Chapter LXXV.

THE FIRST ATTEMPTS TO IMPEACH THE PRESIDENT.

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 of 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.

[1] Third session Twenty-seventh Congress, Journal, pp. 157–163; Globe, pp. 144–146.

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 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 mark 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 slim 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 [1] 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 [3] the following resolution:

---

[1] John White, of Kentucky, Speaker.

[2] Second session Thirty-ninth Congress, Journal, p. 89; Globe, p. 154.

[3] At that time reports could not be made at any time.

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 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 that 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,[1] in the morning hour for the presentation of resolutions,[2] 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.

---

[1] Journal, pp. 118, 119; Globe, pp. 319–321.

[2] This order of business does not now exist.

On the same day, January 7,[1] 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 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[2] 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,[3] 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.

---

[1] Journal, pp. 121–124; Globe, pp. 320, 321.

[2] 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.

[3] Journal, pp. 163, 277, 320; Globe, pp. 443–446, 806–808, 991.

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.

A resolution directing the Judiciary Committee to resume an investigation with a view to an impeachment was held to be privileged.

On February 28,[1] 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[2] the report was laid on the table and ordered printed.

At the beginning of the next Congress, on March 7, 1867,[3] 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 authorized in said resolution of January 7, 1867, and that they have power to send for persons 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.

---

[1] House Report No. 31; Globe p. 1754.

[2] Journal, p. 585; Globe, p. 1754.

[3] First session Fortieth Congress, Journal, pp. 19–21; Globe, pp. 18–25.

Mr. Samuel J. Randall, of Pennsylvania, having raised a question as to the presentation of the resolution, the Speaker [1] 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.[2]

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 proceedings, 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 [3] 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,[4] 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,[5] 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 all the testimony already taken in the impeachment case.

Mr. Benjamin M. Boyer, of Pennsylvania, raised a question as to the privilege of the resolution.

---

[1] Schuyler Colfax, of Indiana, Speaker.

[2] 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 and for payments from the contingent fund.

[3] Journal, pp. 146, 189, 211, 213, 220, 226, 248; Globe, pp. 446, 452, 592, 656, 657, 720, 725, 762, 765, 766, 778, 779.

[4] Globe, p. 565.

[5] Journal, pp. 220, 221; Globe, p. 697.

The Speaker [1] 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.

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 [2] 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 crossexamine 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 [3] 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 [4] presented by Mr. Marshall the investigation is spoken of as "a secret, ex parte one."

---

[1] Schuyler Colfax, of Indiana, Speaker.

[2] 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.

[3] See p. 56 of the testimony.

[4] See p. 110 of the report.

As to the nature of the testimony taken in the course of the investigation, the majority say [1] 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: [2]

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: [3]

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 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 criticized 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

[1] See p. 1 of the report.

[2] See p. 104 of the report.

[3] See p. 110 of the report.

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 or 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 was himself 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 the laws passed by Congress for the 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 endorse 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 systematic 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 modem times is the punishment of high crimes and misdemeanors, chiefly of an official or political character, which axe 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 fill, 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 not 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 afloat 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 ewes 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 impeachable 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 omitted 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 previously 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 usurpation 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 Tudore 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." (I Bish., secs. 389–537.)

"The same doctrine requires all those who have accepted, to discharge faithfully all public trusts. Any act or omission in disobedience of this duty, in a matter of public concern, is, as a general principle, punishable as a crime." (Ibid., see. 913.)

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, see. 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 causes 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 such 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 was 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 juris-

diction 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 term 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." (See. 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 Judge 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 Cong., 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 on 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, 1800. The articles portrayed the conduct of Judge Chase in as offensive a manner as the committee could command. 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 impeachments 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 Strafford, ran down the Duke of Buckingham, and you all know what became of him. Sir Harry Vane, he ran down the Earl of Strafford, 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, 96; 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 difficult 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 shoorn 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 is 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 signification 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 aided 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 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 had he 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 nonindictable 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 inquiry 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,[1] 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.[2] 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.[3]

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.[4]

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[5] the subject was discussed at length by several Members.

---

[1] Second session Fortieth Congress, Journal, pp. 42, 44–54; Globe, pp. 61, 65–68.

[2] See Appendix of Globe, pp. 54, 62.

[3] 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. 480, 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.

[4] Journal, p. 53; Globe, p. 68.

[5] Globe, pp. 172–193.