subject it to be dealt with as a contempt under the implied authority, we are of opinion that jurisdiction is acquired by Congress to act on the subject, and therefore there necessarily results from this power the right to determine in the use of legitimate and fair discretion how far from the nature and character of the act there is necessity for repression to prevent immediate recurrence—that is to say, the continued existence of the interference or obstruction to the exercise of the legislative power. And of course in such case, as in every other, unless there be manifest an absolute disregard of discretion and a mere exertion of arbitrary power coming within the reach of constitutional limitations, the exercise of the authority is not subject to judicial interference.

As to the application of these implied powers to the case at bar, the court holds:

It remains only to consider whether the acts which were dealt with in the case in hand were of such a character as to bring them within the implied power to deal with contempt; that is, the accessory power possessed to prevent the right to exert the powers given from being obstructed and virtually destroyed. That they were not, would seem to be demonstrated by the fact that the contentions relied upon in the elaborate arguments at bar to sustain the authority were principally rested not upon such assumption, but upon the application and controlling force of the rule governing in the House of Commons. But aside from this, coming to test the question by a consideration of the conclusion upon which the contempt proceedings were based as expressed in the report of the select committee which we have previously quoted and the action of the House of Representatives based on it, there is room only for the conclusion that the contempt was deemed to result from the writing of the letter not because of any obstruction to the performance of legislative duty resulting from the letter or because the preservation of the power of the House to carry out its legislative authority was endangered by its writing, but because of the effect and operation which the irritating and ill-tempered statements made in the letter would produce upon the public mind or because of the sense of indignation which it may be assumed was produced by the letter upon the members of the committee and of the House generally. But to state this situation is to demonstrate that the contempt relied upon was not intrinsic to the right of the House to preserve the means of discharging its legislative duties, but was extrinsic to the discharge of such duties and related only to the presumed operation which the letter might have upon the public mind and the indignation naturally felt by members of the committee on the subject. But these considerations plainly serve to mark the broad boundary line which separates the limited implied power to deal with classes of acts as contempts for self-preservation and the comprehensive legislative power to provide by law for punishment for wrongful acts.

The opinion thus sums up the relation between the legislative and judicial departments of the Government:

The conclusions which we have stated bring about a concordant operation of all the powers of the legislative and judicial departments of the Government, express or implied, as contemplated by the Constitution. And as this is considered, the reverent thought may not be repressed that the result is due to the wise foresight of the fathers manifested in State constitutions even before the adoption of the Constitution of the United States by which they substituted for

the intermingling of the legislative and judicial power to deal with contempt as it existed in the House of Commons a system permitting the dealing with that subject in such a way as to prevent the obstruction of the legislative powers granted and secure their free exertion and yet at the same time not substantially interfere with the great guaranties and limitations concerning the exertion of the power to criminally punish—a beneficent result which additionally arises from the golden silence by which the framers of the Constitution left the subject to be controlled by the implication of authority resulting from the powers granted.

As to the privilege of the House in impeachment proceedings, the decision says:

It is suggested in argument that whatever be the general rule, it is here not applicable because the House was considering and its committee contemplating impeachment proceedings. The argument is irrelevant because we are of opinion that the premise upon which it rests is unfounded. But indulging in the assumption to the contrary we think it is wholly without merit, as we see no reason for holding that if the situation suggested be assumed it authorized a disregard of the plain purposes and objects of the Constitution as we have stated them. Besides, it must be apparent that the suggestion could not be accepted without the conclusion that under the hypothesis stated the implied power to deal with contempt as ancillary to the legislative power had been transformed into judicial authority and become subject to all the restrictions and limitations imposed by the Constitution upon that authority—a conclusion which would frustrate and destroy the very purpose which the proposition is advanced to accomplish and would create a worse evil than that which the wisdom of the fathers corrected before the Constitution of the United States was adopted.

In conclusion the court recapitulates:

We repeat, out of abundance of precautions, we are called upon to consider not the legislative power of Congress to provide for punishment and prosecution under the criminal laws in the amplest degree for any and every wrongful act, since we are alone called upon to determine the limits and extent of an ancillary and implied authority essential to preserve the fullest legislative power, which would necessarily perish by operation of the Constitution if not confined to the particular ancillary atmosphere from which alone the power arises and upon which its existence depends.

It follows from what we have said that the court below erred in refusing to grant the writ of habeas corpus and its action must be, and it is, therefore, reversed, and the case remanded with directions to discharge the relator from custody.

And it is so ordered.

535. The investigation of the conduct of Judge Kenesaw Mountain Landis.

A Member, rising in his place, impeached Judge Landis on his responsibility as a Member of the House.

As the Congress was nearing its close, the majority of the majority of the Judiciary Committee recommended that the further prosecution of the investigation be left to the succeeding Congress.

Conflicting views of the majority and minority of the Judiciary Committee, in 1921, as to offenses justifying impeachment.

On February 14, 1921,[28] Mr. Benjamin F. Welty, of Ohio, claiming the floor for a question of privilege, said:

I impeach said Kenesaw M. Landis for high crimes and misdemeanors and charge said Kenesaw M. Landis as follows:

First. For neglecting his official duties for another gainful occupation not connected therewith.

Second. For using his office as district judge of the United States to settle disputes which might come into his court as provided by the laws of the United States.

[28] Third session Sixty-sixth Congress, Record, p. 3142.

Third. For lobbying before the legislatures of the several States of the Union to procure the passage of State laws to prevent gambling in baseball, instead of discharging his duties as district judge of the United States.

Fourth. For accepting the position as chief arbiter of disputes in baseball associations at a salary of $42,500 per annum while attempting to discharge the duties as a district judge of the United States which tends to nullify the effect of the judgment of the Supreme Court of the District of Columbia and the baseball gambling indictments pending in the criminal courts of Cook County, Ill.

Fifth. For injuring the national sport of baseball by permitting the use of his office as district judge of the United States because the impression will prevail that gambling and other illegal acts in baseball will not be punished in the open forum as in other cases.

Mr. Speaker, I move that this charge be referred to the Committee on the Judiciary without debate for investigation and report, and on that I move the previous question.

The House, without division, agreed to the motion.

On March 2,[29] Mr. Leonidas C. Dyer, of Missouri, from the Committee on the Judiciary, reported that the committee had considered the impeachment charges against Judge Landis—

which involve the legal and moral character of his alleged act in accepting employment while a district judge of the United States from certain baseball associations within the United States, to act as an arbitrator in disputes which may hereafter arise between them, at a compensation of $42,500 per annum, and that said committee find that said act of accepting the employment aforesaid, if proved, is, in their opinion, at least inconsistent with the full and adequate performance of the duty of the said the Hon. Kenesaw Mountain Landis, as a United States district judge, and that said act would constitute a serious impropriety on the part of said judge.

That said charges were filed too late in the present session of the Congress to admit of the full and complete investigation which their serious nature requires, and for that reason your committee recommend that the question of the further prosecution of said charges by full and adequate investigation be left to the Sixty-seventh Congress.

The minority views, submitted by Mr. Andrew J. Volstead, of Minnesota, fail to agree with the conclusions reached by the majority and take this position:

No violation of any law has been called to the attention of the committee, nor is it claimed that the judge is guilty of any act that would establish moral turpitude. One or both of those grounds would have to be established before impeachment proceedings could be maintained.

The investigation has gone far enough to disclose the actual facts and there is no reason for the recommendation that a further investigation be had in the next Congress. To postpone action is not only unjust to the judge, but equally unjust to the public. If the judge is guilty, this committee should say so; if he is not, he is entitled to have the public know that fact. Postponement tends only to discredit him in the eyes of the public and to weaken him in the administration of justice.

The Congress was nearing its close and consideration of the report was not reached by the House.

No action by Sixty-seventh Congress appears.

536. The investigation of charges against Attorney General Harry M. Daugherty.

Instance wherein a Member rising to a question of privilege, impeached the Attorney General on his responsibility as a Member of the House.

A Member proposing impeachment is required to present definite charges before proceeding in debate.

Charges of impeachment may not be denied presentation because of generality in statement.

[29] House Report No. 407; Record, p. 4359.

A committee was authorized to send for persons and papers and to administer oaths in an investigation delegated to it by the House.

On September 11, 1922,[30] Mr. Oscar E. Keller, of Minnesota, rising to a question of privilege, said:

Mr. Speaker, I impeach Harry M. Daugherty, Attorney General of the United States, for high crimes and misdemeanors in office.

Mr. Keller proceeded in debate, when the Speaker interposed:

The Chair will say to the gentleman that he ought first to prefer his charges. When the gentleman rises to a question of this high privilege he ought to present definite charges at the outset.

Thereupon Mr. Keller submitted:

First. Harry M. Daugherty, Attorney General of the United States, has used his high office to violate the Constitution of the United States in the following particulars:

(1) By abridging freedom of speech.

(2) By abridging the freedom of the press.

(3) By abridging the right of people peaceably to assemble.

Second. Unmindful of the duties of his office and his oath to defend the Constitution of the United States, and unmindful of his obligations to discharge those duties faithfully and impartially, the said Harry M. Daugherty has, in his capacity of Attorney General of the United States, conducted himself in a manner arbitary, oppressive, unjust, and illegal.

Third. He has, without warrant, threatened with punishment citizens of the United States who have opposed his attempts to override the Constitution and the laws of this Nation.

Fourth. He has used the funds of his office illegally and without warrant in the prosecution of individuals and organizations for certain lawful acts which, under the law, he was specifically forbidden to prosecute.

Fifth. He has failed to prosecute individuals and organizations violating the law after those violations have become public scandal.

Mr. Thomas L. Blanton, of Texas, made the point of order that the charges recited were too general in character to constitute an impeachment of a public official.

The Speaker overruled the point of order, and Mr. Keller offered the following resolution:

Whereas impeachment of Harry M. Daugherty, Attorney General of the United States, has been made on the floor of the House of Representatives from the fourth district of Minnesota: Be it

Resolved, That the Committee on the Judiciary be, and they hereby are, authorized and directed to inquire into the official conduct of Harry M. Daugherty, Attorney General of the United States, and to report to the House whether, in their opinion, the said Harry M. Daugherty has been guilty of any acts which in contemplation of the Constitution are high crimes or misdemeanors requiring the interposition of the constitutional powers of this House; and that the said committee have power to send for persons and papers and to administer the customary oaths to witnesses.

On motion of Mr. Frank W. Mondell, of Wyoming, the resolution was referred to the Committee on the Judiciary.

On December 4,[31] the House, by resolution, authorized the committee in the consideration of the resolution, to send for persons and papers, administer oaths to witnesses, and sit during sessions of the House.

537. The investigation of charges against Attorney General Harry M. Daugherty, continued.

[30] Second session Sixty-seventh Congress, Record p. 12346.
[31] Fourth session Sixty-seventh Congress, Record, p. 18.

Instance wherein a Member declined to obey a summons to appear and testify before a committee of the House.

A committee having summoned a Member to testify as to statements made by him in debate, he protested that it was an invasion of his constitutional privilege.

Form of subpoena served on a Member of the House.

A committee asserted the power of the House to arrest and imprison recalcitrant Members in order to compel obedience to its summons.

An official against whom charges of impeachment were pending asked leave and was allowed to file an answer.

In compliance with a request from the committee that he furnish it with a statement of the facts relied on by him as constituting the offenses charged, Mr. Keller filed a statement specifying some 60 different charges. Thereupon Attorney General Daugherty asked leave and was allowed to file an answer.

While these pleadings were under consideration by the Committee on the Judiciary Mr. Keller appeared before the committee and read a prepared statement criticizing the methods of the committee in conducting the inquiry and announcing:

I reiterate now that I am in possession of evidence ample to prove Harry M. Daugherty guilty of all of the high crimes and misdemeanors with which I have charged him. I am ready and anxious to present this evidence in a proper way before an unbiased committee, but I emphatically refuse to permit it to be used as whitewashing material.

I now repeat my demand that my resolution, House Resolution 425, be reported to the House of Representatives with the recommendation that it pass, and that I be permitted to present my evidence before an unbiased committee in the proper way. With these whitewashing proceedings I shall have nothing further to do.

He then withdrew and declined to further participate in the proceedings.

By direction of the committee the following subpoena was issued and was served upon Mr. Keller by the Sergeant at Arms of the House December 14:

BY AUTHORITY OF THE HOUSE OF REPRESENTATIVES OF THE CONGRESS OF THE UNITED STATES OF AMERICA.

To the SERGEANT AT ARMS or his special messenger:

You are hereby commanded to summon Hon. Oscar E. Keller to be and appear before the Judiciary Committee of the House of Representatives of the United States, of which the Hon. Andrew J. Volstead is chairman, in their chamber in the city of Washington on December 15, 1922, at the hour of 10:30 a.m., then and there to testify touching matters of inquiry committed to said committee; and he is not to depart without leave of said committee.

Herein fail not, and make return of this summons.

Witness my hand and the seal of the House of Representatives of the United States at the city of Washington, this 14th day of December, 1922.

[SEAL.] F. H. GILLETT, *Speaker.*

Attest:

WM. TYLER PAGE, *Clerk.*

Mr. Keller refused to heed the summons and by his attorney, who appeared before the committee for him, submitted that as a Representative in Congress he was not legally bound to obey the subpœna.

On January 25, 1923,[31A] Mr. Andrew J. Volstead, of Minnesota, from the Committee on the Judiciary, submitted a report reciting:

[31A] Fourth session Sixty-seventh Congress, House Report No. 1371.

That the said Oscar E. Keller was duly summoned as a witness by authority of the House of Representatives to give testimony before this committee touching matters of inquiry committed to that committee, and that he willfully made default in that in disobedience to said subpœna and without valid cause or excuse, but in contempt of the authority of the House of Representatives, he willfully failed and refused to appear as such witness and willfully failed and refused to testify in obedience to said subpœna. Your committee is of the opinion that Mr. Keller was legally required to obey said subpœna and that the excuse he submitted through his said attorney is without any merit; that the House of Representatives possesses the power to cause him to be arrested and confined in prison until he shall consent to testify, such confinement not to extend beyond the term of this Congress, and power to otherwise deal with him so as to compel obedience to the summons.

Subsequent illness of Mr. Keller rendered inadvisable further action on the part of the committee or the House.

538. The investigation of the charges against Attorney General Harry M. Daugherty, continued.

A motion to lay on the table a resolution providing for final disposition of impeachment proceedings does not, if agreed to, carry such proceedings to the table with the resolution.

Minority views submitted by Mr. R. Y. Thomas, jr., of Kentucky, take the position that House Resolution 425 merely authorized an investigation of the charges and not a trial of the Attorney General, and conclude with the recommendation:

I therefore recommend, in view of what I consider the farcical investigation of this case, that a special committee be appointed by the Speaker of the House with instructions to make a full and fair investigation of all the charges against the Attorney General.

On January 25, 1923,[32] Mr. Volstead called up the majority report and offered the following resolution:

That whereas the Committee on the Judiciary has made an examination touching the charges sought to be investigated under House resolution 425 to ascertain if there is any probable ground to believe that any of the charges are true; and on consideration of the charges and the evidence obtained it does not appear that there is any ground to believe that Harry M. Daugherty, Attorney General of the United States, has been guilty of any high crime or misdemeanor requiring the interposition of the impeachment powers of the House:

Resolved, That the Committee on the Judiciary be discharged from further consideration of the charges and proposed impeachment of Harry M. Daugherty, Attorney General, and that House Resolution 425 be laid upon the table.

After extended debate, Mr. Finis J. Garrett, of Tennessee, moved to lay the resolution on the table.

In response to a parliamentary inquiry as to whether an affirmative vote on the motion would carry the entire impeachment proceedings to the table, the Speaker held:

This is a resolution laying the whole subject on the table. A motion to lay that on the table, if it carried, would be equivalent to rejecting it. A motion to lay the impeachment proceedings on the table would still leave the impeachment matter pending.

On the question of agreeing to the motion to lay the resolution on the table there were 88 yeas and 204 nays, and the motion was rejected.

A division of the question on the pending resolution and preamble having been demanded, the resolution was agreed to without division, and the preamble by a vote of yeas 206, nays 78.

[32] Fourth session Sixty-seventh Congress, Journal, p. 148; Record, p. 2410.

539. Instance wherein the Senate transmitted to the House testimony adduced before one of its committees for consideration by the House with a view to impeachment.

An official against whom charges were pending having resigned his office, the House committee to which they had been referred made no report.

On March 25, 1924,[33] the Senate passed and messaged to the House the following resolution:

Whereas one Clarence C. Chase is and, for more than a year last past, has been a civil officer of the United States, to wit, the collector of customs at the port of El Paso, Tex.; and

Whereas in the prosecution of an inquiry by the Committee on Public Lands and Surveys of the Senate under Senate Resolution 147, it became necessary to inquire into the source from which one A. B. Fall, late Secretary of the Interior, secured large sums of money at or about the time or shortly after he entered upon negotiations resulting in the execution of leases or contracts relating to the naval oil reserves; and

Whereas it appears from the testimony taken and proceedings had before the said committee that the said Clarence C. Chase entered into a conspiracy with the said A. B. Fall to mislead and deceive the said committee concerning the source of such moneys, and that pursuant to such conspiracy the said Clarence C. Chase, on or about the 29th of November, 1923, endeavored to induce one Price McKinney to represent to and testify before the said committee that he had loaned to the said Fall at or about the time hereinbefore mentioned the sum of $100,000; and

Whereas the said Clarence C. Chase well knew that the said Price McKinney had made no such loan to the said Fall; and

Whereas the said Clarence C. Chase being, on the 24th day of March, 1924, called before the said committee and interrogated concerning the matters herein referred to by the said committee, declined and refused to answer any questions in relation to the same upon the ground that his answers might tend to incriminate him: Now, therefore, be it

Resolved, That a copy of the testimony adduced and the proceedings had before the said Committee on Public Lands and Surveys under Senate Resolution 147 be, with a copy of this resolution, transmitted to the House of Representatives for such proceeding against the said Clarence C. Chase as may be appropriate.

On the following day[34] the resignation of Clarence C. Chase was announced in the Senate.

In the House the resolution was referred from the Speaker's table to the Committee on the Judiciary, which made no report thereon.

540. Proposed inquiry into the eligibility of Andrew W. Mellon to serve as Secretary of the Treasury, in 1932.

Secretary Mellon having been nominated and confirmed as ambassador to a foreign country and having resigned as Secretary of the Treasury, the House declined to authorize an investigation.

On January 6, 1932,[35] Mr. Wright Patman, of Texas, rising in his place in the House, charged that Andrew William Mellon, of Pennsylvania, was serving as Secretary of the Treausry of the United States in contravention of statutes[36] prohibiting certain officials from owning certain classes of property and engaging in certain business enterprises, and offered a privileged resolution providing for an investigation.

On February 13,[37] Mr. Hatton W. Sumners, of Texas, from the

[33] First session Sixty-eighth Congress, Record, p. 4915.
[34] Record p. 5009.
[35] First session, Seventh-second Congress, Record, p. 1400.
[36] U.S. Code, title 5, sec. 243; title 14, sections 1, 51, 66; title 19, sections 3, 382, etc.
[37] Record p. 3850.

Committee on the Judiciary to which the resolution had been referred, presented a report [38] recommending the adoption of the following:

Whereas Hon. Wright Patman, Member of the House of Representatives, filed certain impeachement charges against Hon. Andrew W. Mellon, Secretary of the Treasury, which were referred to this committee; and

Whereas pending the investigation of said charges by said committee, and before said investigation had been completed, the said Hon. Andrew W. Mellon was nominated by the President of the United States for the post of ambassador to the Court of St. James and the said nomination was duly confirmed by the United States Senate pursuant to law, and the said Andrew W. Mellon has resigned the position of Secretary of the Treasury: Be it

Resolved by this committee, That the further consideration of the said charges made against the said Andrew W. Mellon, as Secretary of the Treasury, be, and the same are hereby discontinued.

The resolution submitted by committee was agreed to without debate or division.

541. A proposal to investigate the official conduct of the President of the United States with a view to impeachment was laid on the table.

The question of consideration may not be demanded on a resolution of impeachment until the reading of the resolution has been concluded.

Recognition to propound a parliamentary inquiry is within the discretion of the Chair and may interrupt proceedings of high privilege.

The laying on the table of a resolution of impeachment does not preclude the offering of a similar resolution if not in identical language.

Motions for the disposition of a resolution of impeachment are not in order until it has been read in full.

A resolution of impeachment may be expunged from the record by unanimous consent only.

On December 13, 1932,[39] Mr. Luis T. McFadden, of Pennsylvania, rising to a question of constitutional privilege in the House, proposed to impeach the President of the United States for "high crimes and misdemeanors" in that he had "unlawfully attempted to usurp legislative powers" and otherwise in domestic and foreign relations "violated the Constitution and laws of the United States." The charges were of a general nature and prefaced a resolution authorizing the Committee on the Judiciary to conduct an investigation with a view to impeachment.

In the course of the reading of the resolution by the Clerk, Mr. William H. Stafford, of Wisconsin, interrupted and proposed to submit a parliamentary inquiry, when Mr. Thomas L. Blanton, of Texas, presented the point of order that a proceeding of this character could not be interrupted by a parliamentary inquiry.

The Speaker [40] overruled the point of order and said:

That is in the discretion of the Chair. The Chair will recognize the gentleman from Wisconsin to make a parliamentary inquiry.

Mr. Stafford inquired if it would be in order to raise the question of consideration. The Speaker, Mr. John N. Garner, replied that the question of consideration could not be raised until the reading of the resolution had been completed.

[38] House Report No. 444.
[39] Second session, Seventy-second Congress, Record, p. 399.
[40] John N. Garner, of Texas, Speaker.

The reading of the resolution having been concluded, Mr. Edward W. Pou, of North Carolina, moved that the resolution be laid on the table.

On a yea and nay vote, ordered on the demand of Mr. Leonidas C. Dyer, of Missouri, the yeas were 361, the nays were 8, and the resolution was laid on the table.

On January 17, 1933,[41] Mr. McFadden again rose to a question of privilege and submitted a similar but not identical, resolution embodying similar charges and carrying a similar proposal for an investigation by the Committee of the Judiciary, and asked recognition to debate it. The Speaker said:

The gentleman is entitled to an hour, but first the Clerk must report the resolution of impeachment.

During the reading of the resolution by the Clerk, Mr. Robert Luce, of Massachusetts, interrupted and submitted a parliamentary inquiry asking if it were in order to bring up at this time a proposition of similiar import to one previously laid on the table.

The Speaker said:

The Chair, of course, has not heard the resolution read. Probably if it was identical with the resolution submitted some time ago and laid on the table there would be some question whether or not a second impeachement could be had. But the President can be impeached, or any person provided for by the Constitution, a second time, and the Chair thinks the better policy would be to have the resolution read and determine whether or not it is the same.

Mr. Fred A. Britten, of Illinois, inquired if it would be in order at this time to offer a motion for disposition of the resolution.

The Speaker replied:

No. The Chair would not recognize any Member to make a motion until the resolution is read.

Mr. Britten further inquired if a motion to expunge the resolution would be entertained.

The Speaker responded:

It may only be done by unanimous consent.

The Clerk having concluded the reading of the resolution, Mr. Henry T. Rainey,[42] of Illinois, offered a motion to lay the resolution on the table.

Mr. McFadden submitted that he was entitled to recognition for one hour.

The Speaker differentiated:

The gentleman from Illinois moves to lay the resolution of impeachment on the table.

May the Chair be permitted to make a statement with reference to the rules applying to that motion. The parliamentarian has examined the precedents with reference to the motion. Speaker Clark and Speaker Gillette, under identical conditions, held that a motion to lay on the table deprived a Member of the floor, although the general rules granted him one hour in which to discuss the resolution of impeachment or privileges of the House. Therefore the motion is in order.

The question being put, and the yeas and nays being ordered, it was decided in the affirmative, yeas, 344, nays, 11, and the resolution was laid on the table.

542. The inquiry into the conduct of Harry B. Anderson, United States judge for the western district of Tennessee, in 1931.

[41] Second session Seventy-second Congress, Record, p. 1954.
[42] Mr. McFadden and the President were members of the same party; Mr. Pou and Mr. Rainey were members of the opposing party.

The inquiry into the conduct of Judge Anderson was initiated by a resolution supplemented by a report from the Department of Justice.

While the House decided against impeachment it expressed disapproval of practices disclosed by the investigation.

On March 24, 1930,[43] Mr. Fiorello LaGuardia, of New York, introduced a resolution authorizing a special committee of five members of the Committee on the Judiciary to inquire into the official conduct of Harry B. Anderson, United States judge for the western district of Tennessee.

The resolution was referred to the Committee on the Judiciary and reported to the House by direction of that committee through Mr. Andrew J. Hickey, of Indiana, on June 13.[44]

After brief debate, the resolution was agreed to with an amendment providing for the designation of the members of the special committee by the chairman of the Committee on the Judiciary.

In the course of his remarks, Mr. Hickey, in response to an inquiry from Mr. William H. Stafford, of Wisconsin, explained that the preliminary inquiry had been delegated by the committee to a subcommittee which in addition to its own research had the advantage of a report by the Department of Justice which had made an extensive investigation of the handling of bankruptcy proceedings in Judge Anderson's court.

Pursuant to the resolution, Mr. Hickey, Mr. LaGuardia, Mr. Charles I. Sparks, of Kansas, Mr. Hatton W. Sumners, of Texas, and Mr. Gordon Browning, of Tennessee, were appointed to the special committee which after investigation recommended to the committee that no further action be taken.

On February 18, 1931,[45] Mr. George S. Graham of Pennsylvania, presented the report of the Committee on the Judiciary, embodying the recommendation of the subcommittee

The report recited that while there were no grounds for invoking the high power of impeachment, the investigation disclosed—

> certain matters which the committee does not desire to be regarded as in any way approving or sanctioning. The practice existing in the western district of Tennessee, both under Judge Anderson and his predecessors, of appointing referees to the place and position of receivers in bankruptcy matters is one which the committee thinks ought to be discontinued and desires to express its disapproval of the practice. The atmosphere and surroundings in the Tully case while free from evidence of wrong on the part of the judge, lead the committee to say that in their opinion when private matters or family matters come in touch with the court a judge should exercise more than ordinary care to avoid the appearance of improperly using the process of the court in any way that might be misunderstood, for in such matters the conduct of a judge must always be above suspicion.

The report then recommended the adoption of the following resolution which was agreed to by the House without debate: [46]

> *Resolved*, That the evidence submitted on the charges against Hon. Harry B. Anderson, district judge for the western district of Tennessee, does not warrant the interposition of the constitutional powers of impeachment of the House.

543. The investigation into the conduct of William E. Baker, United States district judge for the northern district of West Virginia.

[43] Second session Seventy-first Congress, Record, p. 6051.
[44] Record, p. 10649.
[45] Third session Seventy-first Congress, Record, p. 5312.
[46] Record, p. 5009.

A memorial addressed to the Speaker and setting forth charges against a civil officer was referred to the Committee on the Judiciary, which recommended an investigation.

The House referred the case of Judge Baker to the Committee on the Judiciary instead of to a select committee for investigation.

On May 22, 1934,[47] Mr. George S. Graham, of Pennsylvania, from the Committee on the Judiciary, reported the following resolution, which was agreed to:

Whereas certain charges[48] against William E. Baker, United States district judge for the Northern District of West Virginia, have been transmitted by the Speaker of the House of Representatives to the Judiciary Committee: Be it

Resolved, That the Committee on the Judiciary be, and they hereby are, authorized and directed to inquire into the official conduct of William E. Baker, United States district judge for the Northern District of West Virginia, and to report to the House whether in their opinion the said William E. Baker has been guilty of any acts which in contemplation of the Constitution are high crimes or misdemeanors requiring interposition of the constitutional powers of this House; and that the said committee have power to send for persons and papers, to administer the customary oaths to witnesses, and to sit during the sessions of the House until adjournment and thereafter until said inquiry is completed and report to the next session of the House.

The committee thus constituted was by later resolution authorized to employ clerical assistance and to incur expenses not to exceed $2,500.

On February 10, 1925,[49] Mr. Leonidas C. Dyer, of Missouri, from the Committee on the Judiciary, submitted the report of the committee on the case.

The committee found:

That in their opinion the said William E. Baker has not been guilty of any acts which in contemplation of the Constitution are high crimes or misdemeanors requiring the interposition of the constitutional powers of this House, and recommends that articles of impeachment be not directed by the House against the said William E. Baker.

The report was referred to the Committee of the Whole House.

544. The inquiry into the conduct of Judge George W. English, United States judge for the eastern judicial district of Illinois.

A resolution proposing investigation with a view to impeachment was introduced by delivery to the Clerk and was referred to the Committee on Rules, on request of which committee it was re-referred to the Committee on the Judiciary.

A joint resolution created a select committee (in effect a commission), composed of Members of the House, and authorized it to report to the succeeding Congress.

A select committee visited various States and took testimony.

January 13, 1925,[50] Mr. Harry B. Hawes, of Missouri, introduced, by delivery to the Clerk, a resolution for an investigation of the official conduct of George W. English, district judge for the eastern district of Illinois, which, under the rule, was referred to the Committee on Rules. On February 3,[51] Mr. Bertrand H. Snell, from the Committee on Rules, by direction of that committee, asked unanimous consent that the resolution be referred to the Committee on the Judiciary, to which communications relating to the charges have been previously referred. The request was agreed to, and subsequently[52] Mr. George S. Graham,

[47] First session Sixty-eighth Congress, Record, p. 9240.
[48] The memorial submitting the charges appears in full at p. 4875 of the Record.
[49] House Report No. 1443.
[50] Second session Sixty-eighth Congress, Record, p. 1790.
[51] Record, p. 2940.
[52] Second session Sixty-eighth Congress, Record, p. 3472.

of Pennsylvania, introduced a joint resolution which was reported from the Committee on the Judiciary and agreed to February 12,[53] as follows:

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That William D. Boies, Charles A. Christopherson, Ira G. Hersey, Earl C. Michener, Hatton W. Sumners, John N. Tillman, and Royal H. Weller, being a subcommittee of the Committee on the Judiciary of the House of Representatives, be, and they hereby are, authorized and directed to inquire into the official conduct of George W. English, United States district judge for the eastern district of Illinois, and so report to the House whether in their opinion the said George W. English has been guilty of any acts which in contemplation of the Constitution are high crimes or misdemeanors requiring the interposition of the constitutional powers of the House; and that the said special committee have power to hold meetings in the city of Washington, District of Columbia, and elsewhere and to send for persons and papers, to administer the customary oaths to witnesses, all process to be signed by the Clerk of the House of Representatives under its seal, and be served by the Sergeant at Arms of the House or his special messenger; to sit during the sessions of the House and until adjournment sine die of the Sixty-eighth Congress, and thereafter until said inquiry is completed, and report to the Sixty-ninth Congress.

SEC. 2. That said special committee be, and the same is hereby, authorized to employ such stenographic and clerical assistance as they may deem necessary, and all expenses incurred by said special committee, including the expenses of such committee when sitting in or outside of the District of Columbia, shall be paid out of the contingent fund of the House of Representatives on vouchers ordered by said committee, signed by the chairman of said committee: *Provided, however*, That the total expenditures authorized by this resolution shall not exceed the sum of $5,000.

The joint resolution was passed by the Senate and approved by the President. Under the authorization thus conferred, the committee held hearings in Illinois, Missouri, and the District of Columbia following the adjournment of the Sixty-eighth Congress and submitted a report to the Sixty-ninth Congress.[54]

545. Impeachable offenses are not confined to acts interdicted by the constitution or the Federal Statutes but include also acts not commonly defined as criminal or subject to indictment.

Impeachment may be based on offenses of a political character, on gross betrayal of public interests, inexcusable neglect of duty, tyrannical abuse of power, and offenses of conduct tending to bring the office into disrepute.

No judge is subject to impeachment on the complaint that he has rendered an erroneous decision.

A committee finding that a judge had failed to live up to the standards of the judiciary in matters of personal integrity and in the discharge of the duties of his office, recommended articles of impeachment.

It is in order to demand a division of the question on agreeing to a resolution of impeachment and a separate vote may be had on each article.

On March 25, 1926,[55] Mr. George S. Graham, of Pennsylvania, from the Committee on the Judiciary submitted the report of the committee reviewing the several charges in detail.

In determining whether the nature of the offenses charged warranted indictment, the committee decide:

[53] Journal, p. 237.
[54] First session Sixty-ninth Congress, House Report No. 145.
[55] First session Sixty-ninth Congress, House Report No. 653.

Although frequently debated, and the negative advocated by some high authorities, it is now, we believe, considered that impeachment is not confined alone to acts which are forbidden by the Constitution or Federal statutes. The better sustained and modern view is that the provision for impeachment in the Constitution applies not only to high crimes and misdemeanors as those words were understood at common law but also acts which are not defined as criminal and made subject to indictment, but also to those which affect the public welfare. Thus an official may be impeached for offenses of a political character and for gross betrayal of public interests. Also, for abuses or betrayal of trusts, for inexcusable negligence of duty, for the tyrannical abuse of power, or, as one writer puts it, for a "breach of official duty by malfeasance or misfeasance, including conduct such as drunkenness when habitual, or in the performance of official duties, gross indecency, profanity, obscenity, or other language used in the discharge of an official function, which tends to bring the office into disrepute, or for an abuse or reckless exercise of discretionary power as well as the breach of an official duty imposed by statute or common law."

The committee hold, however, that:

No judge may be impeached for a wrong decision.

In support of the contention that the personal conduct of an official may be made the basis of impeachment the report says:

A Federal judge is entitled to hold office under the Constitution during good behavior, and this provision should be considered along with article 4, section 2, providing that all civil officers of the United States shall be removed from office upon impeachment for and conviction of treason, bribery, or other high crimes and misdemeanors. Good behavior is the essential condition on which the tenure to judicial office rests, and any act committed or omitted by the incumbent in violation of this condition necessarily works a forfeiture of the office.

A civil officer may have behaved in public so as to bring disgrace upon himself and shame upon the country and he would continue to do this until his name became a public stench and yet might not be subject to indictment under any law of the United States, but he certainly could be impeached. Otherwise the public would in this and kindred cases be beyond the protection intended by the Constitution. When the Constitution says a judge shall hold office during good behavior it means that he shall not hold it when his behavior ceases to be good behavior.

The report therefore concludes:

The Federal judiciary has been marked by the services of men of high character and integrity, men of independence and incorruptibility, men who have not used their office for the promotion of their private interests or those of their friends. No one reading the record in this case can conclude that this man has lived up to the standards of our judiciary, nor is he the personification of integrity, high honor, and uprightness, as the evidence presents the picture of the manner in which he discharged the high duties and exercised the powers of his great office.

The committee accordingly submit five articles of impeachment with the recommendation that they be adopted by the House and presented to the Senate with a demand for conviction and removal from office.

Minority views [56] are filed taking issue with facts determined and conclusions reached in the several specific charges discussed in the majority report, but indicating no disagreement with the views of the majority as to the law governing impeachment proceedings as set forth in the report.

The report was debated in the House on March 30, 31, and April 1, when the resolution reported by the committee was agreed to—yeas, 306; nays, 62.

[56] Record, p. 6363.

The House then adopted a resolution [57] submitted by Mr. Graham naming Messrs. Earl C. Michener, Ira G. Hersey, W. D. Boies, C. Ellis Moore, George R. Stobbs, Hatton W. Sumners, and Andrew J. Montague, majority and minority members of the Committee on the Judiciary, as managers to conduct the impeachment, and instructing them to appear at the bar of the Senate and demand conviction.

On reception of the report in the House on March 25, Mr. Charles R. Crisp, of Georgia, rising to a parliamentary inquiry, asked if it would be in order to demand a separate vote on each of the five articles of impeachment.

The Speaker replied in the affirmative, and when the vote was taken on April 1,[58] recognized Mr. William B. Bowling, of Alabama, to demand a separate vote on the first article of the impeachment, and said:

In response to the query of the gentleman may the Chair state that in view of the fact he is about to recognize the gentleman from Alabama to demand a separate vote on article of impeachment No. 1, the Chair will now put the question on agreeing to the resolution with all the articles except article 1.

In the opinion of the Chair the proper procedure under the circumstances, a separate vote having been demanded on only one article, would be that the vote should be first taken on the resolution and all other articles.

546. The managers on the part of the House having formally presented articles of impeachment, the Senate organized for the trial.

A Senator excused himself from participation in impeachment proceedings on the ground of close personal relations with one of the managers for the House, but on suggestion took the oath as a member of the court of impeachment.

A committee of the Senate after investigation expressed the opinion that during a trial of impeachment the House could, with the consent of the Senate, adjourn and the Senate proceed with the trial.

By common consent it was agreed that a judge under trial before the Senate continued undisturbed in the exercise of the judicial duties of his office.

On April 6,[59] the House by resolution notified the Senate of the appointment of managers and a message was communicated from the Senate in response informing the House that the Senate was ready to receive them.

Accordingly, on April 22,[60] at 2 o'clock p.m., the managers of the impeachment on the part of the House appeared before the bar of the Senate and were announced by the doorkeeper. The Vice President received them and they were seated by the Sergeant at Arms.

By direction of the Vice President the Sergeant at Arms made proclamation:

Hear ye! Hear ye! Hear ye! All persons are commanded to keep silence, on pain of imprisonment, while the House of Representatives is exhibiting to the Senate of the United States articles of impeachment against Hon. George W. English, judge of the United States Court for the Eastern District of Illinois.

Thereupon Mr. Manager Michener read the resolution appointing the managers on the part of the House and presented the articles of

[57] Record, p. 6736.
[58] Record, p. 6735.
[59] Record, p. 6963.
[60] Record, p. 7962.

impeachment with the demand of the House for impeachment, conviction, and removal from office.

On motion of Mr. Albert B. Cummins, of Iowa, the Senate agreed to an order fixing Friday, April 23, as the date on which the Senate would organize for the trial, and the managers on the part of the House retired from the Chamber.

Mr. Coleman L. Blease, of South Carolina, thereupon excused himself from participation in the trial on account of his former business relations with Mr. Manager Dominick.

When, however, on the day of trial, Mr. Blease's name was called for him to be sworn and he failed to appear to take the oath, Mr. John S. Williams, of Mississippi, submitted:

Mr. President, I noticed that, when the name of the Senator from South Carolina was called, he shook his head to indicate that he would not take the oath. On yesterday the Senator from South Carolina asked to be excused from participating in the trial of Judge English and gave as his reason for so doing the relationship which exists between himself and one of the board of managers of the House, Representative Dominick. We all sympathize with the views expressed by the Senator from South Carolina; but in the composition of the Senate as a court to try Judge English on the indictment which has been returned here by the House of Representatives, I think no one may be excused from taking the oath.

What shall happen to the Senator from South Carolina when it becomes necessary to vote is an entirely different matter, but the rule specifically provides that all the Members of the Senate who are present shall present themselves and take the oath, and that absent Senators shall take the oath as they appear in the Senate. I therefore think it not competent for us to excuse the Senator from South Carolina from taking the oath as a member of the court. I hope the question will not be raised and that we shall avoid any technicality which might be urged at any time. I ask the Senator from South Carolina to take the oath.

Thereupon Mr. Blease, when his name was called the second time, came forward and took the oath.

The designated day [61] having arrived, the senior Senator from Iowa, Mr. Cummins, by request administered the oath as the Presiding Officer of the court to the Vice President, who in turn swore in the Senators in groups of 10.

Mr. James A. Reed, of Missouri, having raised a question as to the administration of the oath of absent Senators, the Vice President said:

Under the precedents of the Senate each Senator who has not been sworn will be called to the desk when he enters the Chamber and the oath will be administered to him.

The Senate then agreed to an order submitted by Mr. Cummins notifying the House of Representatives that the Senate was ready for the trial of the articles of impeachment.

Pending the appearance of the House managers, Mr. Claude A. Swanson, of Virginia, inquired of Mr. Cummins, the Chairman of the Judiciary Committee, if conclusion has been reached as to whether the trial required that both Houses of Congress remain in session during the trial or whether the House of Representatives with consent of the Senate could adjourn sine die while the latter remained in session for the trial of the case of whether both Houses might adjourn and the Senate convene in extra session for the trial.

Mr. Cummins said:

[61] Record, p. 8026.

Certain members of the Judiciary Committee, of which I happen to be chairman, have made rather an exhaustive study of that subject. I think it is the opinion of all the members of the Judiciary Committee who have examined the matter that the House can adjourn sine die, with the consent, of course, of the Senate, and that the impeachment proceedings can go forward without the presence of the House of Representatives; although I say, very frankly, that the only precedent with regard to that question was decided the other way. That precedent was in the impeachment of Secretary Belknap. It was then ruled by the Senate that the House of Representatives must be present during the impeachment trial. A very close vote. I think the vote was 19 to 17, but there were not more than 2 votes either way.

In the Belknap case the question arose whether it was necessary for the House to be in session during the trial of the impeachment, and it was ruled in that case that the House must remain in session. I think everybody recognizes that there were very peculiar circumstances surrounding the trial of the impeachment of Secretary Belknap. There were political considerations, which I have no doubt had great weight in the determination of the matter. It was alleged that certain of the Senators did not want to try the Belknap case until after November elections. That did not appear, of course, in the ruling; but, at any rate, that was one of the material things that developed in that case. There was a controversy in respect to the time at which the case should be tried. Some wanted to put it over until after the elections and some wanted to try it before the elections. There are, I think, 12 precedents in the various States with constitutions substantially like our own.

There are half a dozen or more precedents in the States in which it has been uniformly held that the Senate could go forward in the trial of an impeachment case without the presence of the House.

Without any order on the part of the Senate, I appointed a committee—a subcommittee it may be called—of the Judiciary Committee to study and consider that subject.

And the majority of the committee, so far as I know, without any dissent, although they were not all present when the final conclusion was reached, held that it was not necessary for the House to be present or in session during the trial of the impeachment.

Mr. Joseph E. Ransdell, of Louisiana, further inquired if there was any question as to the right of a judge on trial to continue in the exercise of the judicial duties of his office.

Mr. Cummins replied:

None whatever. He will continue to discharge his duties as judge until after the trial of the impeachment.

The managers on the part of the House having appeared, an order was made that a summons be issued for George W. English returnable on May 3, and the Senate sitting for the trial of the impeachment adjourned until that date.

547. The answer of the respondent was printed and time allowed for replication of managers, with order that further pleadings be filed with the Secretary with due notice to the other party prior to a designated date.

The resignation of the respondent in no way affects the right of the court of impeachment to continue the trial and hear and determine all charges.

The respondent having retired from office, the managers, while maintaining their right to prosecute the charges to a final verdict, recommended that impeachment proceedings be discontinued.

On May 3,[62] the Senate convened as a court of impeachment and the respondent appeared and was seated with counsel in the area in front of the Secretary's desk. The return of the Sergeant at Arms was read and sworn to and the respondent presented his answer which

[62] Record, p. 8578.

was read by the Secretary. The answer was ordered printed and the managers on the part of the House were by order of the Senate given until May 5 in which to present a replication, with direction that further pleadings be filed with the Secretary of the Senate with notice to the other party and that all pleadings be closed not later than May 10. The Senate sitting as a court of impeachment then adjourned until May 5.

In the House on May 4,[63] Mr. Carl C. Michener, of Michigan, presented for the managers on the part of the House, their replication which was approved by the House and by resolution ordered to be messaged to the Senate.

On the following day,[64] the Vice President laid before the court of impeachment the message received from the House transmitting the replication which was read by the Secretary and was ordered to be printed. The court of impeachment adopted the usual order relating to the procedure of the Senate sitting as a court of impeachment, and a further order setting the trial for November 10, 1926.

On November 10,[65] the court of impeachment having convened and the managers on the part of the House and counsel for the respondent having been received, Mr. Manager Michener announced:

Mr. President, I am directed by the managers on the part of the House of Representatives to advise the Senate, sitting as a court of impeachment, that in consideration of the resignation of George W. English, district judge of the United States for the eastern district of Illinois, and its acceptance by the President of the United States, certified copies of which I hereby submit, the managers on the part of the House have determined to recommend the dismissal of the pending impeachment proceedings. The managers desire to report their action to the House, and to this end they respectfully request the Senate, sitting as a court of impeachment, to adjourn to such time as may be necessary to permit the House to take appropriate action upon their report.

The resignation and its acceptance are as follows:

UNITED STATES DISTRICT COURT,
EASTERN DISTRICT OF ILLINOIS.
CHAMBERS OF JUDGE GEORGE W. ENGLISH, EAST ST. LOUIS.
East St. Louis, Ill., November 4, 1926.

To His Excellency the PRESIDENT OF THE UNITED STATES:

I hereby tender my resignation as judge of the District Court of the United States for the Eastern District of Illinois, to take effect at once.

In tendering this resignation I think it is due you and the public that I state my reasons for this action.

While I am conscious of the fact that I have discharged my duties as district judge to the best of my ability, and while I am satisfied that I have the confidence of the law-abiding people of the district, yet I have come to the conclusion on account of the impeachment proceedings instituted against me, regardless of the final result thereof, that my usefulness as a judge has been seriously impaired.

I therefore feel that it is my patriotic duty to resign and let someone who is in no wise hampered be appointed to discharge the duties of the office.

Your obedient servant,

GEORGE W. ENGLISH.

[63] Record, p. 8686.
[64] Record, p. 8725.
[65] First session Sixty-ninth Congress, Record, p. 3.

THE WHITE HOUSE,
Washington, November 4, 1926.

Hon. GEORGE W. ENGLISH,
United States District Court, East St. Louis, Ill.

SIR: Your resignation as judge of the District Court of the United States for the Eastern District of Illinois dated November 4, 1926, has been received and is hereby accepted to take effect at once.

Very truly yours,

CALVIN COOLIDGE.

On motion of Mr. Charles Curtis, of Kansas, it was:

Ordered, That the Sergeant at Arms be directed to notify all witnesses heretofore subpoenaed that they will not be required to appear at the bar of the Senate until so notified by him.

It was further ordered:

That in view of the statement just made by the chairman of the managers on the part of the House of Representatives, the Senate, sitting for the trial of the impeachment of Judge George W. English, adjourn until Monday, the 13th day of December, 1926, at 1 o'clock p.m.

The managers on the part of the House and counsel for the respondent then retired from the Chamber.

In the House on December 11,[66] Mr. Michener, by direction of the managers on the part of the House, submitted their unanimous report, reciting the resignation of George W. English, and holding:

The managers are of the opinion that the resignation of Judge English in no way affects the right of the Senate, sitting as a court of impeachment, to hear and determine said impeachment charges.

The managers, however, recommended:

Inasmuch, however, as the respondent, George W. English, is no longer a civil officer of the United States, having ceased to be a judge of the District Court of the United States for the Eastern District of Illinois, the managers on the part of the House of Representatives respectfully recommend that the impeachment proceedings pending in the Senate against said George W. English be discontinued.

Mr. Michener, then moved the following resolution:

Resolved, That the managers on the part of the House of Representatives in the impeachment proceedings now pending in the Senate against George W. English, late judge of the District Court of the United States for the Eastern District of Illinois, be instructed to appear before the Senate, sitting as a court of impeachment in said cause, and advise the Senate that in consideration of the fact that said George W. English is no longer a civil officer of the United States, having ceased to be a district judge of the United States for the eastern district of Illinois, the House of Representatives does not desire further to urge the articles of impeachment heretofore filed in the Senate against said George W. English.

After debate, the yeas and nays being demanded and ordered, the resolution was agreed to, yeas 290, nays 23.

The resolution of the House was messaged to the Senate and was considered by the Senate sitting as a court of impeachment on December 13,[67] when after debate the following order was agreed to, yeas 70, nays 9.

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[66] Record, p. 297.
[67] Record, p. 344.

Ordered, That the impeachment proceedings against George W. English, late judge of the District Court of the United States for the Eastern District of Illinois, be and the same are, duly dismissed.

The Secretary having been directed to communicate the order to the House of Representatives, the Senate sitting as a court of impeachment adjourned sine die.

548. The investigation into the conduct of Frederick A. Fenning, a commissioner of the District of Columbia, in 1926.

A Member by virtue of his office submitted articles of impeachment and offered a resolution referring them to a committee of the House.

A committee of the House by majority report held a commissioner of the District of Columbia not to be a civil officer subject to impeachment under the Constitution.

A committee having reported that evidence adduced, while not supporting impeachment, disclosed grave irregularities, the respondent resigned.

On April 19, 1926,[68] Mr. Thomas L. Blanton, of Texas, claiming the floor for a question of privilege, announced that by virtue of his office as a Member of the House he impeached Frederick A. Fenning, Commissioner of the District of Columbia, of high crimes and misdemeanors, and submitted written charges. At the conclusion of the reading of the charges, Mr. Blanton proposed the following resolution which was referred to the Committee on the Judiciary.

Resolved, That the Committee on the Judiciary be, and it is hereby, directed to inquire and report whether the action of this House is necessary concerning the alleged official misconduct of Frederick A. Fenning, a commissioner of the District of Columbia, and said Committee on the Judiciary is in all things hereby fully authorized and empowered to investigate all acts of misconduct and report to the House whether in their opinion the said Frederck A. Fenning has been guilty of any acts which in the contemplation of the Constitution, the statute laws, and the precedents of Congress are high crimes and misdemeanors requiring the interposition of the constitutional powers of this House, and for which he should be impeached.

That this committee is hereby authorized and empowered to send for persons and papers, to administer oaths, to employ, if necessary, an additional clerk, and to appoint and send a subcommittee whenever and wherever necessary to take necessary testimony for the use of said committee or subcommittee, which shall have the same power in respect to obtaining testimony as exercised and is hereby given to said Committee on the Judiciary.

That the expenses incurred by this investigation shall be paid out of the contingent fund of the House upon the vouchers of the chairman of said committee, approved by the Clerk of this House.

Mr. George S. Graham, of Pennsylvania, from that committee reported the resolution back to the House on May 4,[69] with amendments as to phraseology and on May 6,[70] it was agreed to as amended.

The report [71] of the committee, presented on July 2, considers first the power and right of the House to impeach and thus analyzes the requisites essential to impeachment:

Two things are necessary before the House will authorize impeachment: First, there must be an officer who, by reason of holding such office, is impeachable under the Constitution and laws of the United States, and, second, the establishment by creditable evidence of such misconduct on the part of such officer, defined as

[68] First session Sixty-ninth Congress, Record, p. 7753.
[69] Record, p. 8718.
[70] Record, p. 8828.
[71] House Report No. 1590.

"treason, bribery, or other high crimes and misdemeanors" as will bring the office into disrepute, and which will require his removal, to maintain its purity and the respect of the people for the office.

The question as to whether a Commissioner of the District of Columbia is a Federal officer and subject to the interposition of the Constitutional powers of the House in this respect, is answered in the negative as follows:

The first question that confronts us is, Is a Commissioner of the District of Columbia, appointed by the President and confirmed by the Senate, a civil officer of the United States, subject to the foregoing provision of the Federal Constitution? In order to arrive at a correct solution of this question it is necessary to review the acts of Congress relating to the District of Columbia.

The area within the District of Columbia was ceded by Maryland to, and accepted by, the Government in accordance with clause 17 of Article I of the Constitution, which granted to Congress exclusive legislative jurisdiction over such District. This in effect makes Congress the legislative body for the District with the same power as legislative bodies of the various States, and it has full authority in legislative matters pertaining to the District, subject to the prohibitions contained in the Constitution.

That act of July 16, 1790, provided for the establishment of a seat of government in the District of Columbia. On February 21, 1871, Congress created of the District a municipal corporation by the name of "the District of Columbia," with power to sue, be sued, contract, have a seal, and exercise all other powers of a municipal corporation not inconsistent with the Constitution, the laws of the United States, and the provisions of this act.

Subsequently, on June 11, 1878, the organic act of the District of Columbia was enacted by Congress, which provides that the District of Columbia shall remain and continue a municipal corporation as provided in section 2 of the Revised Statutes relating to said District, and that the commissioners provided for should be deemed and taken as officers of such corporation.

This seems to be as clear as language can express it that thereafter the District of Columbia should enjoy a municipal corporate status and that its officer should be deemed and taken as officers of such corporation. The fact that Congress retains legislative authority and that the method of appointing Federal officers was followed in the appointment of the commissioners is not material and certainly not controlling, for the selection of the commissioners could have been delegated to the President alone or to the people of the District. Had it been the intent of Congress that the commissioners should enjoy the status of Federal officials then no expression thereon was necessary, but the fact that Congress in specific words gave them the status of municipal officers indicates clearly that Congress was making and did make a distinction as to the official status of these officers while, at the same time, retaining the Federal method of appointment.

This was a very reasonable provision for, while these officials are appointed by the President and confirmed by the Senate, they are not paid in the same manner as Federal officers. They are paid out of the District funds, to which, it is true, the Government contributes a certain sum, but they are not paid out of the Federal Treasury as are officials of the Federal Government.

For the reasons stated, it is our conclusion that Frederick A. Fenning is an officer of a municipal corporation, to wit, the District of Columbia, and as such is not a civil officer of the United States and as such is not subject to impeachment.

The report then discusses seriatim the charges filed, and finds in each case insufficient evidence to support the allegation.

In concluding, however, the committee find that the evidence adduced in the course of the hearings discloses practices "illegal and contrary to law," neglect of duty, and conditions "which can not be too severely criticized and condemned" and recommend an investigation by a "proper committee of Congress."

Seven minority views filed by nine members of the committee disagree with the findings of the majority as to proof of various charges but with the exception of two concur in the opinion that a Commis-

sioner of the District of Columbia is not a civil officer subject to impeachment within the meaning of the Constitution.

Congress adjourned on July 3,[72] and in the interim Frederick A. Fenning tendered his resignation as Commissioner of the District of Columbia.

549. The inquiry into the conduct of Judge Frank Cooper, in 1927.

In instituting impeachment proceedings it is necessary first to present the charges on which the proposal is based.

Articles of impeachment having been presented, debate is in order only on debatable motions related thereto.

A motion to refer impeachment charges was entertained as a matter of constitutional privilege.

The proponent of a proposition to refer impeachment charges to a committee is entitled to one hour in debate exclusive of the time required for the reading of the charges.

The motion to refer is debatable in narrow limits only and does not admit discussion of the merits of the proposition sought to be referred.

Propositions relating to impeachment are privileged and a resolution authorizing the taking of testimony and defrayment of expenses of investigations in connection with impeachment proceedings was entertained as privileged.

On January 28, 1927,[73] Mr. Fiorello H. LaGuardia, of New York, rising to a question of high privilege, proposed to impeach Judge Frank Cooper, United States district judge of the Northern District of New York. After he had proceeded for some time in debate, Mr. Thomas L. Blanton, of Texas, made the point of order that he was not entitled to the floor, not having presented formal articles of impeachment.

The Speaker[74] sustained the point of order and said:

The Chair thinks the gentleman from New York should make his charges. The Chair understood he was simply leading up to the charges. But if a point of order is made, the gentleman is bound to state his charges.

Mr. LaGuardia presented formal charges in writing and was again proceeding in debate when Mr. Leonidas C. Dyer, of Missouri, raised the further point of order that impeachment charges were not debatable except in connection with some admissible and debatable motion relating thereto.

The Speaker said:

The Chair would think that the proper procedure would be to introduce the motion or resolution and then it would be proper.

Mr. LaGuardia moved to refer the charges to the Committee on the Judiciary and was again proceeding in debate when Mr. Louis C. Cramton, of Michigan, interposed the point of order that having secured the floor on a motion to refer, it was not in order to discuss the merits of the propositions sought to be referred.

The Speaker sustained the point of order and said:

[72] Second session Sixty-ninth Congress, Record, p. 3723.
[73] Second session Sixty-ninth Congress, Record, p. 2487.
[74] Nicholas Longworth, of Ohio, Speaker.

The Chair thinks that under the motion to refer the gentleman from New York would be limited to a discussion of the reasons why these charges should or should not be referred to the Committee on the Judiciary.

The precedent to which the Chair will call attention is this:

"The simple motion to refer is debatable within narrow limits, but the merits of the proposition which it is proposed to refer may not be brought into the debate."

Under that the Chair would think the gentleman from New York would be confined to a discussion of the reasons why the resolution should be referred to the Committee on the Judiciary.

The gentleman from New York ought not to argue the merits of the case to the House. That is what will be argued before the Committee on the Judiciary, but the gentleman may argue to the House the merits of his motion, to wit, whether this matter should or should not be referred to the Committee on the Judiciary.

After further debate, Mr. Cramton submitted a parliamentary inquiry as to whether the time consumed in reading the charges should be taken from the hour allotted to the proponent of the motion to refer the charges.

The Speaker held:

No; the Chair would think not. The Chair would think that on his motion to refer, the gentleman is entitled to one hour.

The time taken to read the charges was simply time taken to inform the House of the matter before it, such as time taken by the clerk to read a bill. Now, the gentleman from New York makes a motion to refer, and under the rules of the House a motion to refer is debatable for one hour.

The gentleman did not present his case by way of argument. The gentleman read a series of charges, obtaining the floor as a matter of privilege. The reading of those charges was simply to give the House information—not argument, but information. The Chair held, in ruling on the point of order raised by the gentleman from Texas, that the gentleman from New York must read his charges before making any argument. Having now read his charges, the gentleman from New York moves to refer the charges to the Committee on the Judiciary, and under the rules of the House the gentleman is entitled to one hour.

The Chair overrules the point of order.

Subsequently, Mr. Cramton rose to the point of order that the debate was not being confined to the motion to refer.

The Speaker ruled:

The point of order has been made. The Chair thinks the gentleman from New York is going over the line of the argument and into the merits of the question instead of the merits of the motion to refer. The Chair in cases like this is always inclined to be in favor of a reasonable debate, but the Chair thinks that the line of argument which is being made now by the gentleman from New York goes more to the merits of the case than to the merits of the motion. The gentleman will proceed in order.

Debate having been concluded, the motion was agreed to and the charges were referred to the Committee on the Judiciary.

On February 11,[75] Mr. George S. Graham, of Pennsylvania, from that committee submitted the following resolution:

Resolved, That the Committee on the Judiciary, and any subcommittee that it may create or appoint, is hereby authorized and empowered to act by itself or its subcommittee to hold meetings and to issue subpoenas for persons and papers, to administer the customary oaths to witnesses, and to sit during the sessions of the House until the inquiry into the charges against Hon. Frank Cooper, United States district judge for the northern district of New York is completed, and to report to this House.

That said committee be, and the same is hereby, authorized to appoint such clerical assistance as they may deem necessary, and all expenses incurred by said

[75] Record, p. 3525.

committee or subcommittee shall be paid out of the contingent fund of the House of Representatives on vouchers ordered by said committee and signed by the chairman of said committee.

In response to a parliamentary inquiry from Mr. Blanton, as to the privilege of the resolution, the Speaker said:

It is privileged because it relates to impeachment proceedings.

Mr. Graham submitted the report of the committee on March 3,[76] as follows:

The committee has examined into the charges agianst Hon. Frank Cooper, United States district judge for the northern district of New York, made on the floor of the House and referred to it by the House on the 28th day of January, 1927 (Cong. Rec. pp. 2487–2493), and has heard all witnesses tendered by accuser and accused and reports to the House the oral and documentary evidence submitted, and while certain activities of the Hon. Frank Cooper with relation to the manner of procuring evidence in cases which would come before him for trial are not to be considered as approved by this report, it has reached the conclusion and finds that the evidence does not call for the interposition of the constitutional powers of the House with regard to impeachment. The committee, therefore, recommends the adoption of the following resolution:

"*Resolved*, That the evidence submitted to the Committee on the Judiciary in regard to the conduct of Hon. Frank Cooper, United States district judge for the northern district of New York, does not call for the interposition of the constitutional powers of the House with regard to impeachment."

The report was agreed to by the House without division.

550. The inquiry into the conduct of Francis A. Winslow, judge of the southern district of New York, in 1929.

Discussion of methods of authorizing an investigation with a view to impeachment.

Instance wherein a special committee was created for the purpose of instituting an inquiry and drafting articles of impeachment if found to be warranted by the circumstances.

Instance wherein a special committee of investigation was authorized to sit after adjournment of the current Congress and report to the succeeding Congress.

A special committee having been created to investigate charges, a member supplemented the proceedings by rising to a question of privilege in the House and proposing impeachment.

A judge whose conduct was under investigation having resigned, no further action was taken by the committee charged with the investigation.

A judge against whom impeachment proceedings were instituted refrained from the exercise of judicial functions from the date of the filing of the charges.

On February 12, 1929,[77] during consideration of the legislative appropriation bill in the Committee of the Whole House on the state of the Union, Mr. Fiorello H. LaGuardia, of New York, having been yielded time for debate said:

Mr. Chairman and members of the committee, at times it becomes necessary for a Member of the House to invoke the machinery provided in the rules of the House to ascertain whether or not a judge of the Federal court has been guilty of crimes and misdemeanors to warrant his impeachment. We have a situation in the southern district of New York so bad that it has shocked both the bench and the bar; so bad that it is reflecting on the integrity of that court; and unless

[76] Record, p. 5619.
[77] Second session Seventieth Congress, Record, p. 3334.

we have an investigation either to ascertain the truth of these charges or otherwise, the people of that district will lose confidence in that court.

With the permission of the House I will read the resolution which I am now introducing:

Mr. LaGuardia then read from a written memorandum of specific charges and an appended resolution authorizing an investigation.

The resolution with the accompanying charges was later delivered to the Clerk and was referred by the Speaker to the Committee on the Judiciary.

On February 18, Mr. George S. Graham of Pennsylvania, submitted a report from the Committee on the Judiciary recommending the passage of the following joint resolution:

Whereas certain statements against Francis A. Winslow, United States district judge for the southern district of New York, have been transmitted by the Speaker of the House of Representatives to the Judiciary Committee: Therefore be it

Resolved, That Leonidas C. Dyer, Charles A. Christopherson, Andrew J. Hickey, George R. Stobbs, Hatton W. Sumners, Andrew J. Montague, and Fred H. Dominick, being a subcommittee of the Committee on the Judiciary of the House of Representatives, be, and they are hereby, authorized and directed to inquire into the official conduct of Francis A. Winslow, United States district judge for the southern district of New York, and to report to the House whether in their opinion the said Francis A. Winslow has been guilty of any acts which in contemplation of the Constitution are high crimes or misdemeanors requiring the interposition of the constitutional powers of the House; and that the said special committee have power to hold meetings in the city of Washington, D.C., and elsewhere, and to send for persons and papers, to administer the customary oaths to witnesses, all process to be signed by the Clerk of the House of Representatives under its seal and be served by the Sergeant at Arms of the House or his special messenger; to sit during the sessions of the House until adjournment sine die of the Seventieth Congress and thereafter until said inquiry is completed, and report to the Seventy-first Congress.

SEC. 2. That said special committee be, and the same is hereby, authorized to employ such stenographic, clerical, and other assistance as they may deem necessary, and all expenses incurred by said special committee, including the expenses of such committee when sitting in or outside the District of Columbia, shall be paid out of the contingent fund of the House of Representatives on vouchers ordered by said committee, signed by the chairman of said committee: *Provided, however*, That the total expenditures authorized by this resolution shall not exceed the sum of $5,000.

Mr. Bertrand H. Snell, of New York, questioned the method of procedure on the grounds that under the rules a proposition for the creation of a special committee of investigation would come regularly within of a special committee of investigation would come regularly within impeachment was contemplated the matter should follow precedent and go direct to the Committee on the Judiciary.

Mr. Graham replied:

Mr. Speaker, this will not set up a special investigating committee. This resolution is exactly the same as was passed by this House under exactly similar circumstances in the English case. On the strength of that resolution the committee in the English case charged with the duty of investigating was able to subpoena witnesses and proceed in a regular and orderly way to ascertain whether or not the charges that had been made on the floor of the House were well founded. In the English case exactly the same procedure was followed. The House referred the resolutions to the Committee on the Judiciary.

They made a preliminary examination, which was a preliminary step in the procedure. That committee heard any witnesses that were willing to appear before the committee. They had no power to compel anyone to appear before the committee. We have not the right, unless the House gives it to us, to subpoena witnesses and call on them to testify under oath. That authority being given, and the committee, recognizing that it was proceeding under the Congress and that the Congress would die on the 4th of March succeeding, took charge and

this investigation was started but, of course, would die with the Congress. A resolution exactly the same as this was adopted by the House for two purposes, first, to give the committee power to make an investigation, and, second, to give the committee all the necessary machinery and prolong its life beyond the period of its extinction through the adjournment of the Congress.

Now, then, in addition to that the committee was instructed to report back to the House. That meant through the regular channels, which would be by the subcommittee of the Committee on the Judiciary reporting to that body, and to the House. This subcommittee was not a special investigating committee.

Now, I want to say on the general principle that if this were the rule of the House then these resolutions ought not to have been referred to us. They ought to have been referred in the first instance to the Committee on Rules. I want to say to my friends of the House and everybody that such a procedure as this will be marked with regret by those who assent to it making it the practice of the House. Whenever a man on the floor of the House presents such statements as cloud the reputation and standing of a judge of the district court of the United States he puts against that man what is equivalent to impeachment. I care not by what name you call it, impeachment or charges, it is an impeachment of the integrity and mars the usefulness of the judge himself. The matter ought to be proceeded with. It will be a sad day when these matters have first to go to the Committee on Rules where it would be said by the public it was only a subterfuge to delay a procedure which was started by charges made on the floor of the House.

After further debate Mr. Graham offered the following amendment:

To sit during the sessions of the House until adjournment sine die of the Seventieth Congress, and thereafter until said inquiry is completed, and report to the Committee on the Judiciary of the House of the Seventy-first Congress.

The amendment was agreed to and the joint resolution as amended was adopted by the House, and on February 23,[78] was agreed to by the Senate.

On March 2, Mr. LaGuardia, rising to a question of high privilege in the House, formally proposed the impeachment of Francis A. Winslow and submitted 12 specific charges accompanied by a resolution as follows:

Resolved, That Francis A. Winslow, United States district judge for the southern district of New York be impeached of high crimes and misdemeanors in office as hereinbelow in part specifically set forth.

The Speaker referred the resolution to the Committee on the Judiciary.

The subcommittee created by the joint resolution designated April 1 for the opening of the inquiry and notified Judge Winslow who on that day tendered his resignation to the President and issued the following statement by counsel:

Judge Winslow has felt, from the time the charges were made against him, that his usefulness as a member of the judiciary was thereby impaired, and he has since refrained from appearing as a judge. The same belief is still uppermost in his mind. In the interval, the charges directed against him in Congress have been made the subject of inquiry by the grand jury in New York.

Also, since the presentment of the grand jury was made, proceedings have been instituted and concluded against certain of those whose names have been associated with his in the complaints. These several proceedings having ended, Judge Winslow finds that he now has to consider the future of his relations to the bench in the light of his own sense of duty. He can not but realize, notwithstanding the failure to impugn his personal integrity, that the prestige of the court would be impaired should he return to it, and this he could not for himself endure, nor could he allow it to continue as an embarrassment to the other judges.

The resignation was accepted by the President on the day on which received and the committee discontinued the investigation.

[78] Record, p. 4123.

Notwithstanding the resignation, Mr. LaGuardia again preferred the charges by resolution on the convening of the Seventy-first Congress.[79] The resolution was referred to the Committee on the Judiciary which made no report thereon.

551. The inquiry into the conduct of Harry B. Anderson, judge of the western district of Tennessee, in 1930.

Charges having been preferred by a Member of the House, the committee to which the matter was referred reported a resolution providing for the creation of a special committee of investigation.

On March 12, 1930,[80] Mr. Fiorello H. LaGuardia, of New York, filed charges against Harry B. Anderson, judge of the western district of Tennessee with a view to the institution of proceedings for impeachment.

The charges and the accompanying resolution were referred by the Speaker to the Committee on the Judiciary which, on June 13,[81] reported to the House the following resolution which was agreed to:

Resolved, That a special committee of five Members of the House of Representatives who are members of the Committee on the Judiciary of the House, be, and is hereby authorized and directed to inquire into the official conduct of Harry B. Anderson, United States district judge for the western district of Tennessee, and to report to the Committee on the Judiciary of the House whether in their opinion the said Harry B. Anderson has been guilty of any acts which in contemplation of the Constitution are high crimes or misdemeanors requiring the interposition of the constitutional powers of the House; and that the said special committee have power to hold meetings in the city of Washington, D.C., and elsewhere, and to send for persons and papers, to administer the customary oaths to witnesses, all process to be signed by the Clerk of the House of Representatives under its seal and be served by the Sergeant at Arms of the House or his special messenger; to sit during the sessions of the House and until adjournment of the second session of the Seventy-first Congress and thereafter until said inquiry is completed, and report to the Committee on the Judiciary of the House; and be it further

Resolved, That said special committee be, and the same is hereby, authorized to employ such stenographic, clerical, and other assistance as they may deem necessary; and all expenses incurred by said special committee, including the expenses of such committee when sitting in or outside the District of Columbia, shall be paid out of the contingent fund of the House of Representatives on vouchers ordered by said committee, signed by the chairman of said committee: *Provided, however*, That the total expenditures authorized by the resolution shall not exceed the sum of $5,000.

552. The inquiry into the conduct of Grover M. Moscowitz, judge for the eastern district of New York, in 1930.

An instance wherein impeachment proceedings were set in motion by memorials filed with the Speaker and by him transmitted to a committee of the House.

A committee of the House having conducted a preliminary inquiry, a special subcommittee was by joint resolution created to further investigate the case with a view to impeachment.

A vacancy on a special committee created by joint resolution was filled by a further joint resolution.

The committee while criticizing the official conduct of a judge failed to find facts sufficient to warrant impeachment.

On February 27, 1929,[82] the Committee on the Judiciary, in response to certain memorials filed with the Speaker and by him referred to the committee, reported a joint resolution creating a special subcommittee

[79] First session Seventy-first Congress, Record, p. 33.
[80] Second session Seventy-first Congress, Record, p. 5105.
[81] Record, p. 11097 tem.
[82] Second session Seventieth Congress, Record, p. 4610.

of the Committee on the Judiciary to inquire in to the official conduct of Grover M. Moscowitz, judge for the eastern district of New York. with authority to sit after adjournment of the Seventieth Congress and report to the Seventy-first Congress.

The resolution was agreed to by the Senate on March 1,[83] and was thereafter supplemented by a further joint resolution [84] filling a vacancy on the subcommittee.

The report [85] of the Committee on the Judiciary submitted by Mr. George S. Graham, of Pennsylvania, for the committee, on April 8,[86] thus explains the inception of the proceedings:

This investigation had its origin in a letter addressed to the Speaker of the House of Representatives by Representative Andrew L. Somers, of the sixth New York District, transmitting to the Speaker a statement made by Sidney Levine and Joseph Levine, also some correspondence submitted by J. C. Rochester Co. (Inc.), charging misconduct on the part of Judge Grover M. Moscowitz.

The Speaker of the House referred the matter to the Committee on the Judiciary, and owing to the face that the Seventieth Congress was about to expire. House Joint Resolution 431 was presented by the chairman of the Committee on the Judiciary for the purpose of giving vitality to a subcommittee that might make an investigation during the recess and report to the Judiciary Committee in the next Congress.

The Committee finds grounds for severe criticism and the report recites:

After seeing the witnesses, hearing them testify, and with due regard to the argument of counsel and all of the evidence in the case, individual members of this committee do not approve each and every act of Judge Moscowitz concerning which evidence was introduced. For example, the committee can not and does not indorse a business arrangement of Judge Moscowitz with his former partner which continued after Judge Moscowitz became a district judge, especially when he was appointing members of the legal firm to which this former partner belonged to various receiverships in his court. While this committee finds nothing corrupt in these transactions, yet this procedure throws the court open to criticism and misunderstanding by the uninformed, as has happenen in this case; and, therefore, this committee can not and does not indorse this practice.

The Committee, however, concluded:

Nevertheless, after a careful consideration of all the evidence in the case, and giving full consideration to the problems and persons with which the court had to deal, this committee is unanimous in its opinion that sufficient facts have not been presented or adduced to warrant the interposition of the constitutional powers of impeachment by the House.

The House accordingly approved the report and—

Resolved, That the House of Representatives hereby adopts the report of the Committee on the Judiciary relative to the charges filed against Hon. Grover M. Moscowitz, United States district judge for the eastern district of New York; and further

Resolved, That no further action be taken by the House with reference to the charges heretofore filed with the committee against Hon. Grover M. Moscowitz, United States district judge for the eastern district of New York.

[83] Record, p. 4839.
[84] Record, p. 5015, 5068.
[85] House Report No. 1106.
[86] Record, p. 6992.